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WEEKLY NOTES OF CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF PENNSYLVANIA, THE COUNTY COURTS OF PHILADELPHIA, AND THE UNITED STATES DISTRICT AND CIRCUIT COURTS FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BY

MEMBERS OF THE BAR.

VOLUME V.

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Supreme Court (*Middle District*).

Mr. Robert Snodgrass, Prot'y, Mr. John B. McPherson and Mr. George H. Irwin, *assisted by* Messrs. James T. Chamberlin, George W. Heck, John A. Herman, M. W. Jacobs, Fred. M. Ott, and William Pearson (Harrisburg).

Supreme Court (*Western District*).

Messrs. S. C. Wells, John B. Herron, Jr., Charles H. Kloman, and Winfield S. Wilson (Pittsburgh), and Robert H. Neilson (Philadelphia).

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WEEKLY NOTES OF CASES.

VOL. V.] *THURSDAY, JAN.* 31, 1878. [No. 1.

Supreme Court.

Oct. & Nov. '77, 263. Oct. 18, 1877.

Ashby et al. v. The City of Erie.

Municipal corporations—Non-liability of municipal corporation for the acts of independent officers—Act of April 4, 1867—*City of Erie.*

A municipal corporation is not liable for the acts of officers appointed under the provisions of an Act of Assembly, who are independent of the city authorities.

The city of Erie is not responsible for the negligence of a board of water commissioners created by virtue of the Act of April 4, 1867 (P. L. 768).

Case, by John E. Ashby and Harry Vincent against the city of Erie, for negligence.

Plea, not guilty.

The evidence showed that in January, 1875, the water pipes along State Street, in the city of Erie, burst and flooded the cellar of the plaintiffs' place of business. The plaintiffs were engaged in the business of printing, and a large amount of paper and other perishable material was destroyed by water. It was alleged that the break in the pipe was due to the action of frost, and that the city was guilty of negligence in permitting the pipes to be laid sufficiently near the surface to be subject to the action of frost.

The water department of the city of Erie is in charge and under the full control of three commissioners appointed by the Court of Common Pleas under authority of an Act of Assembly approved April 4, 1867 (P. L. 768), the second section of which reads as follows:—

It shall be the duty of said commissioners to take the *full charge and control* of the erection and completion of water works in said city, and to make all contracts for the erection and completion thereof, and to provide for the repair and maintenance of the same, to acquire, by purchase, or otherwise, such and so much real estate as may be necessary for the efficient use of said water works, whenever the same may be needed, to furnish a full supply of water, to be taken from the bay, or harbor, or from Lake Erie, to collect the water rents, and appoint all necessary officers and agents, and take from them, respectively, such security, for the faithful performance of duty, as said commissioners shall deem proper, and to fix, from time to time, the amount of salaries and wages to be paid such officers and agents. They shall also have power to make all such by-laws, rules, and regulations for the economical and efficient management and protection of the works and their appurtenances as they may deem expedient and necessary, and, from time to time, make and establish such rates, terms, and conditions, upon which water from said works shall be furnished to applicants therefor, as said commissioners shall deem just and proper; but such rates, terms, and conditions shall be subject to approval by the city councils before they go into operation; and all such by-laws, rules, and regulations, when made by said commissioners, shall have the force and effect of ordinances in said city, and the penalties imposed thereby shall be collected in the same manner that penalties imposed by city ordinances are now, by law, collected; *and said commissioners shall prepare full and careful plans and specifications of all the work and material necessary for the erection and completion of said works*, and, shall, by due public notice, invite proposals for performing and furnishing the same, and shall, in all cases, *let the contracts therefor* to the lowest responsible and capable bidder, and shall take adequate security for the due performance of the several contracts; and said works shall be put under contract, and prosecuted to completion, with all convenient and reasonable dispatch.

On the trial the defendant's counsel moved for a nonsuit, based on the following proposition:—

The city of Erie cannot be held responsible for the neglect of a duty specially enjoined by law upon public officers who neither derive their appointments or authority from the corporation, and are not subject to its control; who can neither be directed by the corporation in the discharge of their duty, nor be dismissed for neglect of duty.

The Court entered the nonsuit accordingly, and after argument refused a motion to take it off.

Plaintiffs took this writ, assigning as error the action of the Court.

J. Ross Thompson, for plaintiffs in error.

Although the commissioners have large powers delegated to them, they are not independent of but act in conjunction with the municipal authorities; they establish water rates, etc., "subject to approval by city councils before they go into operation," and deposit all moneys with the city treasurer. For whom are the water commissioners acting? Not for the commonwealth; not as such public officers; not for the public; although the public may be somewhat interested in having water, the grant is a special private franchise, made for the private emolument and advantage of the city as well as for public good.

The city, therefore, owning the water works as a private corporation, should be liable for the damages arising from the defective construction of the works, or negligence in maintaining the same.

Davenport and Griffith, for defendant in error.

The rule is that where the corporation has no choice in the selection of officers, but is bound to accept the services of a particular person who derives his authority from another source than itself, or where duties are specifically imposed by statute, it is not liable for his acts.

Shearman and Redfield on Negligence, § 138.
Alcorn *v.* Philadelphia, 8 Wr. 348.
Winpenny *v.* Philadelphia, 7 Phila. 111.
Lorillard *v.* The Town of Monroe, 1 Kernan, 392.

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Nov. 7, 1877. THE COURT. The water commissioners, under the Act creating commissioners of water works in the city of Erie, are a board wholly independent of the city authorities.

Whether it is wise to separate so widely a function so intimately connected with the welfare of the city from the control of the councils, is a question for the Legislature, not for us. We cannot see how the city under the law in question can be held liable for the negligence of the water commissioners, who are appointed by the Court, and neither account to nor owe obedience to the city authorities.

PER CURIAM. Judgment affirmed.

SHARSWOOD, J., absent.

Oct. & Nov. '77, 10. Oct. 6, 1877.

Adams v. Carroll & Co.

Joint ownership of a steamboat—When not equivalent to a partnership—Bill of sale of vessels—When sufficient notice of change of ownership—Act of Congress of July 29, 1850—Statute of limitations—Mutual accounts.

When no other relation is shown between the shareholders of a steamboat than that which arises from joint ownership, a partnership will not be inferred.

The disposal of the interest of one of such shareholders by a bill of sale in conformity with the Act of Congress of July 29, 1850, is valid notice to parties with whom the owners have had dealings, as well as to subsequent creditors.

The exception to the statute of limitations in favor of mutual accounts has no application when the debit side of the account consists of charges and the credit side of cash payments on account, and when, consequently, the right of demand is not mutual.

Error to Common Pleas No. 2 of Allegheny County.

Assumpsit, for work and materials, brought in December, 1873, by Carroll & Co. against Adams, Jacobs, and Collins, owners of the steamboat Glasgow. Adams alone made defence, and pleaded non assumpsit, payment with leave, etc., and the statute of limitations.

At the trial (before KIRKPATRCK, J.) the plaintiffs produced an account showing charges against Adams, Jacobs, and Collins, as owners of the Glasgow, for repairs. The first charges, dated March 27 and 30, 1867, amounted to $530.98. The next charge was dated March 31, 1868, and there were others of which the last was dated January 12, 1870. The account gave the owners credit for a payment of $200, dated July 26, 1867, and for four other payments, each of the same amount, dated June 6, 1868, and subsequent days. The plaintiffs then put in evidence a certified copy of the enrollment of the steamboat Glasgow in the office of the collector of customs at Pittsburgh.

The defendant put in evidence a certified copy of a bill of sale dated March 27, 1868, and duly acknowledged and recorded, as required by the Act of Congress of July 29, 1850, whereby he had sold all his interest in the boat to Collins. The plaintiffs testified in rebuttal that they knew nothing of the sale of Adams's interest until suit was brought. They also testified that Adams had given them orders as to the repairs after April 8, 1868, but as to this they were contradicted by Adams.

The defendant requested the Court to charge, *inter alia*, (1) That the bill of sale by Adams was sufficient notice to the plaintiffs, from and after the date of recording it, that the said Adams had disposed of all his interest in the steamboat to Collins and had ceased to be a part owner. *Answer.* "The point as presented is refused. Such an enrollment, such a sale, such a record, would be notice to all the world except parties who had been trading with and keeping an account at home with the boat." The Court added, that in relation to such parties the owners "did not differ from an ordinary partnership," and that it was their duty to have given special notice of the dissolution of partnership to those persons with whom they had had running accounts, or to prove that those persons had received notice. (2) That the credits for moneys paid, in the plaintiffs' account, showed that all the indebtedness of the steamboat or the owners thereof, existing at the time of the record of the bill of sale, had been fully paid. *Refused.*

The Court directed the jury that the account being "a running account, and credits given from time to time, the statute will only commence to run from the last item," and "if . . . the debt was incurred six years before the last item sued for, then there ought to be no recovery."

Verdict and judgment for the plaintiffs. The defendant, Adams, took this writ, assigning for error, *inter alia*, the answers to his points and the charge as above.

J. J. Mitchell, for the plaintiff in error.

The bill of sale was in accordance with the Act of U. S. of July 29, 1850 (Revised Statutes, §§ 4192–93–94). The Act provides that no bill of sale of any vessel of the United States shall be valid against any person but the grantee, his heirs, and persons having actual notice, unless such bill be acknowledged before an officer authorized to take acknowledgments, and recorded in the office of the collector of customs where such vessel is registered.

It follows that this bill of sale, which was made in accordance with the Act, was full notice to all the world.

Parsons' Laws of Business, 315.

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Granting that this was a running account, the liabilities previous to the recording of the bill were the earliest. The credits are given generally. No appropriation was made by the parties, hence the law will apply the payments to the earliest liabilities.

Pierce *et al. v.* Sweet, 9 C. 151.

John Barton, contra.

The plaintiff in error does not cite any authority to show that the statute of limitations applied. The ruling of the Court below is sustained in—

Chambers *v.* Marks, 1 C. 296.

The Act of U. S., *supra*, was intended to apply solely to the title of vessels and the mode of transferring the same. Yet even since that Act it has been held that the certificate of the register of a vessel is not evidence in favor of the party named therein.

Lincoln *v.* Wright, 11 H. 76.

The defendant's second point was rightly refused. If the account must be separated, of course the money paid by the new owners must go to liquidate the indebtedness incurred by them.

Oct. 15, 1877. THE COURT. Suit was brought against the plaintiff in error and others, as owners of the steamboat Glasgow for work and materials furnished to the boat. The debit side of the account is composed of several items, commencing March 27, 1867, and ending January 12, 1870; and credit is given for five payments of $200 each on account.

It was shown by the bill of sale, acknowledged and recorded as required by the Act of Congress, that on the 21st of March, 1868, Adams, the plaintiff in error, sold his interest in the boat to Collins; and it was contended that he was not liable for any of the articles subsequently furnished. In refusing to affirm defendant's first point, the Court instructed the jury that the sale was "notice to all the world except parties who had been trading with and keeping an account at home with the boat," and said in substance that, in regard to the necessity of giving notice to those with whom they have had previous dealings, the joint owners of a steamboat, "do not differ from an ordinary partnership." In this we think there was error.

When no other relation exists between the shareholders of a steamboat than that which arises from the joint ownership, they are not partners, nor is their liability measured by the rules of law which are peculiar to the partnership relation. (Hopkins *v.* Forsyth, 2 Harris, 34.) It is true they may become partners in a trade or business in which the boat is employed; but when it is claimed that such relation exists, it must be averred and proved by competent testimony. It cannot be inferred from the joint ownership alone.

In this case it does not appear that the interests of the owners were connected with anything else than the boat itself. They were sued as joint owners and not as partners. The rule requiring notice of dissolution to be given to those with whom the copartnership has had dealings, has never been extended to a change in the ownership of a steamboat or other chattel. It was not incumbent, therefore, on Adams to notify the plaintiffs that he had disposed of his interest in the boat. The transfer was made in the manner prescribed by the Act of Congress, and nothing more was necessary to relieve him from liability for goods subsequently furnished to the boat.

The defendant's second point was properly refused. There appears to be but one credit prior to the change of ownership. The others were dated afterwards, and if they were not made by the defendant or on his account he has no right to have them applied to that portion of the debt which was contracted while he was a joint owner of the boat.

As to all the items of plaintiffs' claim prior to the sale, the statute of limitations was interposed; and the charge of the Court on this subject is assigned for error. The jury were instructed, *inter alia*, that it being "a running account and credits given from time to time, the statute will only commence to run from the last item," and if the debt was incurred six years before the last item sued for, then there ought to be no recovery.

To constitute mutual accounts there must be mutual demands. Each party must have a demand or right of action against the other. The exception in the statute has no application when the demand, as in the present case, is altogether on one side, although payments on account have been made. (Ingram *v.* Sherard, 17 S. & R. 347; Lowber *v.* Smith, 7 Barr, 381.) For aught that appears in this case the statute commenced to run from the date of the last item in the account prior to the sale of defendant's interest in the boat, and the jury should have been so instructed.

Judgment reversed, and *venire facias de novo* awarded.

Opinion by STERRETT, J.

Oct. & Nov. '77, 102. Nov. 7, 1877.

Oak Bridge Coal Company v. Reed.

Master and servant—Liability of corporation to servant—Defective appliances—Negligence—Notice.

A master is not liable to his servant for injuries occasioned by the use of defective appliances furnished by the master, if such defects are so obvious that no prudent

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man would use the appliances, and the servant gives no notice to the master that such defects exist.

But where such appliances, though in fact dangerous, are not obviously defective, and the servant in the execution of his employment, notwithstanding the exercise of skill and caution in their use, was injured by reason of defects in the appliances, the master will be held liable.

The plaintiff was employed by the defendant as a brakeman; his duty required him to couple cars while on a trestle work, and while so engaged he was injured by reason of an alleged defect in the construction of this trestle work.

The Court below submitted to the jury the question of fact as to the defective character of the trestle work, and instructed them that if the plaintiff, in obedience to the requirement of the defendant, incurred the risk of the alleged insufficiency of the trestle work, and it was reasonably probable that the trestle work could be used without danger by the exercise of ordinary care, and the plaintiff did in fact exercise such care, and was nevertheless injured by reason of the defect of the trestle, then the defendant was liable:

Held, not to be error.

Error to the Common Pleas No. 2 of Allegheny County.

Case, brought by William Reed against the Oak Ridge Coal Company, to recover damages for an injury to the plaintiff, suffered while in the employ of the defendant as a brakeman.

The defendant company had erected near their mines a railroad siding, built upon trestles, used for running in cars to be loaded. It was part of the plaintiff's duty, in the course of his employment, to couple and uncouple the company's coal cars as they were run on and off this siding. On March 29th, 1875, while making a coupling of the company's cars, or immediately after making such coupling, the plaintiff was injured by reason of a wheel of one of the cars running on his foot and crushing it badly. To recover damages for this injury this action was brought.

On the trial (before EWING, P. J.) it appeared that the plaintiff was a competent and experienced brakeman, and that at the time when the accident occurred the cars were running so slowly that they came to a standstill at the instant when the wheel was on the plaintiff's foot. The plaintiff claimed, and introduced evidence tending to prove, that the trestle work of the siding on which the injury was sustained was so defectively constructed, by reason of the omission to place a board on the standing room outside the tracks, that the injury was the immediate and unavoidable consequence of such faulty construction. The evidence in relation to the existence of a board-walk on the trestle work outside the track was conflicting.

The defendant proved that the plaintiff had been in the employ of the defendant company for about three months when the injury was sustained, and that during that time the trestle work was in the same condition as at the time of the injury. The defendant also claimed that the injury was caused by the negligence and carelessness of the plaintiff in putting his foot on the rail while coupling the cars, and that he had frequently been warned against so doing, because it was a dangerous habit.

The defendant requested the Court to charge the jury *inter alia*: (1) That, taking all the evidence in the case to be true, the plaintiff is not entitled to recover in this action.—*Refused.* (5) If the jury find that the plaintiff had full knowledge of the place and means provided by the defendant for the performance of the service in which he was engaged, and continued in such service for a considerable period of time, without notice or complaint to the defendant company of hazards or defects which endangered his safety, the defendant cannot be held liable for injuries to plaintiff resulting from such risks. (6) That if the jury should find from the evidence that the siding and trestle work of the defendant were insufficient and defective, and that such insufficiency and defect existed at the time of the employment of the plaintiff, and continued until the accident, and were known to him at the time of his employment, or became known to him long before the accident, and he made no complaint of such insufficiency or defect, and continued in the employment of the defendant with full knowledge of them, then such continuance in such employment is such concurrent or contributory negligence as will bar his recovery in this action, and their verdict must be for the defendant.

The 8th point was substantially the same as the 6th point.

The Court answered the 5th, 6th, and 8th points as follows:—

These three points are substantially the same, and are answered together. On the authority of Patterson *v.* The Pittsburgh and Connellsville Railroad Co. (26 P. F. Smith, 390), they are refused. If the jury find that the trestle work and appliances on and by which the plaintiff was required to perform his service in coupling cars was so obviously and immediately dangerous that a man of common prudence would refuse to use it; and also find, what is admitted by the plaintiff, that he was in the employ of the defendant company from two to three months, and was almost daily using the trestle work in coupling of cars without notice to or complaint to defendant's agents of its insufficiency, the defendant is not liable for the injuries received by the plaintiff. But if the plaintiff, in obedience to the requirement of the defendant, incurred the risk of the alleged insufficiency and defect of the trestle work, and though dangerous, it was not so obviously dangerous as to threaten immediate injury, and it was reasonably probable that it could be

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safely used by great caution and skill, and the trestle and appliances in question were under the daily inspection of the officers of the company, whose duty it was to supply defects and repair injuries to the work; and that the plaintiff did in fact exercise the requisite caution and skill in his work; and, notwithstanding this, received the injury complained of by reason of the insufficiency and defect of the trestle and appliances furnished by the defendant, he is entitled to recover.

Verdict and judgment for the plaintiff for $800. The defendant took this writ, assigning for error the above answer to the points submitted.

A. M. Brown (*W. W. Thompson* with him), for the plaintiff in error.

The testimony clearly established that the plaintiff had been in the employ of the company for some months before the accident happened; that during all this time the trestle work was in the same condition as at the time of the accident; and that the plaintiff had used the trestle work daily, and had never made any complaint to the company. Upon these facts it was the duty of the Court to charge the jury that the plaintiff could not recover.

Clarke *v.* Holmes, 7 H. and N. 942.
Frazier *v.* Penna. Railroad Co., 2 Wright, 111.

The case of Patterson *v.* The Pittsburgh and Connellsville Railroad Co. (26 Sm. 389; S. C., 1 WEEKLY NOTES, 569), differs materially from this case. In it Patterson had given notice to the company of the defective switch which caused the accident, and the company had promised to repair it, but neglected doing so, while at the same time they requested him to continue using it. The plaintiff here himself testified that he was an experienced brakeman, and, if so, he must have known of the defective condition of the trestle work, and be held to have taken the employment, with all its risks, with his eyes open.

M. W. Acheson, contra.

The question as to whether due care and diligence had been used by the defendant company in the construction of their siding and trestle work was one of pure fact, to be determined by the jury.

Pennsylvania Railroad Co. *v.* Henderson, 1 Sm. 315.
West Chester and Phila. R. R. Co. *v.* McElwee, 17 Sm. 311.

The jury, by their verdict, answered this question in the negative.

The Court below properly relied upon the case of Patterson *v.* The Pittsburgh and Connellsville Railroad Co.

Nov. 12, 1877. THE COURT. This case necessarily went to the jury upon a disputed fact, of which there was evidence on both sides, and this fact appears to have been the turning point of the question of culpable negligence on the part of the company in neglecting to maintain a structure upon their road necessary to the safety of their employees. This question was decided against the company, and hence we cannot say there was error in the manner the case was submitted by the Court.

The case was not in fact governed by that of Patterson *v.* The Pittsburgh and Connellsville R. R. Co. (26 Sm. 389), for there were obvious differences in the facts; but principles were stated in the opinion in that case, which the Court below adopted and applied to this, in the answer to the 5th, 6th, and 8th points of the defendant, and we cannot say any error was committed in so doing.

PER CURIAM. Judgment affirmed. PAXSON, J., absent.

Oct. & Nov. '77, 243. Oct. 15, 1877.

Bean v. Howe et al.

Roads and Bridges—Act of February 19, 1849—Railroad corporations—Eminent domain—Trespass—Authority of agent, when a question for a jury.

A railroad company having occupied a portion of a public highway, and having taken away a bridge, neglected to replace the bridge. The road commissioners undertook the work, and let the contract to a contractor who entered upon the railroad company's ground. There was evidence of assent to the location by the railroad company's superintendent, who, however, denied both his assent and authority to assent. When the bridge was nearly completed, employés of the railroad company drove the contractor from his work and tore up the bridge. In an action of trespass by the contractor, the Court instructed the jury to find a verdict for the defendants, on the ground that the plaintiff had no authority to enter on the company's premises:

Held (reversing the judgment of the Court below), that the question of the scope of the superintendent's authority, and of his agreement, was for the jury.

Held further, that if the superintendent's authority and agreement had been proved, the plaintiff would have been entitled to recover.

Error to the Common Pleas of Forest County.

Trespass *vi et armis*, by Abraham Bean against William Howe, Richard Ray, Michael Sullivan, Patrick Garvey, *et al.* Plea, not guilty.

From the evidence the following facts appeared:—

In 1866 the Warren and Franklin Railroad Company (afterwards consolidated with the Oil Creek and Allegheny River Railroad) ran a line of track along the bank of the Allegheny River, through Harmony Township, Forest County, taking for the purpose the bed of a public road to the extent of some sixty perches, including a point where it crossed a stream called Jones'

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Run. The bridge over Jones' Run was torn away by the company. Just at this point there is a station of the railroad company called Trunkeyville. Nothing was done toward replacing the road or rebuilding the bridge until 1870, when, the population having considerably increased, it became imperatively necessary. The road commissioners were called on, and they, in turn, called upon C. J. Hepburn, general superintendent of the railroad company, who met them upon the ground

John Thompson, one of the road commissioners, testified that "Mr. Hepburn agreed to give us a bridge as good as the one they had taken away. We located where the new bridge was to be; it was agreed on by all." This testimony was corroborated by the other road commissioners. After waiting for several weeks for the railroad to begin work, the commissioners took upon themselves the work, advertised for proposals, and let the contract to Abraham Bean, the plaintiff. When the bridge was nearly completed Howe, a section boss, and the other defendants, employés of the railroad company, came upon the ground, drove the plaintiff and his workmen away, and tore up the bridge. Hepburn testified, on behalf of the defendants, that he had no authority to make an agreement for the company to build the bridge, and that, in fact, he made no such contract.

On the trial (before WETMORE, P. J.) plaintiff's counsel requested the Court to charge: (1) That if the railroad company obstructed the public highway by appropriating the road-bed and bridge for their track, it was their duty, under the Act of Assembly, to open and construct *forthwith* another road and bridge in a convenient location, and if the company failed or neglected to do so, after notice, and the lapse of a reasonable time, the road commissioners of the proper township had the same right and power that the company had to appropriate other ground conveniently adjacent for a road and bridge, and it was their duty to do so. (2) That if the jury believe from the evidence that on the 22d of June, 1870, the superintendent of the railroad company met the road commissioners on the ground to arrange about supplying a new road and bridge in place of the one obstructed, and jointly selected and agreed upon a site for such new road and bridge, and the superintendent then agreed in behalf of the company to build the bridge in the location so selected, but the company failed and neglected to do so within a reasonable time thereafter, and the road commissioners then went on, advertised for proposals to construct the bridge, and afterwards let the contract therefor to the plaintiff, who proceeded to erect a bridge on said location in pursuance of said contract, the plaintiff had a right to construct said bridge, and if it was destroyed by the defendants before the same was accepted by the road commissioners and taken off plaintiff's hands, the defendants were trespassers, and the plaintiff is entitled to recover.

These points were answered as follows: Under the evidence in this case, there was no legal authority in plaintiff acting under contract from the road commissioners of Harmony Township to enter on the premises in question and construct the bridge, and hence defendants, acting under direction of the railroad company, were not tresspassers in removing the same.

Verdict and judgment for defendants.

Plaintiff took this writ, assigning as error the answer to points as above given.

S. T. Neill (with whom was *M. J. Heywang*), for plaintiff in error.

The commissioners had certainly authority to erect a bridge, and were, in fact, bound to do so. They were acting within the line of their duty.

Penna. R. R. *v.* Duquesne Borough, 10 Wr. 224.
Newlin Township *v.* Davis, 27 Sm. 317.
Phœnixville *v.* Phœnix Iron Co. 9 Wr. 135.

Whether our views of the law as stated in our first point were correct or not, there was sufficient testimony of the assent of the railroad company to our entering upon the land, to have the case submitted to the jury upon the instructions suggested by our second point.

Bevan *v.* Ins. Co., 9 W. & S. 187.
Wenrich *v.* Heffner, 2 Wr. 207.

[MERCUR, J. Is there any special law for Forest County giving road commissioners power to lay out and open roads without an order of Court?]

It is not claimed that there is any such law, or any necessity for it, so far as this case is concerned.

[SHARSWOOD, J. What right have these road commissioners to lay out and open this road without the appointment of viewers?]

The Act of 19th Feb. 1849, requires a railroad company forthwith to rebuild a public road or bridge occupied by them, and, upon their failure to do so, the duty devolved upon the proper township officers, and they had the same right and authority as is given to the railroad company by the statute, that is to rebuild it forthwith.

(No paper book was presented for defendants in error, and no counsel appeared.)

Jan. 7, 1878. THE COURT. Throughout the transactions that gave rise to this litigation, and in the trial of the cause, a strange misconception seems to have prevailed in relation to the nature and extent of corporate privileges and corporate obligations. In the years 1866 and 1867, the Warren and Franklin Railroad Company built their railroad along the Allegheny River, through the township of Harmony in the county of Forest. In doing this, the bed of a public road, which had been in use for a number of years,

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was appropriated to the extent of some sixty perches, including a point where it crossed a stream known as Jones' Run, the bridge over which was torn away. Another public road extended from tois bridge, into the open country, back from the river along the upper bank of the run. A short distance below the bridge the White Oak Station of the company was erected.

When this controversy had begun, nothing had been done towards replacing the road that had been occupied, or the bridge that had been destroyed. In the interval after consolidation with another corporation, this company became merged in the Oil Creek and Allegheny River Railroad Company.

On the trial it was alleged on behalf of the plaintiff, that in June, 1870, the road commissioners of the township of Harmony met Mr. Hepburn, the superintendent of the railroad company, by appointment at the station, which by this time had acquired the name of Trunkeyville. A new station-house was then being erected on the lower bank of Jones' Run, and the plaintiff's evidence tended to show that the superintendent entered into an agreement that the company should build a public road on the upper side of their track, to pass along the rear end of the station-house, and across Jones' Run to the road leading into the country along its upper bank. The same evidence was relied on to prove an agreement made at the same time that the company should put up a new bridge over the run in place of that which had been taken down. It was asserted by the plaintiff that this work was agreed to be done within three weeks. No steps having been taken within the allotted time to carry the alleged agreement into effect, the road commissioners entered into a contract with the plaintiff for building the bridge at the point selected. He began the work, and prosecuted it until it was nearly finished, when the defendants, who were in the service of the railroad company, forced him to abandon it, and destroyed the bridge. For this trespass this suit was brought. As the bridge had been erected within the limits of the company's right of way, the Court below held that the defendants having acted under the corporate authority, were not trespassers, and that the plaintiff could not recover.

Whether the performance of the duty, which the law laid on the railroad company, can be enforced as the result of the proceedings in this action or not, must depend upon the opinion a jury may form hereafter on controverted facts. At some time, in some proceeding, the law will compel that performance, for there can be no doubt of the existence of the duty itself. By the 13th Section of the Act of the 19th February, 1849, it is required that a railroad company, finding "it necessary to change the site of any portion of any turnpike or public road, shall cause the same to be reconstructed forthwith, at their own proper expense, on the most favorable location, and in as perfect a manner as the original road." For present purposes it is to be assumed that the corporate authorities whose franchises have become vested in the Oil Creek and Allegheny River Railroad Company appropriated the bed of this highway as a part of their right of way, and took possession of, and destroyed the bridge over Jones' Run. The doctrines deducible from the cases of Phœnixville *v.* The Phœnix Iron Company (9 Wright, 135); The Pennsylvania Railroad Company *v.* Duquesne Borough (10 Wright, 223); The Township of Newlin *v.* Davis (27 P. F. S. 317), and the Pennsylvania Railroad Company *v.* The Borough of Irwin, decided at the present term (4 WEEKLY NOTES, 513), would have justified the road commissioners, after notice to the company, in taking any proper steps to replace the road and bridge, and would have entitled them to recover from the company the expense incurred. They have attempted to reach the end in view in another way, and it remains to be ascertained whether the attempt shall be successful.

In the first point presented on behalf of the plaintiff, the Court was asked to say "that if the railroad company obstructed the public highway by appropriating the road-bed and bridge for their track, it was their duty under the Act of Assembly to open and construct forthwith another road and bridge in a convenient location, and if the company failed or neglected to do so, after notice and the lapse of a reasonable time, the road commissioners of the proper township had the same right and power that the company had to appropriate other ground conveniently adjacent for a road and bridge, and it was their duty to do so." It is not necessary to discuss the question whether the abstract legal principle embodied in this point was, or was not, accurately stated. It was the duty of the Court to answer it in view of the peculiar facts which the trial has developed. It was an admitted element in the cause, that the bridge the plaintiff was building was within the lines of the land the company had appropriated under their charter for the right of way.

Their statutory duty was to reconstruct the public road elsewhere, and under no circumstance could the road commissioners enter upon the land set apart for the purposes of the railroad track without the company's express consent; an affirmative answer would have been unwarranted under the facts disclosed. Apart, however, from the rights and duties of the parties under the statute, and the legal rules which have been settled in its construction, the claim was made for the plaintiff that he was protected by the agreement alleged to have been made between the

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road commissioners and the company's superintendent. His counsel asked the Court in his second point to charge "that if the jury believe from the evidence that on the 22d of June, 1870, the superintendent of the railroad company met the road commissioners on the ground to arrange about supplying a new road and bridge in place of the one obstructed, and jointly selected and agreed upon a site for such new road and bridge, and the superintendent then agreed, on behalf of the company, to build the bridge in the location so selected, and the company failed to do so within a reasonable time thereafter, and the road commissioners then went on and advertised for proposals to construct the bridge, and afterwards let the contract therefor to the plaintiff, who proceeded to erect the bridge on said location, in pursuance of said contract, the plaintiff had a right to construct said bridge, and, if it was destroyed by the defendants before the same was accepted by the road commissioners and taken off the plaintiff's hands, the defendants were trespassers, and the plaintiff is entitled to recover."

This prayer for instruction was unqualified, and assumed the power of the superintendent to bind the company. The fact was disputed, for he had sworn he possessed no such power, and the question was one for the jury to decide. If the point therefore had been simply refused, it would be difficult to find error in the ruling. But the Court did more than that; they charged that "under the evidence in this case there was no legal authority in plaintiff acting under the contract of road commissioners of Harmony Township, to enter on the premises in question and construct the bridge, and hence, defendants, acting under the direction of the railroad company, were not trespassers in removing the same." This instruction was a summary disposition of the whole controversy, irrespective entirely of the alleged agreement, and in disregard of all evidence that had been submitted. It may or it may not be that the authority of the superintendent to bind the company would have been found by the jury. The road had been completed for three years, and was in operation under the superintendent's general management. Contracts of this character are usually within the scope of the powers of a railroad official of Mr. Hepburn's grade, after the functions of the staff of engineers have ceased and the work of construction has been closed. Whether or not there was direct affirmative evidence of authority is a question that was not raised on the trial, and one which the record furnishes this Court with no material to answer. The superintendent's own testimony was, of course, not conclusive. The fact could only have been settled by a verdict, and no opportunity was afforded for that, for the cause was determined by the peremptory ruling of the Court. It has been said already that an inquiry into the right of township officers to exercise the general powers of railroad companies in the reconstruction of highways, where there has been corporate neglect, would not now be justified. The proviso to the 13th Section of the Act of 19th February, 1849, directs the ascertainment and payment of damages incurred in changing the location of any road in the same manner as that provided for the location and construction of the company's own railroad. Grave reasons would stand in the way of the assertion by municipal authorities of the company's right of eminent domain. But there is no room for the introduction of that question here. If an agreement was duly made, the line of the highway and the site of the bridge were dedicated to the public, and became subject to the control of the public officers. The statute had defined the corporate duty to reconstruct the road that they had appropriated. The agreement defined its location. It ceased to be exclusive corporate property thenceforth. The company were bound to complete it by erecting the bridge on the site selected. Failing to do so, the public interest required the road commissioners to do the work on the precise principle that made the municipality liable for a failure to complete a bridge which the railroad company had left unfinished, in The Township of Newlin *v.* Davis, and that enabled the municipality to recover, in the Pennsylvania Railroad Company *v.* the Borough of Irwin, the cost of a bridge which it was the duty of the company to rebuild. The jury should have been instructed that if Mr. Hepburn was the authorized agent of the company, and such an agreement as that set up by the plaintiff was entered into, the action of the road commissioners in making the contract for the bridge was fully justified, and the plaintiff had a lawful possession of the premises, which it was a trespass on the part of the defendants to disturb.

Judgment reversed, and *venire facias de novo* awarded.

Opinion by WOODWARD, J.

Quarter Sessions.

Oct. 30, 1877.

Election Law—Connolly's Case.

Payment of tax within thirty days of the election —Art. VIII., sect. 1 of the constitution.

Application to the Court to direct the receiver of taxes to receive and receipt for a tax.

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The facts were admitted to be that the petitioner, supposing his name to be on the assessor's list of voters, as it should have been, went on the 32d day before election to pay his tax, but his name not being in fact on the list, the receiver refused to receive the tax. Petitioner then went to the assessor, who admitted that the name ought to be on the list, and had been omitted by mistake, but refused to put it on because he had no authority to change his list after the 60th day before election. Subsequently, on the revision of the list by the Court, the name was put on, but the receiver of taxes still refused to receive the tax on the ground that it was within ninety days of the election.

Reference was made to the opinion of LUDLOW, J., *In re* Election Law, 1 WEEKLY NOTES, 49.

THE COURT. No authority has been shown for the jurisdiction of the Court to make any summary order on the receiver of taxes, and this application must therefore be refused.

We may say, however, that we think the meaning of the opinion in 1 WEEKLY NOTES, 49, has been misunderstood. The Constitution, Art. 8, Sect. 1, does not *prohibit the payment* of a tax within thirty days of the election, but provides that such payment *shall not be sufficient to enable the tax payer to vote.* The language of the Court in that case was used with a different point in contemplation, and should not be taken in the sense of a direction to the receiver not to receive taxes within thirty days of the election. On the contrary, we think, he should, in the regular discharge of his duties, receive taxes at any time when offered. But a tax paid within thirty days of the election is inoperative as a qualification for voting. The letter of the constitution is too plain for any doubt. It makes no allowance for mistakes or hard cases. It is imperative that the tax "shall have been paid, at least one month before the election," if not, the receipt is not available, and on challenge should be treated, as to the election within thirty days of its date, as no receipt at all.

Opinion by MITCHELL, J., ELCOCK, J. concurring.

Nov. 2, 1877

Election Law—Murray's Petition.

Employes in almshouse—Paupers—Right to vote.

Application to the Court, in the revision of the assessment lists, to strike off certain names in the lists of the second division of the Twenty-seventh Ward.

THE COURT. It was decided by Judge LUDLOW, in 1874, that employés in the almshouse, "in however humble a capacity, were not paupers, and were entitled to vote, though they had formerly been inmates and paupers." To this principle we adhere, and in accordance therewith we hold that all of the names objected to which represent men who, though at one time paupers, have been regularly discharged, and are now in good faith employed at wages, even though small, and who clothe themselves, and are at liberty to leave their places at their own free will, are properly on the list and entitled to vote.

But a different question arises in a class of cases which includes those who, being former paupers, get no money compensation or wages at all, and merely do certain work, and are accorded certain privileges, in return for their board, lodging, and clothing, supplied by the Institution. This class is very near the class of paupers among whom such distinctions as to employment and privileges may fairly be made as a reward for superior intelligence, industry, or good behavior. We think it is more in accordance with the language and spirit of the Constitution to treat such persons as still in the class of paupers. They are not free and self-supporting citizens, and are therefore deprived, for the time, of their political privilege of voting.

Such names as come within this description are ordered to be struck off.

Opinion by MITCHELL, J., ELCOCK, J. concurring.

Common Pleas—Law.

C. P. No. 2. Jan. 19, 1878.

Merriman v. Richardson.

Lien of municipal claim — Benefits assessed against property owners for opening streets—Acts of January 6 and April 1, 1864—Lien of mortgage given between date of award, and date of filing claim thereon—Power of Court over sheriff's sale—Sale causing a cloud upon the title to prior incumbrances on the property sold—When set aside upon terms.

Rule to set aside sheriff's sale.

This was an application to the equitable discretion of the Court under the following circumstances: The property was sold under a judgment for $42,584, entered on single bill Oct. 16, 1877. At the time of sale it was thought that the first incumbrances were certain mortgages amounting to $160,000 made in September, 1875, and therefore that the mortgages would not be discharged by the sale.

The holders of the mortgages had no notice of the sale, and the properties were purchased by

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the plaintiff in the judgment at nominal prices. Subsequently it appeared that in June, 1875, an award of $7000 had been made by a road jury and confirmed by the Court of Quarter Sessions against the land mortgaged, and in December, 1875, the city solicitor had filed a lien for this award in C. P. No. 1. The award and the lien filed upon it were against a large tract of land in the name of Freeman Scott, then the owner, which tract included in fact the present premises, but the description in the award was so vague that it had not appeared on the city solicitor's searches or elsewhere as an incumbrance against the premises mortgaged, and the mortgagees and their successors in title, without any negligence on their part, had been ignorant of the lien until after the sale.

The important question presented in the case was, therefore, whether the award of damages was a lien from its confirmation in June, 1875, or only from the filing of the claim in December, the mortgages in question having been made in September intermediate between those dates.

Olmsted and *E. C. Mitchell* (with whom were numerous other counsel), for the rule.

This is a case of hardship appealing to the discretion of the Court which is always liberally exercised in such cases.

By the Act of January 6, 1864 (P. L. 1130, Purd. Dig. 1289, pl. 132) an award against land for benefits is a lien from the *time of confirmation.** The Act of April 1, 1864 (P. L. 206; Purd. Dig. 1289, pl. 133–135), makes it a lien from the time of the *claim filed*, but does not expressly repeal the Act of January 6, so that at best there is a doubt whether our mortgages are discharged or not, and that is a cloud on them that decreases their value.

If this rule is made absolute we can pay the city's claim against our respective lots and thus avoid all question of the priority of our liens.

Sellers (with him *O. A. Law*), for the purchaser, contra.

The Act of January 6, 1864, is repealed by the Act of April 1, 1864, and the alarm here is unfounded. The mortgages are the first liens, and are not discharged. The purchaser does not dispute that the land is subject to the mortgages, but is not willing to have the sheriff's deed made expressly "under and subject" to these mortgages, because under the decisions that might make him personally liable for the mortgage debts.

C. A. V.

Jan. 26, 1878. THE COURT. We entertain no doubt whatever that the Act of Jan. 6, 1864, is repealed by the Act of April 1 of the same year. The latter not only establishes a complete and harmonious system covering the whole subject matter of the former Act, but is entirely inconsistent with the other in its terms. If the earlier Act is still in force the later one by its third section does the utterly vain and useless thing of making that a lien which was already a lien months before. It is quite clear that in saying that the city solicitor shall file a claim "*which claim shall be a lien*," etc., the Act of April 1 means that the award shall not be a lien until filed as a claim of record by the city solicitor. Not only natural justice but the whole policy of this State, from its earliest colonial days, has been against secret liens, and the retroactive force of matters of which no diligence can practically obtain notice. The Act of January 6, 1864, is in conflict with this long settled policy, and we have no doubt it was the legislative intent, as it certainly was the effect, that the Act of April 1, 1864, should repeal it.

We are, therefore, clearly of opinion that these mortgages are not disturbed by the sale. But we recognize the fact that investors and conveyancers are sometimes over cautious, and that there may still be such a shadow of doubt upon this question as to affect the market value of these mortgages. It is settled law that on a bill for specific performance a chancellor will often refuse to compel a purchaser to take a title which is in the chancellor's opinion perfectly good. The existence of a cloud, however unsubstantial, is a fact affecting the selling value of securities which a court of equity cannot ignore. In this case the interests involved are large, and the mortgage holders are in no default. We think it, therefore, a proper case for a liberal exercise of our power over sheriff's sales, and this rule will be made absolute on payment of the sheriff's costs, and of the municipal claim, so that at a new sale all question about the priority of the mortgages may be avoided.

Opinion by MITCHELL, J.

C. P. No. 4. Dec. 13, 1877.

Jeffords v. Crump.

Innkeeper — Liability of — Distinction between guest and boarder—An innkeeper, as such, in the absence of negligence, is not responsible for the loss of property by a boarder.

Sur exceptions to report and award of referee. The case being at issue, it was agreed "that all

* The Act of January 6, 1864, provides that the report of a jury assessing damages on property owners for the widening or opening of any street in the city of Philadelphia shall "be and remain a lien . . . for the space of six months *from the confirmation of the report.*"

The Act of April 1st, 1864 provides (§ 3) that when the Court shall have confirmed the award of the jury the city solicitor shall notify the property owners benefited, of the amount assessed; "and if said assessments are not paid within thirty days . . . . said solicitor shall without delay file a claim . . . . *which claim shall be a lien* against the premises assessed."

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matters at variance between the parties be submitted to Edward Olmsted, Esq., whose decision is to be final and conclusive." The following facts appeared: The plaintiff and his mother were lodgers at the Colonnade Hotel, kept by the defendant, in the city of Philadelphia. The price for this accommodation was a certain sum per week; there was no agreement for any particular time.

The parties occupied connecting rooms from October, 1875, to May, 1876, and, during this time, Mr. Jeffords had no other home. About the beginning of April clothing and an opera-glass, together valued at $92, were stolen from the rooms. The referee found that the rooms were locked by the plaintiff; that he obeyed all the rules of the hotel, and omitted no proper precaution to secure the contents of the room, and that there was no evidence of negligence on the part of the defendant.

After reciting the facts and reviewing the general liabilities of innkeepers, the referee reported as follows:—

"In Story on Bailments, § 475, an innkeeper is defined to be the keeper of a common inn for the entertainment of travellers and passengers; and the author adds: 'if a party comes on a special contract to board, he is not a guest, he is deemed a boarder.' Judge STORY cites the case of Chamberlain *v.* Masterson (26 Alabama, 376), where it was decided that if goods belonging to a boarder are lost, he must show that the innkeeper was guilty of negligence before he can charge him. And in Manning *v.* Wells (9 Humphries, 746), it was held that a person was not a guest, in the sense of the law, who comes to an inn on a special contract to board and sojourn; he is a boarder, and must prove that the innkeeper has been guilty of culpable negligence before he can recover for the loss of his goods. In Willard *v.* Reinhardt (2 E. D. Smith, 148), the difference between the relations of an innkeeper and the keeper of a boarding house to their guests is thus defined: 'In a boarding house the guest is under express contract at a certain rate for a certain period of time, but in an inn there is no express engagement; the guest being on his way, is entertained from day to day on an implied contract.' Walling *v.* Potter was a case in Connecticut, and is reported in 9 Am. L. Reg. 618. The plaintiff lost money at the defendant's inn, and brought suit against the innkeeper. It was admitted that the defendant was an innkeeper, and that he and the plaintiff resided in the same town, and about half a mile from each other. The plaintiff came to the inn on an evening, staid over night, and took breakfast. He paid the usual charge for his night's lodging and breakfast. The plaintiff claimed that he was a guest, and entitled to hold the defendant responsible as an innkeeper. The defendant contended that the plaintiff was not a traveller or a wayfaring man, and not a guest at an inn so as to be authorized to charge him as an innkeeper for the loss claimed. The Supreme Court of Errors, holding that the plaintiff was a guest, and entitled to all the rights of a guest, although not actually a traveller, said that in order to charge a party as innkeeper it was not necessary to prove that it was only for the reception of travellers that his house was kept open, it being sufficient to prove that all who came were received as guests, without any previous agreement as to the time or terms of their stay. A townsman or neighbor may be a traveller, and therefore a guest at an inn, as well as he who comes from a foreign country. If he resides at the inn, his relation to the innkeeper is that of a boarder, but if he resides away from it, whether far or near, and comes to it for entertainment as a traveller, and receives it as such, paying the customary rates, they knew no reason why he should not be subjected to all the duties of a guest, and entitled to all the rights and privileges of one. The distinction between a guest and a boarder is distinctly drawn in the cases I have cited.

"There does not seem to be any reason why an innkeeper should not be responsible to both alike when their goods have been lost. The inn is a public house, accessible to every one, and it is the duty of the keeper, in the language of the Court in Houser *v.* Tully (12 Sm. 92) 'to provide honest servants, and to exercise an exact vigilance over all persons coming into his house as guests or otherwise.' It would seem that the security this implies is due to the boarder as well as the guest. But the cases I have cited are decisive that there is the distinction I have referred to, and that the guest only is entitled to recover from the innkeeper for the loss of his goods.

"I feel constrained to decide according to these authorities, and report that the plaintiff has no cause of action."

To this report the plaintiff excepted, on the grounds: (1) that there is no distinction between a *guest* and a *boarder* in determining the liability of an innkeeper; (2) that before exonerating the defendant he should have been required to establish, according to the provisions of the Act of May 7, 1855, the fact of the plaintiff's room having been left unlocked at the time of the loss.

The case was submitted without oral argument.

R. P. Dechert, for the exceptant, furnished no paper-book.

M. Arnold, contra, in his brief argued, *inter alia*, that the Act of May 7, 1855 (Purd. Dig. 774), has no application; it is a restraining, not an enlarging statute; and was not designed to render innkeepers liable where they were not so previously.

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The distinction between a guest and a boarder as to the liability of the landlord is well defined.

Coggs *v.* Bernard, 1 Sm. L. C. 307, and cases cited in note.
Bacon's Ab. "Inns," chap. v.
Manning *v.* Wells, 9 Humphreys, 746.
Berkshire Woollen Co. *v.* Proctor, 7 Cushing, 417.
Neal *v.* Wilcox, 4 Jones (N. C.), 146.
Kisten *v.* Hildebrand, 9 B. Monroe, 72.
Chamberlain *v.* Masterson, 26 Alabama, 317.
Willard *v.* Reinhardt, 2 E. D. Smith, 149.
Cromwell *v.* Stephens, 3 Abb. Pr. N. S. 35.

Dec. 26, 1877. THE COURT. The weight of authority seems to be clearly against the exceptant.

Exceptions dismissed and report confirmed.

(No opinion filed.)

C. P. No. 4. Dec. 13, 1877.

Citizens' Bank v. John Wiegand, Jr., et al.

Action on official bond—Evidence—Illegal custom—Negligence—Whether evidence of a commercial custom to do an illegal act is admissible as a defence—Whether temporary surrender of securities of a bank by the president, in good faith, to enable a customer of the bank in good standing to compare them with his books, is negligence per se.

Sur rule for a new trial. (*Coram* THAYER, P. J., and BRIGGS, J.; ELCOCK, J., being engaged in the Court of Quarter Sessions.)

This was an action on an official bond for $10,000, given to the Citizens' Bank by the defendant John Wiegand, Jr., President of said bank, and by the other defendants as his sureties. The condition of the bond was that "John Wiegand, Jr., as President, shall at all times faithfully perform and execute all the duties pertaining to his office during his continuance therein, without fraud or further delay."

At the trial (before BRIGGS, J.), the defendant, J. Wiegand, Jr., testified, on behalf of the defence, that he had, at the request of M. Kuhn, a partner in the firm of M. Kuhn & Bro., for whom large discounts had been made by the bank, delivered to him, the said M. Kuhn, a bill of lading for cotton worth from $25,000 to $30,000, deposited to secure said discounts, to take to the office of Kuhn & Bro. to compare with their books. The latter refused to return the bill of lading, fled the city, and were in debt to the bank in the sum of $90,000.

Counsel for defendants offered to prove, in justification of this act, that it was usual for banks under such circumstances to lend their customers bills of lading for examination and comparison; that the financial standing of Kuhn & Co., at the time of lending them the bill of lading, was unquestioned; and that Wiegand had previously loaned them bills of lading under similar circumstances, which had always been returned. Objected to; objection sustained; exception.

BRIGGS, J., charged the jury that the loan of the security by the president of the bank was such a breach of duty on his part as to place him in the position of an insurer; that there could be no answer to the liability, except to return the security, or pay its value; and directed a verdict for the plaintiff. Verdict for plaintiff accordingly.

Silas W. Pettit (*W. H. Burnett* with him), for the rule.

The question is between the bank and the sureties of Wiegand. The condition of the bond was that Wiegand should discharge his duties with fidelity and without fraud, and, impliedly, according to the usual custom.

Union Bank *v.* Clossey, 10 Johns. 271.
State Bank *v.* Chetwood, 3 Halst. 25.

The offer was to show this to have been an every-day transaction, and whether legal or illegal, there was no fraud.

[BRIGGS, J. The existence of an illegal practice is no justification for adopting it. If you were to show that every bank president in the city of Philadelphia were doing this, it would only prove that they were all acting illegally.]

The particular circumstances which we offered to prove justified Wiegand in reposing confidence in Kuhn. The question of negligence should have been submitted to the jury.

Geo. W. Thorn, contra.

Of the lawfulness of a custom, the Court must decide. Evidence of an unlawful custom is not admissible.

Coxe *v.* Heisley, 7 H. 243.
Wetherill *v.* Neilson, 8 Ibid. 448.
Evans *v.* Waln, 21 Sm. 69.
Horner *v.* Watson, 29 Sm. 242.

[THAYER, P. J. I cannot see that under the circumstances it would necessarily be negligence. Whether it were so or not, might depend upon the facts, the character of the loan, of the borrower, and on custom.]

When the facts are admitted, the question of negligence is for the Court.

C. R. R. of N. J. *v.* Feller, 4 WEEKLY NOTES, 160.

C. A. V.

Jan. 5, 1878. BRIGGS, J. (after stating the facts). That the defendants, by becoming parties to the bond, assured the bank that John Wiegand would not only act honestly and with care in his duties, but that he possessed the requisite skill and competency to perform all the requirements pertaining to the office, is determined in Minor *v.* Mechanics' Bank (1 Peters, 69); American Bank *v.* Adams (12 Pick. 303); Barrington *v.* Washington Bank (14 S. & R. 420). But the defendants allege that the question whether Wie-

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gand, in surrendering said bill of lading to M. Kuhn, acted honestly and with competent skill, should have been submitted to the jury without a binding instruction.

The law is well settled that when the fact is ascertained and indisputable, the Judge has no discretion to submit the question to the jury, because he has the fact already ascertained before him, and he must determine the law applicable to it. This is just what was done in this case. The allegation that the conduct of Wiegand in the premises was usual with banks will not help the defendants, unless the custom is a lawful one. (Horner *v.* Watson, 29 Sm. 242; Evans *v.* Waln, 21 Id. 69; Coxe *v.* Heisley, 7 H. 243.) The effect of the offer was to show not that Wiegand acted within the line of his duty, but to justify his wrongful act by endeavoring to show that others acted in like manner.

Peculation and embezzlement of late have become quite frequent on the part of those having custody of trust money and property; indeed the contagion in this respect has spread to an alarming extent, and yet, I apprehend, if one of these violators of the law were to attempt to justify his act by offering to show that these practices had become so extensive and general as to make it customary, no one would seriously contend that it would be the duty of the Court to submit the question to the jury. It may be said that this illustration is not analogous to the case before us; true, in degree it is not, but the difference is only in degree of aggravation. In both cases the acts are illegal, and to that extent the analogy is complete. Once give the force and effect to usage that is claimed for it by the defendant, and it will become the refuge behind which every delinquent and defaulter in matters of trust will seek to shield himself.

I admit that there are cases in which those occupying positions of like character with that of Wiegand could not be held answerable for mistaken confidence reposed in others. To illustrate: the discounting of paper being part of banking business, to make discounts on securities supposed to be good after proper inquiry and the exercise of due diligence, though they should result in loss, would not be followed by liability. Or for the officers of the bank to be robbed of the bank's property while using it within the limits of their functions, and with proper care. Or if they lose it without negligence there would be no liability. Or for the cashier, in the press of business, to honor an over-draft on his bank, not knowing that it was such, and in doing so, in view of all circumstances, did nothing more than may occur, and does occasionally occur, after the exercise of proper diligence, would fix no liability on him. In all such cases a mixed question of law and fact would arise, which would have to be submitted to the jury; the question of negligence as one of fact would be for the jury's ascertainment, with instruction from the Court; if they found there was negligence then the party would be liable, but if there was no negligence he would not be

But the act of Wiegand was not one of this character. It was not in the line of his duty as president of the bank, nor incidental to his duty, to lend to the bank's customers its securities to take away from the bank for inspection and analyzation. His duty was to hold the bill of lading till the discounts should be paid, or he be ordered by the board of directors to surrender it. Nor can he now substitute for the abstracted security his mistaken faith in M. Kuhn. His act was of itself a breach of his duty, and not one of negligence merely. Even putting his act on the footing of negligence, it was of that class which is negligence *per se*. Risk necessarily inhered in the act by tempting Kuhn to do just what he did. A man might walk on the track of a locomotive railroad and escape many times, but when injured by the engine I apprehend no Court could be found to adjudge that such conduct was not negligence *per se*, or justify it because people were accustomed to walk there. Such a custom, like the one claimed here, should be "more honored in the breach than the observance."

Such was my opinion when I directed a verdict for the plaintiff; and deliberate reflection since has convinced me that in doing so I correctly stated the law in the premises.

THAYER, P. J., dissented, in the following opinion:—

I am of opinion that the rule for a new trial should be made absolute. It was not pretended that Wiegand had acted in bad faith in loaning the bill of lading for a brief space of time to the customer of the bank, who had deposited it as a collateral. The whole question, therefore, was resolved into one of negligence, and that question, I think, should have been left to the jury under all the circumstances of the case, as such questions usually are. I think, also, that the proof which was offered of the character and standing of Mr. Kuhn, and the general practice of the banks relative to such transactions with their customers, ought to have been admitted as having an important bearing upon the question of negligence. In short, the case turned not upon a question of law, but a question of fact, which ought to have been left to the decision of the jury instead of being taken from them. The rule for a new trial was argued before two judges, Judge ELCOCK being engaged in the Criminal Court, and, as the two judges before whom it was argued differ in opinion, the consequence is, that the rule for a new trial falls.

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C. P. No. 4. Jan. 10, 1878.

Dougherty v. Frankford and Southwark Passenger Railway Co.

Negligence—Passenger railway company using steam dummy engine—Accident happening at night to person on the track, intending to become a passenger—Contributory negligence—Presumption—Burden of proof—Nonsuit—Where plaintiff's case fails to show that the person injured was a passenger on the defendant's car, and fails to show any negligence by defendant, a nonsuit will be entered.

Motion to enter nonsuit. At Nisi Prius, *coram* THAYER, P. J.

Case, to recover damages for the alleged negligent killing of the plaintiff's son, Hugh Dougherty. (He was not a minor.)

The declaration contained four counts, averring in substance: (1) that the company defendant had received Hugh Dougherty as a passenger on its dummy engine and car, and had wrongfully and negligently ejected him therefrom before the end of his journey, whereby he was knocked down and killed; (2 and 3) that the defendant had received Hugh Dougherty as a passenger on its dummy engine, or the car attached thereto, and by careless and improper control, had caused him to be thrown therefrom; (4) that Hugh Dougherty, while lawfully upon the public highway, was knocked down and killed by the dummy engine of the defendant in consequence of the careless management thereof.

Plea, "Not guilty."

On the trial the plaintiff's witnesses testified that Hugh Dougherty was last seen alive in Flood's brickyard, near the line of the defendant's track, in the outskirts of the city, on the night of November 25, 1872; that shortly afterwards a "dummy" steam-engine and car attached was seen to approach; that then a scream was heard, and on going out to the street, Dougherty was found lying upon the track with his legs mangled. The dummy and car had continued on their course. From these injuries, Dougherty died in a few days. One of the plaintiff's witnesses testified that Dougherty left the brickyard for the purpose of getting on the dummy, and that he had cautioned him against doing so because he had been drinking. The plaintiff called the conductor and engineer, who both swore that they did not know Dougherty, and knew nothing of the accident until the day following its occurrence. None of the passengers were called as witnesses.

At the close of the plaintiff's case, *Edward Olmsted*, for defendant, moved for a nonsuit on the ground that there was no evidence of negligence on the part of the defendant.

John Dolman, contra, argued that the fact of Dougherty's having left the yard for the declared purpose of getting on the dummy, and the subsequent accident, raised the presumption of his having been a passenger, and thereby threw on the defendant the burden of disproving negligence.

Motion granted.

Amendment to Rule of Court, XV., sec. 48, (*relating to examination of witnesses upon depositions, in advance of trial.*)

Adopted by all the Courts of Common Pleas of Philadelphia County, January 26, 1878.

And now, January 26, 1878, the following amendment is made to Rule XV., Section 48, by adding at the end thereof the following:—

"But no party shall be entitled to compel the deposition of the adverse party, in advance of the trial, except upon an order of the Court, upon notice and cause shown."

Orphans' Court.

Nov. 19, 1877.

Thomson's Estate.

Decedents' estates—Liability of a decedent as a member of unincorporated association for debts of the association—Copartnership—Liability of individual partners who expressly ratified an originally unauthorized act of an agent—Orphans' Court—Effect of withdrawal of a claim, after presentment to auditor—Distribution not postponed to await result of claim pending in another forum—Commissions—Cotenant, making sales of land, when not entitled to commissions from his tenant in common—Collateral inheritance tax—Chargeable on gift intended only to take effect after death of donor—Chargeable on present value of annuities—How such charge ascertained—Set-off—Cross demand arising out of distinct cause of action—Claim for a conveyance of real estate cannot be set off against money demand.

Sur exceptions to auditor's report.

John Edgar Thomson died May 27, 1874, having by his will appointed The Philadelphia Trust Company, and William M. Spackman and George B. Roberts trustees. Subsequently the

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same parties were appointed administrators *cum testamento annexo*.

The account of the said administrators, having been filed, was referred to an auditor by consent of the parties in interest, about March 1, 1875, who filed his report on June 23, 1877.

Before the auditor The Guarantee Trust and Safe Deposit Company, administrators of Samuel Veazey, deceased, presented a claim against the decedent's estate for $134,500, the amount of seventeen promissory notes of $7500 each and one of $7000, which had been given by the European and North American Railway Company, as principals, with the International Railway Construction and Transportation Company, as sureties, in payment for 3000 shares of the capital stock of the Bangor, Milford, and Oldtown Railroad Company. The decedent was sought to be made individually liable for said claim, as a member of the International Railway Construction and Transportation Company, an unincorporated association, and therefore in law a copartnership. And it was alleged that he had ratified and approved the signing of said notes as sureties, thereby making such suretyship a debt, obligation, and contract of the partnership, for which decedent and his associates were jointly and severally responsible.

From the evidence before the auditor it appeared that the notes were given under the following circumstances:—

The European and North American Railway Company was a corporation formed by consolidation of two other railroad companies, for the purpose of constructing a railway from Bangor, Maine, to St. John's, N. B. The International Railway Construction and Transportation Company was organized on January 17, 1868, under Articles, executed by Wm. G. Case, John Edgar Thomson (the decedent), Benjamin E. Smith, G. K. Jewett, Noah Woods, and others, reciting *inter alia*, that the subscribers were owners and held together $\frac{17}{20}$ths of the right, title, and interest in a certain contract for the construction of the European and North American Railway, made between that company and the firm of Pierce & Blaisdale. The objects of the said company were "the building, equipping, and operating the European and North American Railway under the construction contract and other contracts which have been made, or may hereafter be made touching the said objects and purposes; and the said W. G. Case, Benj. E. Smith, and N. Woods, are created trustees for the purpose of carrying into effect these articles." The association was never incorporated, but said articles provided that these trustees should appoint a treasurer and secretary, that they should choose one of their number for president of the Board of Trustees, who was to be president of the association, and who under the authority and direction of the trustees could exercise all their powers under the articles of association. It was further provided that the "said trustees, their survivor or survivors, successor or successors, are hereby vested with full power and authority to manage, protect, and control said construction contract, and other contracts connected therewith, and all the property, assets, and effects of the association until said contracts are performed." The trustees were required to "keep a full record of their proceedings as trustees."

The president of the European and North American Railway Company, G. K. Jewett, was also a member of the International Railway Construction and Transportation Company. Nearly all the capital stock of the Bangor, Milford, and Oldtown Railroad Company was the property of the estate of Samuel Veasey.

On November 27, 1869, an agreement in writing was made between C. V. Lord and Alfred Veazey, executors, on behalf of Samuel Veazey's estate, and N. Woods and G. K. Jewett on behalf of the International Railway and Construction Company, for the purchase by the latter from the former of the three thousand shares of the capital stock of the Bangor, Milford, and Oldtown Railroad Company, for which the said promissory notes now claimed upon were given. They were payable in from five to ten years from date. The purchase was made under the belief that this road would form a dangerous competitor to the European and North American Railway Company. By this agreement it was provided, *inter alia*, that the notes to be given and accepted shall "be so far authorized by the said companies that the same shall be binding on the said European and North American Railway Company as a corporation, and upon the individual members of said Construction and Transportation Company as a copartnership." Woods and Jewett also contracted to procure for Lord and Veazey a writing by which the individual members of the said Construction and Transportation Company "should ratify the giving the said notes or authorize the same with their liability thereon, although such shall not be a conditional thing upon which any forfeiture of this contract may depend, provided that all such persons shall in fact be liable upon the said notes by the copartnership or joint stock company name when said notes shall be given."

On December 18, 1869, the decedent, in a letter to the President of the European and North American Railway Company, and one of the associates in said Construction Company, used the following language, *inter alia*:—

"The purchase of the main road is a good thing doubtless for the European and North American Railway Company, but I do not see how the interest of the individuals in the International is to be promoted to the extent of the purchase-money for which they became responsible. Still,

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if the arrangement cannot otherwise be carried out, I will agree to it."

And in a letter to Messrs. Woods and Jewett, the former one of the so-called trustees, and the latter president of the railway company, dated December 29, 1869, the decedent wrote as follows:—

"Gentlemen: I am informed by you of the purchase of the Bangor, Oldtown, and Milford Railroad for and on behalf of the European and North American Railway Company, to be paid for by the duly authorized note or notes of said railway company, the price being $135,000, and payable one-fifth of the entire amount in five years from date of purchase, and one-fifth in each succeeding year after the fifth year, until the whole amount is paid, with interest to be paid annually, which note or notes I understand to be signed as sureties by the trustees of the International Railway Construction and Transportation Company. As a member of the said International Railway Construction and Transportation Company I hereby approve of said purchase, *and, so far as it relates to myself, ratify and sanction the signing of said note or notes by the trustees of said company.*"

On May 10, 1870, the promissory notes were executed by the principal and sureties, and delivered to Lord and Veazey, the owners of the capital stock of the Bangor, Oldtown, and Milford Railroad Company, who thereupon assigned and transferred said capital stock. The annual interest upon said notes was paid by the maker, the European and North American Railway Company, until after the death of decedent, when the same became in default.

The association or company of which decedent was a member was composed of twenty-three individuals, thirteen of whom, including the decedent, approved and ratified the purchase of the capital stock spoken of, and the signing of the notes given in payment by the three managing members or "trustees" as sureties.

From these facts and others in evidence, the auditor concluded that the International Railway Construction and Transportation Company was in law a copartnership, and that the members were jointly and severally liable for all debts contracted in the furtherance of the objects of its formation; that the promissory notes claimed upon were a debt of the copartnership, and the decedent in his lifetime having been a member of said firm, was liable therefor. He therefore awarded to the claimants the sum of $112,000, with interest from Dec. 31, 1875. To this finding the administrators of the decedent filed exceptions.

Several additional claims were presented before the auditor, and to his rulings thereon exceptions were filed. A concise statement of the facts and rulings of the auditor in each of such claims is contained in the opinion of the Court, *infra*.

Wm. A. Porter, for the administrators of J. Edgar Thomson.

Under the Articles of Association of the International Construction and Transportation Company, Woods and Jewett had no authority to make the purchase of the Bangor Company's stock; giving or guaranteeing the notes, not being within the scope of their limited powers as agents, was a void act; and that which is void cannot be ratified. Under those articles there could only have arisen, in any case, a joint and not a several liability, as guarantors, and not sureties; but seven of the members did not unite in or ratify the bargain. The letters of the decedent to Woods and Jewett created no contract with the claimants, between whom and the decedent there was no privity. The articles of association are not admissible in evidence in favor of the claimants, and Lord and Veazey are interested parties, and therefore incompetent as witnesses in this claim against administrators.

The above points are amply sustained by the following among numerous other authorities:—

De Colyear on Guarantees, 130, 216.
Hoffman *v.* Bechtel, 2 Sm. 190.
Finney *v.* Cochran, 1 W. & S. 112.
Bacon *v.* Chesney, 2 E. C. L. R. 352.
Pidcock *v.* Hinton, 10 Id. 197.
Dundas *v.* Sterling, 4 Barr, 73.
Juniata Bank *v.* Brown, 5 S. & R. 226.
Wharton on Agency, § 65.
Pitts. & Steub. R. R. Co. *v.* Gazzam, 8 Cas. 340.
Appeal of Balt. Turnpike Co., 5 Binn. 484.
Angell & Ames on Corp. 272, § 277.
Allum *v.* Carroll, 17 Sm. 68.
Karns *v.* Tanner, 16 Id. 297.
Patterson *v.* Reed, 7 W. & S. 144.
Haus *v.* Palmer, 9 H. 296.

The auditor should therefore have disallowed the claim.

Henry M. Dechert, for the administrators of Samuel Veazey, deceased.

W. Heyward Drayton, for the administrators of W. Phillips, deceased, exceptants.

Chapman Biddle, for Miss Anna Thomson, an exceptant.

W. H. Speakman, for Anna, Mary, Adeline, and Edgar L. Thomson, exceptants.

M. J. Mitcheson, for Mrs. Ellen B. A. Mitcheson, an exceptant.

Jan. 5, 1878. THE COURT. Exceptions have been filed to the report of the auditor by claimants against the estate, as creditors, annuitants, and legatees, and also by the accountants, the executors, and administrators with the will annexed.

We will first consider those of the accountants to the award of $112,000, with interest from December 31, 1875, to the Guarantee Trust and Safe Deposit Company as administrators of the estate of Samuel Veazey, deceased, a creditor. (The Court here reviewed at length the facts relating to their claim.)

After a careful consideration of the questions involved, while we are obliged to differ from some of the findings of the learned auditor, yet

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in the main point involved we think he is correct in holding decedent individually liable, and, rejecting the irrelevant and inadmissible evidence, sufficient was shown to justify and sustain the award. The auditor rightly held the International Railway Construction and Transportation Company to be a copartnership, and the authorities fully sustain his opinion. (Parsons on Partnership, 543 and 544, and cases cited in notes.) In Hess *v.* Werts (4 Sergeant & Rawle, 366), an association gave notes promising to pay the amounts out of their joint funds, and it was held that all the shareholders were personally liable. DUNCAN, J., said, that the association might, as between themselves, stipulate for a contracted responsibility, yet as to the rest of the world, it is clear that each partner is liable to the whole amount of the debts contracted. In the same case, GIBSON, C. J., said: "It is a general principle that partners are liable to third persons as for a personal debt. It is not merely the stock they bring into the partnership that is hazarded, but they are responsible to the extent of their individual fortunes. And such responsibility cannot be limited by any proviso in the articles of partnership. But I see no reason to doubt that they may limit their responsibility by an explicit stipulation with the party with whom they contract and clearly understood by him at the time." The said Railway Construction and Transportation Company, being then a firm or copartnership, it naturally follows that each copartner was personally liable for all its debts. The question then arises, was the purchase of the shares of the capital stock of the Bangor, Oldtown, and Milford Railroad, and becoming surety upon the notes given in payment, a debt, obligation, and contract of the copartnership. The auditor has found that it was. But upon examination of the articles of copartnership, we cannot discover that the purchase of the capital stock of a railroad corporation, or becoming surety for the payment of promissory notes given for the purchase, were ever contemplated by the persons who organized the International Railway Construction and Transportation Company. Their "objects and purposes were the building, equipping, and operating the European and North American Railway under the construction contract, and other contracts which have been made or may hereafter be made touching the said objects and purposes." That the purchase of said stock, and becoming sureties upon the promissory notes, were not within the objects for which said association or company was formed, or the scope of the powers conferred upon the managing copartners or "trustees," is also shown by the agreement between the owners of the stock and Woods and Jewett, two of the copartners, by which the latter expressly stipulated to procure the ratification in writing of all the individual members of the firm, with "their liability thereon." This would have been unnecessary if the "trustees" possessed the requisite power and authority to bind the firm. While, therefore, the contract of suretyship assumed by the three trustees was not in its inception binding upon the copartnership trading as the International Railway Construction and Transportation Company, yet before or after its execution it cannot be doubted that it was competent for the members of the firm to ratify and approve the contract, and thereby make it binding upon the firm. And while each member of a copartnership, within the scope of its legitimate business, may render his copartners liable for debts contracted with third parties, without notice of any private agreement to the contrary between the copartners, yet where the debt is contracted and liability assumed in an undertaking or enterprise foreign to the "objects and purposes" of the copartnership, we think it requires the assent or ratification of each and every member of the firm before they can be held individually liable.

But in the present case it appears that only thirteen members of the firm, including the decedent, assented to and ratified the contract entered into by their three associates. If all the members of the firm are not liable, are these thirteen? We think the question must be answered in the affirmative. Condensing the evidence, it appears that thirteen members of a firm agreed to and ratified a contract entered into by three of their copartners in the name and for the benefit of the firm; that, in consideration thereof, the contract was fully executed, and the property, the subject-matter of the contract, passed from the vendors, and became part of the assets and estate of the copartnership. In view of these facts we are of opinion that, although the copartnership as such is not liable as surety upon the promissory notes held by estate of Samuel Veazey, deceased, yet the thirteen members of the firm are individually liable.

All the parties to the contract relied upon this assurance and faith, and those who contracted as sureties must be held to the consequences of their act. We do not consider it necessary to consider in detail the exceptions, thirty-six in number, as they all bear upon a single point. While a number may be sustained for errors apparent upon the evidence presented, yet we think, as already stated, sufficient evidence was submitted to warrant the award made by the auditor. The general exception thereto is therefore dismissed.

An exception was also filed by accountants to the allowance of the claim of Franklin A. Wilson, late trading with John A. Peters as Peters & Wilson, upon a promissory note for $500, with interest from December, 1875. This note was originally held by the executors of the estate of

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Samuel Veazey, deceased, and formed part of the sum of $135,000, the consideration for the sale and transfer of the shares of capital stock of the Bangor, Oldtown, and Milford Railroad Company, before referred to. It bears the same date, and is similar in form to the notes upon which the award is made to the Guarantee Trust and Safe Deposit Company, and as the views expressed in regard to that award are equally applicable to this claim, the exception to its allowance is also dismissed.

The next exceptions to be considered are those filed by the accountants to the awards made to the Second National Bank of Bangor, Oakland National Bank, Mrs. Nancy Farnsworth, Hugh Ryan, Joshua W. Hathaway, and Edward D. Jewett, claiming as creditors of said International Railway Construction and Transportation Company. The auditor found that these claims were debts justly due and owing by said company, and that decedent as a member was liable therefor. In view of the evidence presented, we discover no error in the findings of fact by the auditor, and therefore dismiss these exceptions.

The last exceptions filed by the accountants are to the refusal of the auditor to report adversely to the claim of Sulzbach Brothers, alleged creditors of decedent. This claim was presented on behalf of the firm of Sulzbach Brothers, bankers at Frankfort-on-the-Main, Germany, to recover $600,000 for an alleged over issue of bonds to that amount of the Davenport and St. Paul Railroad Company, by decedent and William Dennison, trustees under a mortgage of said company to secure bonds to the amount of $6,000,000. After much testimony had been submitted to the auditor, and many months occupied in consideration of the claim, the counsel for the claimants, under instructions to that effect, finally withdrew and declined to further prosecute the claim before the auditor. He has consequently reported that he had no further jurisdiction over the claim, and could not report whether it was valid or otherwise. In the mean time the claimants filed a bill in equity in the Circuit Court of the United States for the Eastern District of Pennsylvania, against the accountants and others, as defendants, for the same cause of action. These exceptions cannot be sustained. It cannot be questioned that a party claiming as a creditor of a decedent's estate may select his forum. Nor can it be doubted that if he comes into the Orphans' Court, and submits to its jurisdiction, he has the right afterwards to withdraw, and in effect to "discontinue" his action. But he prejudices no one but himself, and must take the consequences. If he thus, with notice, loosens the hold he once had upon the fund, exclusively in the Orphans' Court for distribution, he may lose it forever, for the Court, in the exercise of its power and jurisdiction, may order distribution of the fund among other creditors, heirs, or legatees. A creditor cannot, by the course he sees proper to adopt, delay the settlement of the estate, and will be remitted to his remedy against the real estate of the decedent, if any, or claim upon a subsequent fund brought into the Orphans' Court for distribution. These exceptions are therefore dismissed.

The next exceptions to be considered are those on behalf of Mrs. Ellen B. A. Mitcheson, as executrix of Catharine Alexander, deceased, to the allowance of commissions to the decedent upon the sales of land in which he and the estate of William G. Alexander, deceased, were jointly interested. The exceptant claimed, as a creditor of decedent, to recover interest upon the proceeds of land sold and received by him as a joint owner with the estate of William G. Alexander, deceased, from the year 1865 to 1872, when the balance due said estate was paid by decedent, but without interest. The claim was proved and directed to be paid, but the auditor deducted therefrom and awarded to decedent a certain sum as commissions. This was objected to by the claimant. From the evidence we are unable to discover the slightest ground upon which to base a claim of, or allowance to decedent of any commissions or compensation whatever.

In 1858, decedent and William G. Alexander, now deceased, were tenants in common of a certain tract of land in Huntingdon County, Pennsylvania. This land was sold in lots from time to time by a resident agent at Huntingdon, who remitted the proceeds to decedent, and charged, and was paid a commission of five per cent. for his services. The sums thus received by decedent were entered upon his books, but no charge was made therein or credit claimed for commissions to himself personally. In 1872, decedent paid to claimant the amount due the estate she represented, which had been in his possession since 1865, and had accumulated to nearly $12,000, exclusive of interest, without any deduction for commissions; and claimant, at the time of settlement, reserved her right to demand interest. There was no evidence of any agreement either by William G. Alexander in his lifetime, or of the claimant since his death, that the decedent should receive any compensation for services in relation to said lands, or that the decedent ever contemplated making any claim to such compensation. In view of these facts the auditor was in error in making the deduction for commissions to the decedent, and the exceptions thereto are sustained.

Exceptions were also filed on behalf of Anna Thomson, a claimant, to the deduction of the collateral inheritance tax from the principal of a bond with warrant of attorney annexed, executed

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by decedent, and payable to her after his death. There can be no doubt that this payment, directed by decedent to be made, and take effect after his death, is within the provisions of the Act of April 7, 1826, and subject to the tax. (Wright's Appeal, 2 Wright, 507.). And the auditor is correct in holding "that any disposition of property, to take effect after death, made consciously or unconsciously to evade the payment of the tax, is inefficient in this respect." These exceptions are also dismissed.

Exceptions were also filed by Mary Adeline Thomson, Anna Thomson, and Edgar L. Thomson, annuitants under the will of testator, to the charge and deduction of the collateral inheritance tax, from their several annuities. It was argued on their behalf that the law required the tax to be paid "out of the estate," and not by the annuitants. But this is clearly a misapprehension of the Acts of Assembly upon the subject. An annuity is as much an "estate" in the view of the law as a devise, legacy, or distributive share passing to a collateral heir or stranger in blood to the decedent, and equally subject to the tax. It must in all cases pay the tax, otherwise injustice would be done to those who are entitled to the residue. And the only instance wherein the latter are burdened with the tax upon legacies or annuities is where the testator expressly directs the same to be paid, free and discharged from the tax. (Shippen *v.* Burd, 42 Penna. St. Rep. 461.)

The mode of assessing the tax is provided by the Act of April 10, 1849. The value of the annuity is to be ascertained, and five per cent. thereon deducted from the principal necessary to be set apart and invested to produce the annuity. The tax is of course to be paid in the first instance by the executor out of the estate, and afterwards deducted from the annuitant. To illustrate our meaning, if an annuity of $1200 per annum be bequeathed, and its value as of the age of the annuitant is appraised at $7200, five per cent. upon this amount would be deducted from $20,000, the sum necessary to produce $1200 per annum, leaving $19,640 to be invested, and reducing the annuity to $1148.40 per annum. The auditor being therefore correct in charging the annuities with the collateral inheritance tax, and in the manner adopted by him, the exceptions thereto are dismissed.

The last exceptions to be considered are those filed by the administrators of Wm. Phillips, deceased. The first is to the disallowance of a claim upon an alleged promissory note of decedent for $100,000, dated June 1, 1872, and payable one year after date to "William Phillips, President B. B.," these letters signifying Bennett's Branch of the Allegheny Valley Railroad. The note was not produced, nor was it proved to have been lost or destroyed. In defence of the claim accountants produced a cancelled promissory note for $100,000, signed by decedent, dated June 1, 1872, payable twelve months after date to the order of the Allegheny Valley Railroad Co. It appeared that at the date of the note, William Phillips was president of said railroad company. He died April 14, 1874. John Scott succeeded him as president, and soon afterwards presented said note to J. Edgar Thomson for payment. On May 4, 1874, it was paid by him in full, with interest. From the evidence the auditor found that the note claimed upon was the identical note paid by decedent, and now in the possession of the accountants, cancelled. We discover no reason to differ from his conclusion, and therefore dismiss the exception.

The second exception is to the disallowance of the claim upon two due bills made by decedent, one dated February 18, 1870, for $7964.07, the other dated February 2, 1871, for $2680, both in favor of William Phillips. That the due bills were valid and unpaid was admitted, but it was contended by accountants that claimants were not entitled to recover thereon, for the reason that William Phillips in his lifetime was indebted to decedent for the amount of the latter's share of the proceeds of certain real estate in which they were jointly interested, sold by said Phillips and not accounted for. And also because the due bill first mentioned was given by decedent to William Phillips in payment of his share in a joint purchase of other lands, but which share had never been conveyed to him by said Phillips. The defence is therefore in the nature of a set-off. It is shown by the evidence that decedent and Wm. Phillips, with others, were interested in the purchase of a tract of land known as the Verner tract, in Allegheny County, Penna. That seventy-two acres, part of the same, were afterwards sold to the Allegheny Valley Railroad Co., and the share of the decedent being one-sixth of the proceeds, was received by him. That Phillips, who held the title, subsequently sold other portions of the land for $40,000, but never paid decedent his one-sixth part or share. Decedent, with Phillips and others, had a like interest in other lands in Clearfield and Armstrong Counties, Penna. In payment of his share of the purchase money in Armstrong County decedent gave Phillips the due bill for $7964.07. The title to these lands was also held by Phillips, who died before any conveyance was made to decedent of his undivided share. William Phillips at his death was found to be largely indebted. In view of these facts, the auditor disallowed the claim, upon the ground of the indebtedness of Phillips to decedent for lands sold, and also for the reason that the claimants were not entitled to recover, without first tendering conveyances of the shares to which decedent was entitled, freed from the statutory

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lien of the debts of said William Phillips. We agree with the auditor that the debt due from Phillips to decedent for his proportion of the sales of land is a proper set-off; but we are of the opinion that the non-conveyance by Phillips of decedent's undivided share on the lands cannot be so regarded. A cross demand of this character does not seem to be contemplated by the Defalcation Act of 1805, nor the current of decisions under it. The Act has ever been liberally construed, and unliquidated cross demands arising out of separate and distinct causes of action allowed to be set off. But it must arise *ex contractu*, and be capable of liquidation by a jury. (Ahl *v.* Rhoads *et al.*, 34 Legal Intelligencer, 393; 4 WEEKLY NOTES, 483.)

And when the right of the defendant would require to be settled in an action of account render, or a bill in equity for an account, or to compel specific performance, his demand would not be admissible as a set-off. (Russell *v.* Miller, 4 P. F. Smith, 154.)

The claimants, therefore, being entitled to recover the difference between the amount of the due bills, with interest, and the sum found due from William Phillips upon the sales of land, with interest, the second exception is sustained.

The auditor was appointed not only to audit all claims presented against the estate, and settle and adjust the accounts filed by the executors and administrators *c. t. a.*, but also to report *distribution* of the balance in the hands of the accountants. This latter duty has not been performed, for the reason, as stated by the auditor, that "the great claim of the Messrs. Sulzbach has only been withdrawn to be presented in another forum, it becomes the duty of the administrators to retain sufficient assets for its liquidation until it shall be finally determined whether it is or not a valid demand against the estate. There can obviously be no distribution until this important question shall be settled."

The inevitable effect of this course, if adopted, is to delay and postpone any distribution for years, and probably until the Supreme Court of the United States shall finally pass upon the claim of the Messrs. Sulzbach. In the mean time creditors, accountants, and legatees must suffer, as the accountants can make no payments to either, except at their peril. But we do not propose to adopt a course so fraught with injustice.

Without repeating what we have already said respecting the claim of Sulzbach Brothers, we think the parties who have proved their claims, the accountants, and legatees, are entitled to distribution. The Messrs. Sulzbach, having once submitted to the jurisdiction of the Court, and for some reason seen fit to withdraw, must abide the result. They cannot thus delay, hinder, and embarrass others interested. We think we are fully sustained in this view. (See Hammett's Appeal, 2 Norris, 392; 3 WEEKLY NOTES, 416.)

The report is therefore recommitted to the auditor for correction, and to make distribution in accordance with this opinion.

The following decree was entered:—

And now, January 5, 1878, the above exceptions coming on to be heard, and having been argued by counsel and considered by the Court, it is ordered, adjudged, and decreed: (1) That of the exceptions filed by accountants to the allowance of the claim of the Guarantee Trust and Safe Deposit Company, administrator, etc., of Samuel Veazey, deceased, the third, twenty-second, twenty-fifth, twenty-sixth, twenty-seventh, twenty-ninth, and from the thirtieth to the thirty-third, both inclusive, be sustained, and the remaining exceptions dismissed. (2) That the exceptions of accountants to the allowance of the claims of the Second National Bank of Bangor, Oakland National Bank, Mrs. Nancy Farnsworth, Hugh Ryan, Joshua W. Hathaway, and Edward D. Jewett, be dismissed. (3) That the exceptions of accountants to the ruling of the auditor respecting the claim of Sulzbach Brothers, be dismissed. (4) That the exceptions filed by Mrs. Ellen B. A. Mitcheson, executrix of Catharine Alexander, deceased, be sustained. (5) That the exceptions filed on behalf of Miss Anna Thomson be dismissed. (6) That the exceptions filed on behalf of Mary Adeline Thomson, Anna Thomson, and Edgar L. Thomson, as annuitants, be dismissed. (7) That the first exception filed on behalf of the administrators of William Phillips, deceased, be dismissed, and the second in part sustained.

And it is further ordered that the said report be recommitted to the auditor for correction, in conformity with the opinion filed herewith, and to make distribution of the balance in the hands of the accountants.

Opinion by HANNA, J.

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WEEKLY NOTES OF CASES.

VOL. V.] *THURSDAY, FEB.* 7, 1878. [No. 2.

Supreme Court.

Jan. '77, 134. Jan. 17, 1878.

Yard, Executor, v. Murray et al.

Will—Lapsed Devise—Heirs-at-law—Residuary devisee.

Where the devisee of real estate (who is not within the provisions of the Acts of 8 April, 1833, and 6 May, 1844) dies after the date of the will, but before the testator, the estate devised will go to the heirs-at-law of the testator, unless the language of the residuary clause indicates a special intent to pass lapsed devises into the residue.

Error to the Common Pleas No. 4, of Philadelphia County.

Ejectment, by Murray and others, heirs-at-law of Mary P. Loxley, deceased, against Charles Yard, executor of the said decedent, for one undivided moiety of premises situate on the northwest corner of Thirty-fourth and Bridge Streets, in the city of Philadelphia. Plea, not guilty.

It appeared upon the trial that Mary P. Loxley, by her will dated February 6, 1860, provided, *inter alia*, as follows:—

"*Item.* I give, devise, and bequeath unto my friend John Yard, Junior, of the said city, collector, as an evidence of my regard for him, his heirs and assigns, all that certain lot," etc. (describing the premises in question).

"*Item.* It is my mind and will, and I do hereby direct, authorize, and empower my executors hereinafter named, and the survivor of them, and the heirs, executors, and administrators of such survivor, in pursuance and under the express power and authority which I have hereinafter given them, to sell and convert into money all the rest, residue, and remainder of my estate, real, personal, and mixed, of which I may die seized, possessed, or entitled to, and to part and divide the net proceeds thereof (after deducting and defraying all costs, charges, and expenses attending the sale of my said estate) into three even and equal parts or shares, and one of the said three full equal third parts or shares thereof, I give and bequeath unto all and every," etc. (distributing the whole residuary estate among three classes of persons).

John Yard, Jr., the devisee, died after the date of the will, and before the death of the testratrix.

The above facts were admitted by the parties, and found by the jury as a special verdict; and, under the instruction of the Court, a verdict was rendered in favor of the plaintiffs, subject to the opinion of the Court upon the point of law reserved, to wit: "Whether by reason of the death of John Yard, Jr., subsequent to the date of the will, but prior to the death of the testatrix, the premises in question, which were specifically devised to him, descended, by reason of the lapse, to the heirs-at-law of the testatrix, or passed with the residuary estate to her residuary legatees and devisees."

The Court afterwards entered judgment for the plaintiffs on the point reserved, ELCOCK, J., who delivered the opinion, saying: "Upon a careful consideration of the numerous authorities we are of opinion that a lapsed devise descends to the heirs-at-law of the testator, unless there is an intention expressed in the residuary clause of the will, to cover the particular devise." (See report of the case in the Court below, with opinion of ELCOCK, J., in full, 3 WEEKLY NOTES, 275.)

The defendant took this writ, assigning for error the entry of judgment for the plaintiffs on the reserved point.

J. Cooke Longstreth (*H. S. Hagert* with him), for the plaintiff in error.

Since the Wills Act of 1833 a lapsed devise passes under the residuary clause, if it be sufficiently clear and comprehensive to embrace it.

Patterson *v.* Swallow, 8 Wright, 490.

By the Act of 8 April, 1833 (Purd. Dig. 1476, pl. 11), it is provided that the real estate acquired by the testator after making his will, shall pass by a general devise, unless a contrary intention be manifested on the face of the will. In Massachusetts and Maine there are similar statutes, and it has been there held that they have the effect of changing the rule of construction that the residuary devisee can take only what was intended for him at the date of the will. They take from residuary devises their specific character, and remove all ground of distinction between them and residuary bequests.

Prescott *v.* Prescott, 7 Metcalf, 141.
Thayer *v.* Wellington, 9 Allen, 295.
Allen *v.* White, 97 Mass. 504.
Drew *v.* Wakefield, 54 Maine, 296.

The residuary clause in this will is very strong, and manifests the intent of the testatrix that all her real estate not otherwise effectually disposed of at the date of her death should pass by the residuary devise.

E. L. Perkins and *J. G. Johnson*, contra, argued that the rule of the common law had always been that a lapsed devise passed to the heirs-at-law of the testator, and that no statute of Pennsylvania had altered the rule. In New York it has been held that the statute passing after acquired real estate does not apply to the case of a lapsed devise.

Van Cortland *v.* Kip, 1 Hill, 596.
Waring *v.* Waring, 17 Barb. 556.

Patterson *v.* Swallow was the case of a *void*, not a *lapsed*, devise. The remarks of the learned Judge, who delivered the opinion, referring to lapsed devises, were, therefere, merely *dicta*. The heir can be disinherited only by express words.

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Jan. 28, 1878. THE COURT. When the language of a residuary clause in a will has sufficient scope and extent evincing the intent of the testator to take up and carry into the residuary estate all of his estate remaining at his death undisposed of for any reason, the residuary clause will receive and pass a lapsed legacy or devise. This follows from the manifest intent of the testator himself. Such was one of the aspects of Patterson *v.* Swallow (8 Wright, 489), where the residuary words were: "All the rest and residue of my real estate *which does not pass by virtue of my will and codicil*, I give, devise," etc. In his opinion Justice WOODWARD considered the italicized words as having a strong indication of the testator's desire. Patterson *v.* Swallow was decided, however, on the ground that the antecedent blank legacies were void, and, therefore, nothing did or could pass under these bequests, for there was no one named to take. But where the residuary clause does not by its own terms take in a lapsed legacy or devise, so as to disclose the intent of the testator to pass the lapsed estate into the residue, the rule is different. This we considered settled. (Neff's Appeal, 2 P. F. Smith, 326.) That case was elaborately considered by the late Justice READ, and many authorities were cited bearing on the question. The language there was: "The rest (that is all), residue, and remainder of my estate, real, personal, and mixed, whatsoever, I give, devise, and bequeath to my sons," etc. This broad language was held insufficient to carry the lapsed share into the residuary clause. While broad, it did not indicate a special intent to pass over lapsed shares into the residue. The language of the will of Mary P. Loxley is certainly no stronger, and evinces no certainty of intent to take up lapsed portions of the estate and pass them into the residue.

Judgment affirmed.

Opinion by AGNEW, C. J.

[It is suggested that, although the language of the learned Chief Justice, taken literally, would extend to a lapsed legacy of personal property, the decision of the Court is confined to the subject matter of the case before it, namely, a lapsed devise of real estate. That lapsed devises will go to the heir-at-law of the testator, unless the residuary clause indicates a special intent to pass them over into the residue, is undoubtedly the rule of the common law, for every intendment is to be made in favor of the heir, and he cannot be disinherited without express words. But as to lapsed bequests of personalty, the rule has always been held to be the reverse, and such a bequest will fall into the residue, unless there be a special intent apparent to *exclude* it (Williams on Executors, 1450), for every presumption is to be made against an intent of the testator to die intestate as to any part of his personal estate. Sir WILLIAM GRANT in Leake *v.* Robinson (2 Meriv. 392) stated the law thus: "I have always understood that with regard to *personal estate*, every thing which is ill given by the will does fall into the residue; and it must be a very peculiar case, indeed, in which there can at once be a residuary clause and a partial intestacy, unless some part of the *residue* itself be ill given. It is immaterial how it happens that any part of the property is undisposed of—whether by the death of a legatee, or by the remoteness and consequent illegality of the bequest; either way, it is residue, *i. e.*, something upon which no other disposition of the will effectually operates." The rule as thus stated was adopted by the Supreme Court of Pennsylvania in Nyce's Estate (5 W. & S. 254), Woolmer's Estate (3 Wharton, 477), and Neff's Appeal (2 Sm. 326). In this last case, relied on by the Court in the above opinion, the lapsed bequest was of residue, and accordingly Mr. Justice READ held it to be within the exception to the general rule mentioned by Sir WILLIAM GRANT, *supra*.]

Jan. '76, 202. Jan. 11, 1878.

Pennsylvania Railroad Co.'s Appeal.

Corporation—Liability of, for improper transfer of stock—Negligence—Contributory negligence—Estoppel.

Where a plaintiff by his own negligence furnishes a third person with the means of perpetrating a wrongful act, whereby the plaintiff incurs a loss, he cannot recover, even though the exercise of due diligence and proper care on the part of the defendant might have prevented the occurrence of the loss.

A corporation is not justified in transferring stock on its books upon a blank power of attorney, signed by the owner many years previously (in this case thirteen), without making due inquiry as to whether the power has been revoked.

But where, in such case, the owner of stock had intrusted the certificates, with blank powers of attorney to transfer the same, to an agent for safe keeping, by whose fraudulent transfers the loss was incurred, the plaintiff cannot recover from the corporation.

The rule of law which declares a corporation to be the trustee of its stockholders throws on the corporation the onus of proving due diligence in its dealings with the property of the stockholders. Per SHARSWOOD, J.

Appeal from the Common Pleas No. 3, of Philadelphia County.

Bill in equity, by Mary Fearon, executrix and legatee under the will of Samuel P. Fearon, deceased, against John V. Creeley, B. Schultz, and the Pennsylvania Railroad Company. The defendant Creely, although duly served, made no answer, and was not represented by counsel. The other defendants filed separate answers, and the cause proceeded as though all the defendants had been regularly represented.

The material facts as alleged in the bill and answers, and sustained by the proofs, were as follows: Samuel P. Fearon, at the time of his death, in August, 1865, was the owner of twenty-three shares of stock in the Pennsylvania Railroad Company. By his will the plaintiff Mary Fearon was appointed executrix. Some time in 1871 the plaintiff took the certificates of stock, and other property belonging to the testator's

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estate, and deposited them for safe keeping with the defendant Creeley, who was at that time a member of the bar in good standing. For a time he collected the dividends, and paid them over in good faith; subsequently he fraudulently converted the stock to his own use in the following manner: In 1860 Samuel P. Fearon had effected a loan on certain of these certificates, which he deposited as collateral, together with powers of attorney to sell and transfer the same, executed by him in blank, of which the following is a copy:—

Know all men by these presents, That I, the undersigned, for value received, do hereby irrevocably constitute and appoint to be my true and lawful attorney, for me and in my name and behalf to sell, assign, and transfer unto or to any other person or persons shares of the capital stock of the Pennsylvania Railroad Company. And, further, one or more persons under to substitute with like power.

In witness whereof, I have hereunto set my hand and seal this twenty-fifth day of January, 1860.

Witnesses present: S. L. Smith, Wm. Donovan. } SAMUEL P. FEARON. [Seal.]

Although Fearon paid the said loan at maturity and received back his certificates and powers of attorney, the powers of attorney were never cancelled, but remained attached to the certificates and passed with them from the possession of Fearon's executrix to that of Creeley.

Thus armed, Creeley applied to the defendant Schultz for the loan of $1000, representing that he had a client named Fearon who was in want of the money and who could give Pennsylvania Railroad stock as collateral security. Schultz accordingly advanced the money, Creeley forging the name of S. P. Fearon to two judgment notes, and delivering the railroad stock, with powers of attorney attached, as collateral security.

The notes not being paid at maturity, Schultz on Feb. 23, 1873, went to the office of the company and requested that the stock should be transferred to his own name, which was done, and he subsequently disposed of it. The clerk who made the transfer being dead, the only evidence offered by the company to show the care exercised by them on this occasion, was evidence of their ordinary method of doing business and the testimony of Schultz. Schultz's testimony was not full, but, so far as it went, tended to prove that the company made no effort to discover whether the powers of attorney were unrevoked. This was alleged in the bill as the negligent act from which the loss occurred.

The cause was referred to a Master, who reported a decree against all three defendants, and after argument on exceptions to the Master's report, the Court confirmed the Master's decree as to Creeley, reversed it as to Schultz, and decreed that the Pennsylvania R. R. Co. should issue to the plaintiff "duplicate originals of the certificates of stock so transferred." Whereupon the Pennsylvania R. R. Co. took this appeal, assigning as error the action the Court.

Chapman Biddle, for appellants.

The Court erred in not making a decree against the defendant Schultz, who, if there was any wrong done to the plaintiff by the railroad company, was the real author of it.

A corporation innocently permitting a transfer of stock on a forged power of attorney would, doubtless, be liable. But where the negligence of a stockholder misleads the corporation into the belief that a transfer which was in fact fraudulent had been made with the assent of the stockholder, the corporation is relieved from responsibility.

Coles *v.* Bank of England, 10 Ad. & Ell. 437.
Duncan *v.* Luntley, 2 Mac. & G. 30.

Our case is even stronger, because the signatures of Fearon to the powers of attorney were genuine. Here, too, the negligence which was productive of the loss to the plaintiff began with the testator, who permitted these powers of attorney to remain uncancelled up to the time of his death, and was continued by his executrix who placed the property within the control of a person unworthy of the trust. If parties who would have equity must do equity, in what position is the plaintiff placed? Knowledge of the death of Fearon was not brought home to the company, who in the ordinary course of business allowed a transfer upon the authority of genuine powers of attorney.

Finally, that part of the decree of the Court below which requires the company to issue "duplicate original certificates" is plainly impossible, for the effect of it would be to increase our capital stock, which the Court have not the power to do.

John A. Scanlan, for appellee.

The power of attorney was dated in 1860, and the dividend books of the company show payments to Fearon, in person, for some time after that period; also to Mary Fearon, the executrix; to John A. Winner, who had a special power of attorney from the executrix, and thereafter to Creely, whose name appears on the dividend book as "atty." This was notice to the company that Fearon owned the stock long after the date of the power. The fact that several persons collected the dividend for thirteen years after Fearon's death, and that the stock still remained in Fearon's name, was in itself sufficient to induce the company to pause and inquire as to the ownership of the stock when, thirteen years after the date of the power, Schultz applied to have the stock transferred to himself.

It has been held that the bare fact of the loss of a certificate, indorsed in blank, was not evidence of such negligence on the part of the owner, as would enable the person into whose hands they found their way to transfer the title; the owner

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is not bound to cancel or fill up a blank indorsement, in anticipation of a possible loss.

Biddle *v.* Bayard, 1 H. 150.

The company is bound to see that the party making the transfer, has the legal title thereto, and the right to transfer. The mere fact that the signatures were genuine is not conclusive, for the certificates may have been lost or stolen, and if so, the company could not deprive the real owner of his property by transferring.

Bayard *v.* Bank, 2 Sm. 232.
Grant's Law of Banking, 391.

A power of attorney is revoked by death of maker, however irrevocable in terms, for a valid act cannot be done in the name of a dead man.

Frederick's Appeal, 2 Sm. 338.
Hunt *v.* Rousmanier's Exrs., 8 Wheat, 174.

Jan. 21, 1878. THE COURT. There is no doubt that a corporation is a trustee of its stockholders, and is bound to proper vigilance and care that they may not be injured by unauthorized transfers of their stock. (Bayard *v.* Bank, 2 P. F. Smith, 232.) And there is no doubt, we think, also, that had the certificates of stock which are the subject of this controversy been lost or stolen from the possession of the appellees the appellants would have been responsible. Though the signature of Samuel P. Fearon to the power to transfer was genuine, yet they had actually been revoked by his death, and in fact before, and the circumstance that at the time the transfer was permitted they were thirteen years old was enough to arouse suspicion and inquiry, and it is necessarily to be presumed that if proper inquiry had been made the truth would have been elicited. The clerk by whom the transfer was permitted unfortunately is dead, and we are without evidence on the subject. The onus, however, of showing due diligence was on the corporation appellants, and they must suffer from the want of the evidence.

But there certainly was negligence on the part of the appellee. As executrix she placed the certificates in the hands of Creeley as her attorney with the blank powers indorsed uncancelled. Thus by her act he was enabled to commit this fraud.

The equities of the respective parties are not equal. When one of the two parties who are equally innocent of actual fraud must lose, it is the suggestion of common sense as well as equity that the one whose misplaced confidence in an agent or attorney has been the cause of the loss shall not throw it on the other. As Judge KING has well expressed this principle, in The Bank of Kentucky *v.* Schuylkill Bank (1 Parsons' Eq. Rep. 248): "The true doctrine on this subject is, that where one of two innocent persons is to suffer from the tortious act of a third, he who gave the aggressor the means of doing the wrong must alone bear the consequences of the act."

The appellee in this case selected the attorney. She had entire confidence in him. She placed these certificates, with the blank powers, in his hands. He proved unworthy of the trust reposed in him. He perpetrated a gross fraud, by which he converted this property to his own use. That he was an attorney-at-law in good standing does not help her case. He added to the crime of which he was guilty that of moral perjury by the violation of his official oath. On what principle of equity can she be allowed to throw off from herself on to the appellants the loss which has resulted from the dishonesty of her own agent? This important element in the case was entirely overlooked by the learned Master and the Court below, and we think, applying it to the undisputed facts of the case, the appellee's bill as to the appellants ought to have been dismissed.

Decree reversed, and now the bill of the appellee, Mary Fearon, is dismissed as to the Pennsylvania Railroad Company, with costs and the costs of this appeal.

Opinion by SHARSWOOD, J.

[See the report of the above case in the Court below, 2 WEEKLY NOTES, 363, and cases referred to in note.]

July, '77, 100. Jan. 15, 1878.

Williams's Appeal.

Mechanics' liens—Locality of property charged —Patent error in description, when not fatal.

A mechanic's claim is not necessarily invalid because of an obviously inaccurate description of the locality of the premises charged, if the error be not such as to directly mislead from the true location, and if there be enough in the general description contained in the claim to identify the property and prevent mistake.

Appeal from the Common Pleas No. 2. of Philadelphia County.

The case was heard in the Court below upon exceptions to the report of an auditor distributing the proceeds of a sheriff's sale of real estate under a writ of *levari facias* issued upon a judgment on a mortgage. The auditor (Samuel B. Huey, Esq.), found that the property sold under the writ was a "three story brick messuage, and two story double back buildings, with lot of ground situate on the north side of Christian Street, 116 feet west of Twentieth Street, in the city of Philadelphia, No. 2011, containing in front on said Christian Street 16 feet, and in depth 100 feet 3⅝ inches." The claimants upon the fund were J. P. Williams, the plaintiff in the execution and holder of the mortgage, and T. Williams, Jr., & Co., mechanics' lien creditors. The claim of

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the latter was an apportioned claim. It was conceded if the validity of the mechanics' liens could be sustained, that they took precedence of the mortgage. The original claim was filed for $965.51, for lumber, etc., against—

"Two three story buildings, with two story back buildings, situated on the north side of Christian Street, 116 feet west of *Twentieth* Street, in the city of Philadelphia, described as follows: No. 1.—North side of Christian Street, 116 feet west of *Twenty first* Street, front 16 feet, depth 100 feet 3⅝ inches. No. 2.—North side of Christian Street, 132 feet west of *Twentieth* Street, front 16 feet, depth 100 feet 3⅝ inches. Apportioned each $482.75.

At the time of the audit the claim against No. 2 had been satisfied. The allowance of the claim on No. 1 was objected to because the property sold was west of Twentieth and not of Twenty-first Street. The auditor was of opinion that the description in the claim of T. Williams & Co. was sufficiently accurate, saying in his report: "As the auditor understands the law, the rule is, that a claim is not necessarily void because it does not accurately describe the building, and that if there be enough in the description of the locality and other peculiarities of the building to identify it, to point it out with reasonable certainty—with certainty to a common intent—the statutory requisition is sufficiently complied with. If the description is sufficiently accurate to prevent mistake on the part of the creditor and purchaser, the lien is good. (Kennedy *v.* House, 5 Wr. 39; Washburn *v.* Russel, 1 Barr, 499; Shaw *v.* Barnes, 5 Barr, 18; Ewing *v.* Barras, 4 W. & S. 467.)" The auditor, therefore, awarded payment of the claim.

J. P. Williams filed exceptions which were overruled by the Court, and the report was confirmed. He then took this appeal, assigning for error the Court's decree.

E. K. Nichols, for the appellants.

This is not a case of doubt or uncertainty. The claim locates the property west of Twenty-first Street. This is not the property sold. A distinction exists between the ambiguity and the inaccuracy of language.

1 Greenleaf on Evidence, § 299.

Hemberger *v.* Kohler, 1 WEEKLY NOTES, 311.

The mechanics' lien acts being in derogation of the common law should be strictly construed. A claim must show on its face the names of the parties, the amount of the debt, and the *locality* and description of the building. It is no answer to a wrongly described locality to say that the parties interested have not been misled by the misdescription. Regard must be had to correctness in describing the property to be affected.

Thayer (*Harlan* with him), contra, was not called upon.

Jan. 21, 1878. THE COURT. This is not the case of a variant description of the property subject to the mechanic's claim, leading directly away from the true lot, but it is merely dubious, with sufficient on its face to lead to the true lot. Both lots were described as adjoining and situate on the north side of Christian Street, and 116 feet west of Twentieth Street. The houses were both three storied, with two storied back buildings. No. 2 was correctly described as west of Twentieth Street. The fact that by a patent error No. 1 was placed west of Twenty-first Street clearly did not lead away from the true position of the houses. It simply created some confusion, but did not actually mislead. The auditor having found the lot in question to be west of Twentieth instead of Twenty-first, there is no reason that the mechanic's claim should be lost by such an error.

Decree affirmed with costs of the appeal, and the appeal is dismissed.

PER CURIAM.

Oct. & Nov. '77, 98 & 99. Nov. 19, 1877.

Kerr v. Roberts et al.

Bills and notes—Protest—Notice of, when sufficient.

A hotel in a town, where a party to a negotiable note is in the habit of stopping when he comes into the town from his known place of country residence, is not a place at which notice of protest and non-payment of the note should necessarily be left by the notary.

In such case a notice by mail to his nearest post-office address is sufficient to charge him as indorser.

Error to the Common Pleas of Crawford County.

Two actions of assumpsit, by Roberts & Co. against Adam Kerr, as indorser of two notes for $600 each, made by Archie Johnston to the order of Adam Kerr, and by him indorsed, both dated March 19, 1875, and payable three and four months after date respectively, at Roberts & Co.'s bank in Titusville, Pa.

At the maturity of the first of these notes, on June 22, 1875, upon demand made at Roberts & Co.'s bank for payment, the same was refused. On July 22, 1875, at the maturity of the second note, a like demand and refusal occurred. The notes were both protested for non-payment immediately after the refusal by the maker to pay, and the notary who made the protest first sought Kerr at the American Hotel in Titusville, which place he was in the habit of frequenting while in town. Not finding him there, the notary deposited notices of protest in each case in the Titusville post-office, directed to Adam Kerr, Titusville.

On August 7, 1875, both of these notices were

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returned to the notary as "not called for," and he then directed that they should be put in the box of Miss Wilson, with whom, it was alleged, Kerr regularly resided, a short distance out of town. The nearest post-office to the residence of Kerr was that of Titusville.

Two separate suits were brought against Kerr upon his indorsements of these two notes, and the cases were, by consent, tried together.

Upon the trial, the defendant offered to prove that he spent the greater part of his time at the American Hotel in Titusville, and only went out to the house of his niece, Miss Wilson, on Saturday evenings, returning to Titusville on Monday morning; that all persons having business with Adam Kerr invariably inquired for him at the American Hotel; and that this hotel was his stopping place, and was so known in the community. Objected to; objection sustained; exception.

The Judge instructed the jury to find for the plaintiff. Verdict and judgment for plaintiff accordingly. The defendant took this writ, assigning for error the rejection of his offers of evidence and the instruction of the Court.

S. T. Neill (*M. J. Heywang* with him), for the plaintiff in error.

We showed that Kerr never had actual notice of the non-payment of these notes, and it was then proper for us to show, by way of rebuttal to the certificate of the notary, that due diligence in giving notice had not been used, because it was notorious that Kerr stopped at the American Hotel when in town, and that all persons desiring to see him sought him there. That was the proper place at which to give him notice.

Murphy *v.* Richardson, 4 Casey, 288.
Lawrence *v.* Miller, 16 N. Y. 235.

An indorser is entitled to the best notice possible under the circumstances, and the posting of a notice in the mails is the last method to be adopted, and is then only evidence of diligence. But here a better mode was possible, and was known to the plaintiffs. They were therefore guilty of such negligence as would release an indorser.

Edwards on Bills, *611.
Spencer *v.* Bank of Salina 3 Hill (N. Y.), 520.

Pearson Church, contra.

The notice of the dishonor of these notes was given in the usual way, by directing a sealed envelope containing the notice to the post-office nearest the indorser's residence.

There can be no question as to the sufficiency of such notice.

Jones *v.* Lewis, 8 W. & S. 14.
Byles on Bills, 220, 221, Sharswood's Ed.

Jan. 7, 1878. THE COURT. All the assignments of error in this case resolve themselves into a single point, viz., is a hotel in a town where a party to a negotiable note stops when he comes into the town, and though it be his place of common and idle resort, frequented habitually for drinking and sleeping, a place at which notice of protest and non-payment of the note must be left by the notary, the party actually living out of the town at his own known place of residence. We discover no error in holding that it was not a proper place for the service of such a notice. Had the party been found there and personally served with the notice, no question as to the *place* itself could have arisen.

PER CURIAM. Judgment affirmed.

Oct. & Nov. 1877. Oct. 23, 1877.

Union Express Co. v. Shoop.

Bailment—Common carriers—Rights and duties of connecting express companies—Rights of the consignee as against the second company—Constructive notice.

A second carrier company, receiving goods at the end of a first company's line, and transporting them to their destination, is not chargeable with the omission of the first company to report the prepayment of freight, and is entitled to retain possession of the goods for a length of time reasonably sufficient to inform itself of the true state of facts.

Error to the Common Pleas of Armstrong County.

This was, in the Court below, an appeal from the judgment of an alderman for $40, in favor of John H. Shoop *v.* Union Express Company. To the narr. filed the defendant pleaded non assumpsit, and payment with leave, etc.

The action was originally brought to recover $26.25, the value of a box of furs shipped from Philadelphia in 1872, by Lippincott & Co., and consigned to John H. Shoop, Freeport, Pa. The shipment from Philadelphia was by the Adams Express Company, which line terminated at Pittsburgh, at which place the goods were transferred to the Union Express Company, its line running north of Pittsburgh through the town of Freeport, the residence of the consignee. The receipt stipulated that the Adams Express Company should be liable as forwarders only. The two Express Companies were wholly different and independent carriers, the only relation between the two companies being, as expressed in the testimony of the superintendent of the Union Express Company, as follows: "The same agreement exists between the Adams and Union Express Companies that exists between all other forwarding companies, that the one pays the charges of the other for all services rendered for them on their lines. The Union Express Company looks to the Adams Company for expressage

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fees on packages expressed at Philadelphia to Freeport, when prepaid, and will have notice of the fact, providing the Adams Company prepays the Union Company in Pittsburgh her charge from Pittsburgh to Freeport. We settle between the Adams Company and Union Company every day. When the goods come from Philadelphia to Freeport, prepaid or not, we send them on as rapidly as possible."

In this instance the transportation charges ($1.25) were prepaid in Philadelphia to the Adams Express Company, but the fact of prepayment was neither marked upon the box nor upon the way bill. There was no evidence that the Union Express Company had either knowledge or notice of such prepayment. The agent of the Union Express Company at Freeport had no authority to deliver any non-prepaid goods without the payment of the charges. On the arrival of the package at Freeport, notice was given to the consignee, who sent his clerk for them. The agent refused to deliver the goods unless Shoop paid the charges, or satisfied him that they were prepaid, stating at the same time that if the charges had in fact been prepaid, he would refund them to Shoop on being satisfied thereof. Although the plaintiff then wrote for and obtained the receipt of the Adams Express Company, showing the prepayment of the box, he at no time mentioned it or exhibited it to the agent. The plaintiff refused to pay the charges, and brought this suit for the value of the goods.

On the trial (before BOGGS, P. J.) defendants' counsel requested the Court to charge, *inter alia*, (4) That if the jury believe from the evidence that neither the way bill nor the box containing the plaintiff's property, when delivered to the defendants at Pittsburgh by the Adams Express Company, presented any proper evidence, under the practice and arrangement of the transportation company, that the goods had been prepaid to Freeport, in that event the defendant had a right to demand the payment of charges from the consignee at Freeport, and, upon his refusal to pay, hold the goods until such payment was made, or satisfactory evidence furnished of prepayment in Philadelphia.

Answer. "Answered in the negative as explained in the general charge."

In the general charge the Court instructed the jury, *inter alia*, as follows: "Then if you find from the evidence this theory of the defendants to be true, and that the plaintiff had notice or knowledge, within a reasonable time, that the goods were at the office ready for delivery to him, on payment of express fees, we instruct you that the agent of the defendants had no right to detain the goods; if it is true that the express charges were prepaid in Philadelphia, they were bound to deliver them in their usual way as soon as the goods arrived at the place of destination, and the consignee called for the same." (Thirteenth assignment of error.)

Verdict and judgment for the plaintiff. Defendants took this writ, assigning as error, *inter alia*, the answer to the above point, and the portion of the charge quoted.

E. S. Golden, for plaintiffs in error.

The question is, whether a second carrier company, receiving goods at the end of the first carrier company's line, and transporting them to their destination, and without any fault in itself, is responsible for the faults or errors of the first company, and that without any privity of contract with or existing obligation to the first company. There is no case to be found in England or America furnishing a precedent in law for the affirmative of the proposition; upon what principle, therefore, can it be sustained?

David Barclay, for defendant in error.

The Union Express Company were bound to know that the charges had been paid, and it was their duty to deliver the goods to the consignee on demand.

Nov. 19, 1877. The COURT. The application of a moderate amount of common sense, with a reasonable spirit of accommodation, would have saved the parties the expense of this litigation. The original contention was about a very small matter, the sum of $1.25 for express charges upon a package of merchandise of the value of $26.25, shipped by Lippincott & Johnson, Philadelphia, to John H. Shoop (plaintiff below), to Freeport, Pa. The package was delivered to the Adams Express Company in Philadelphia, and the express charges were prepaid to Freeport. This company carried the package to Pittsburgh, and there delivered it to the Union Express Company, plaintiffs in error, which company carried it to Freeport, its place of destination. By the neglect of the Adams Express Company the package was not marked prepaid on the way bill. Upon its arrival at Freeport, the Union Express Co. notified Mr. Shoop that the package was at their office, but they declined to deliver it without payment of the charge for freight. There is evidence that the agent of the company offered to refund the freight, if it subsequently appeared that it had been paid at Philadelphia. It is also undisputed that Mr. Shoop wrote to the shippers in Philadelphia, and received from them a reply inclosing the receipt of the Adams Express Company. After the receipt of this letter, Mr. Maxler, the clerk of Mr. Shoop, called at the express office and exhibited the letter, but did not show the receipt. This omission was singular, the more so as in all probability the production of the receipt would

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at once have ended the difficulty. Why it was not done has not been explained.

Upon the refusal of the company to deliver the package under the foregoing circumstances, the plaintiff below brought this action of trover to recover its value. The Court below ruled that under the contract with the Adams Express Company, the Union Express Company was bound to deliver the package to Mr. Shoop upon its arrival at Freeport, without payment of the charge for freight, upon the ground that by the arrangement between the two companies, the plaintiffs in error took upon themselves to complete the performance of the contract implied in the express receipt, given in evidence, by expressing the goods from Pittsburgh, the end of the Adams line, to Freeport, then to deliver the goods in a reasonable time to the consignee, as the law requires. It is undoubtedly true that by virtue of the receipt and the understanding between the companies the plaintiffs in error undertook to complete the contract made with the Adams Company so far as to safely carry the goods from Pittsburgh to Freeport, and to deliver them within a reasonable time to the consignee. But this was the extent of their obligation. They did not assume responsibility for any acts or omissions of the Adams Company. The shipping receipt of the latter company contained this clause: "And if the same is entrusted or delivered to any other express company or agent (which said Adams Express Company are hereby authorized to do), such company or persons so selected shall be regarded exclusively as the agent of the shipper or owner, and as such alone liable; and the Adams Express Company shall not be, in any event, responsible for the negligence or non-performance of any such company or person, and the shipper and owner hereby severally agree that all the stipulations and conditions in this receipt contained, shall extend to and inure to the benefit of each and every company or person to whom the Adams Express Company may entrust or deliver the above described property for transportation, and shall define and limit the liability therefor, of such other company or person." The plain meaning of this is that each company shall be responsible to the shipper or owner for the property while in its custody, but not for the default or negligence of any other company or person. Now in what was the Union Express Company in default? They had carried the package safely, and were ready to deliver it upon payment of the freight charges. But it was said it was their duty to have informed themselves as to whether the express charges were paid or not. They were informed by the waybill that the charges were not paid. It is true this was an error; but whose fault was that? Manifestly that of the Adams Express Company, by whose neglect it occurred. Under the circumstances, the Union Company being in no default, what was its duty? The answer is not difficult. It was to deliver to the consignee within a reasonable time, upon notice and satisfactory evidence that the freight charges had been paid. If such notice was not given by the consignee at Freeport he has no ground of complaint if the company declined to deliver until such reasonable time as they could inquire into and ascertain the facts. Still less reason has the consignee to complain if he had in his possession the evidence of the prepayment of the freight and neglected or refused to produce it. The Union Express Company were entitled under the circumstances disclosed by the evidence to a reasonable time, to be measured by the distance to Philadelphia and the facilities of communication, to ascertain whether the charges had been paid to the Adams Express Company, after which it would be their duty to deliver the package, in case of such prepayment, to the consignee when required. These views of the law, as it will be seen, differ materially from the rulings of the learned Judge of the Court below in his answer to the defendants' fourth point, and also in that portion of his charge embraced in the 13th assignment of error. We notice nothing else in this record that needs to be discussed.

The judgment is reversed, and a *venire facias de novo* is awarded.

Opinion by PAXSON, J.

AGNEW, C. J., and SHARSWOOD, J., absent.

Jan. '77, 160. March 21, 1877.

Wright et al. v. Wigton et al.

Taxes—Liability of estate assigned for the benefit of creditors—Collection of taxes in Montgomery County—Acts of March 16, 1866, and March 17, 1868.

Real estate and personal property assigned for the benefit of creditors remain liable to taxation as if no assignment had been made, and the personal property, while it remains on the real estate, may be distrained and sold both for taxes assessed against the real estate before the assignment and for those assessed afterwards.

The Act of March 16, 1866 (P. L. 226), relating to the collection of taxes in Montgomery County is not repealed by the Act of March 17, 1868 (P. L. 342).

On December 31, 1874, real estate and personal property thereon situate in Montgomery County were assigned for the benefit of creditors. On December 18, 1875, the tax collectors of the county levied upon and distrained the personal property remaining on the real estate for taxes of 1874 and 1875 assessed against the real estate. Upon a case stated to determine their right to make such levy:

Held (reversing the judgment of the Court below), that the assignment did not exempt the property from taxes afterwards assessed, and that, the assignee not being a

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purchaser for value, the personal property remained liable for taxes already assessed against the real estate, especially in view of the Act of March 16, 1866, rendering personal property in Montgomery County liable for taxes of the current year assessed before the owner took possession of the real estate.

School Directors of Lancaster *v.* Rathvon, 6 C. 533, distinguished.

Error to the Common Pleas of Montgomery County.

Amicable action. Case stated, in which the collectors of county, borough, and school taxes for Montgomery County were plaintiffs, and Wigton *et al.*, assignees for benefit of creditors of Schall & Co., were defendants.

On the 31st December, 1874, Schall & Co. executed and delivered to R. B. Wigton and William H. Jones a voluntary deed of assignment of all partnership property, real and personal, in trust for the benefit of their creditors. On December 18, 1875, C. W. Wright, one of the plaintiffs and collector of taxes for the county of Montgomery and the borough of Norristown, by virtue of a warrant against Schall & Co., levied and made a distress upon the assigned personal property in the borough of Norristown as follows:

Borough tax for the year	1874 . . .	$320 54
" " "	1875 . . .	320 54
County tax "	1875 . . .	161 14
		$802 22

On December 18, 1875, Charles Slingluff, one of the plaintiffs and a collector of school taxes for the borough of Norristown, under a warrant against Schall & Co., levied upon and made a distress upon the said assigned personal property as follows:

School tax for school district of Norristown for the year 1875–6 . . . . . $286 20

The tax for the year 1874 was assessed on the assigned real estate of Schall & Co. prior to the date of the deed of assignment, and the rest of the taxes were assessed against Schall & Co. since the execution of the deed of assignment.

If the Court should be of opinion that the personal property levied and distrained upon is liable for the payment of the taxes or any part thereof, then judgment to be entered in favor of the respective plaintiffs for such amount as the Court shall be of opinion each is entitled to. But if the Court should be of a contrary opinion, then judgment to be entered in favor of the defendants as between both or either of the plaintiffs. Either party to have the right to sue out a writ of error to the Supreme Court.

The Court below (Ross, P. J.) entered judgment for the defendants. The plaintiffs took this writ, assigning for error the entry of this judgment.

B. E. Chain (with whom were *George N. Corson* and *J. Wright Apple*), for the plaintiffs in error.

The 46th section of the Act of 15th April, 1834 (Purd. Dig. 1370) provides that—

"the goods and chattels of any person occupying any real estate shall be liable to distress and sale for the non-payment of any taxes assessed upon such real estate, during his possession or occupancy and remaining unpaid, in like manner as if they were the goods and chattels of the owner of such real estate."

The tax for 1874 was for the current year, and therefore within the Act of March 16, 1866 (P. L. 226), which provides—

"that the goods and chattels of any owner or occupier of any messuage or lot or piece of ground within the county of Montgomery, shall be liable to be distrained for the taxes of the then current year assessed on such premises, although said taxes may have been assessed on said premises before such owner took possession or became owner thereof."

It is argued, on the authority of Smeich *v.* York County (18 Sm. 439), that, because the tax was not assessed during the possession or occupancy of the assignee, therefore the property was not liable to levy. But that was the case of a purchaser at sheriff's sale, and is clearly distinguishable, for an assignee under a deed of assignment is not a purchaser. Possession and occupancy of the assignee is but the possession and occupancy of the assignor.

Spackman *v.* Ott, 15 Sm. 131.
Ritter *v.* Brendlinger, 8 Sm. 68.
Ludwig *v.* Highley, 5 Barr, 132.
Vandyke *v.* Christ, 7 W. & S. 373.
Twelves *v.* Williams, 3 Wh. 485.

The answer to the contention that the property is relieved from taxes because held in trust for creditors is found in the Act of April 22d, 1846 (Purd. Dig. 1381), which provides that "all property, real or personal (not taxed under existing laws), held, owned, used, or invested by any person, company, or corporation, in trust for the use, benefit, or advantage of any other person, company, or corporation, excepting always such property as shall be held in trust for religious purposes, shall be liable to taxation." See also—

Constitution of 1874, Art. 9, section 2.

James Boyd, contra.

The Act of March 16, 1866, was repealed by the Act of March 17, 1868 (P. L. 342), but in any event it is not applicable, because assignees are not owners or occupiers of the premises within the meaning of the act. The act refers to purchasers. Assignees for the benefit of creditors are not purchasers. They are merely trustees recognized by law to execute a trust in conformity with law. Distress for taxes cannot interfere with the execution of the trust. No preference is given by law to taxes. This case is governed by

Jefferis's Appeal, 9 Casey, 40.
School Directors *v.* Rathvon, 6 Casey, 533.

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The Act of March 17, 1868, requires that the delinquent tax-payer should be named in the schedule accompanying the warrant. In this case the assignees were not named, and are neither within the letter nor the spirit of the act.

The assessment must be made during possession or occupancy.

Smeich *v.* The County of York, 18 Sm. 439.

No assessment was made against the assignees or the assigned estate. The collectors cannot levy on the assigned personalty, for, having made no levy before assignment, they had no lien on the personalty.

Moore *v.* Marsh, 10 Sm. 46.

Parsons *v.* Allison, 5 Watts, 72.

Property which the law has taken into its own hands simply to collect and then to distribute, is not liable to taxation.

School Directors *v.* Rathvon, *supra.*

May 7, 1877. THE COURT. As a general rule all lands in this commonwealth are subject to taxation. No Act of Assembly has exempted from such liability the real estate on which the taxes in question were assessed. It is claimed that the voluntary assignment of this land made for the benefit of creditors had that effect. That it not only prevented the collection of the taxes assessed prior to the assignment, but also prohibited the levying of subsequent taxes on the land while it remained in the hands of the assignee. This view gives an undue effect to the assignment. A belief in its correctness, probably did much towards leading the Court to an erroneous conclusion.

It is well settled in this State by numerous decisions, that a voluntary assignee is not a *bona fide* purchaser for value. He is the mere representative of the debtor, enjoying his rights only, and is bound where he would be bound. (Twelves *v.* Williams, 3 Wharton, 485; Vandyke *v.* Christ, 7 W. & S. 373; Ludwig *v.* Highley, 5 Barr, 132; *In re* Fulton's Estate, 1 P. F. Smith, 204; Spackman *v.* Ott, 15 Id. 131.) Nor are the creditors, for whom he holds the property in trust, purchasers for value. They are not parties to the deed. They have relinquished nothing in compensation of the benefits of the trust. They have not agreed to look to it for satisfaction of their claims. They have no title to the property assigned. They acquired a right only to enforce the duty undertaken by the assignees. (Twelves *v.* Williams, *supra;* Jefferis's Appeal, 9 Casey, 39; Fulton's Estate, *supra;* Spackman *v.* Ott, *supra.*) The assignee then being the hand only of the assignor, through which the latter distributes his property, it follows that it remains liable to taxation, as if no assignment had been made. It is no more exempt from taxation than lands devised to an executor to sell for the payment of debts. In either case the lands continue subject to taxation.

The remaining question is whether the personal property was legally liable to distress for the non-payment of the taxes.

The borough taxes were for the years 1874 and 1875; the county tax for 1875; and the school tax for 1875–6. The assignment of both real and personal estate was made 31st December, 1874. The distress was made 18th December, 1875, on the personal property assigned which still remained on the premises thus taxed.

It is undoubtedly true that the warrant of a collector of taxes is no lien on property before actual seizure. It was also held in Smeich *v.* County of York (18 P. F. Smith, 439), that under the Act of 15 April, 1834, the goods and chattels of a person occupying real estate, were not liable to distress and sale for the non-payment of taxes assessed thereon in like manner as if they were the goods and chattels of the owner of such real estate, unless they were assessed during his possession or occupancy thereof. But, as we have shown, the assignment was not a *bona fide* sale of the property for a valuable consideration. The title thereto remained in the assignor for all purposes not inconsistent with the trust. Neither the assignee nor the creditors can successfully claim that the property shall be exempt from the public burdens. This view of the case is further supported by the Act of 16th March, 1866 (P. L. 226). Section 1 declares "that from and after the passage of this act, the goods and chattels of any owner or occupier of any messuage, or lot or piece of ground, within said county of Montgomery, shall be liable to be distrained for the taxes of the then current year assessed on such premises, although said taxes may have been assessed on said premises before said owner took possession or became owner thereof."

Section 2 authorized the goods and chattels to be distrained anywhere within the county, although the same are not on the premises. The Act of 17th March, 1868 (P. L. 342), relating to the collection of taxes in the same county, does not repeal these provisions in the Act of 1866. It leaves the liability of property to taxation and the property subject to distress for the non-payment of taxes untouched.

The tax for 1874 was laid and due before the assignment. The personal property was liable to distress at the time the assignment was made. No such change of possession took place as to remove that liability.

The School Directors of the City of Lancaster *v.* Rathvon (6 Casey, 533) has been cited as sustaining a different view. An examination of that case shows it to be wholly unlike the case now under consideration. There all the taxes assessed on the real estate had been paid. No question was raised as to the liability of the assignee to pay those taxes, nor of the liability of

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the personal property thereon to distress for their non-payment. The only question was whether the bills receivable were liable to assessment and taxation in the hands of the assignee. The Court held they were not. Nothing in that case in the slightest degree impinges on the doctrine that the personal property on the land is liable for the taxes assessed on the same land. It follows, therefore, that the learned Judge erred in entering judgment in favor of the defendants, and it must be reversed.

Judgment reversed. And now, to wit, May 7, 1877, judgment is hereby entered in favor of C. M. Wright, one of said plaintiffs, for the sum of $802.22; and in favor of Chas. Slingluff, the other plaintiff, for the sum of $286.20, according to the case stated.

Opinion by MERCUR, J.

Common Pleas—Equity.

C. P. No. 4. Dec. 13, 1877.

Johnson v. Whiteall et al.

Inheritance—Intestate laws—Adoption Act—The Adoption Act does not modify § 9 of the Intestate Act excluding from inheritance persons who are not of the blood of the perquisitor.

Hearing on bill and answer.

The following facts appeared:—

By her will, dated March 13th, 1857, Mrs. Jane Johnson devised to testamentary trustees certain real estate in the city of Philadelphia, in trust to collect the rents and profits thereof, and to pay them over to her son, Samuel B. Johnson, for and during the term of his natural life, the same not to be subject to any debts or liabilities contracted by him, and immediately after his death to grant and convey the said real estate to such person or persons, for such estate and in such proportions as would, by the intestate laws of this Commonwealth, be entitled to the same if he, the said Samuel, had died intestate, seized thereof in fee.

Other parts of her estate were similarly disposed of, in trust for three other sons. Her residuary estate was devised and bequeathed to trustees upon like trusts, for the benefit of her four sons for life, with a similar limitation of the remainders in each to such persons as would, by the intestate laws of Pennsylvania, be entitled to the same, if the sons had respectively died intestate, seized in fee. By a codicil the testatrix restricted the amount of income to be paid to her son Samuel to such sums as the trustees might, in their own discretion and judgment, think proper and conducive to his welfare, and not to his injury.

On the 8th of May, 1875, Samuel B. Johnson applied to the Court of Common Pleas for permission to adopt Ann Booth Francis, a minor (the complainant), under the provisions of the Act of May 4th, 1855 (Purd. Dig. p. 61), which petition, having been assented to by her mother, was duly granted, and it was decreed, in accordance with the Act, that she should have "all the rights of a child and heir of the said Samuel B. Johnson." Ann Booth Francis was a step-daughter of Samuel B. Johnson, being a daughter of his wife by James Francis, her former husband. Samuel B. Johnson died December 18th, 1876, leaving a widow and no child, except his adopted daughter, the complainant.

The bill was filed by the said Ann B. F. Johnson, by her guardian, against the trustees and *cestuis que trustent* under the will of Mrs. Jane Johnson, setting out the foregoing facts, and praying for a decree that all the said estate, real and personal, devised for the use of Samuel B. Johnson for life, and after his death as above set forth, should be conveyed and assigned by the said trustees in fee to the said complainant, Ann B. Francis Johnson; and for an account of the income thereof since the death of the said Samuel B. Johnson.

The answer denied that under the Adoption Act, or the decree thereunder, the complainant was entitled to any interest in the estate of the said Mrs. Johnson, or that the said Samuel B. Johnson died seized of any inheritable estate under the said will; and averred that the trust created by the said will for the first takers was designed by the testatrix to extend the final enjoyment of her estate to her grandchildren.

W. H. Drayton, for the complainant.

The will was carefully drawn, and a phrase selected which means, not children or issue, but *heir*. This takes the case out of the decision of Schafer *v.* Eneu (4 Sm. 304). The adopted child is given "all the rights of a child and heir of such adopting parent." The Adoption Act must be read as a part of the Intestate Act, and repeals it *pro tanto*.

[THAYER, P. J. By the Act of April 27, 1855, an illegitimate child was endowed with capacity to inherit from its mother, and *vice versa;* but in Grubb's Appeal (8 Sm. 55) it was decided that the mother's next of kin could not inherit from the child.]

Geo. Junkin, for the defendants.

The testatrix clearly manifests the intention that the *cestuis que trustent* should have no control over the estate. If the construction con-

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tended for be adopted, the intention will be defeated. The underlying principle of the Intestate Act (P. L. 1855, 430) is, that the property should remain in the blood of the decedent, the only exception being in favor of husband and wife. At the time of the execution of the will both Acts existed, and there is no conflict between their respective provisions.

The will especially limits the estate to such persons as would, by the *intestate laws*, be entitled to the same if he had died intestate seized thereof in fee. Whoever may be entitled takes, not from Samuel B. Johnson, but from the testatrix as purchaser; he simply serves to mark the stock.

C. A. V.

Jan. 5, 1878. THE COURT. The question to be decided upon the pleadings is, whether the fee in that portion of the estate of the testatrix which was devised and bequeathed in trust for Samuel B. Johnson for life has vested in the complainant, his adopted daughter, or has passed under the will to his surviving brothers and the children of his deceased brothers.

It is clear that whoever is to take the remainder is to take as a purchaser under the will of Jane Johnson, and not by descent as the heir of her son. The son may be said to have been a purchaser as to his life interest; for, although at common law a devisee, who takes by the will precisely the estate that would have been cast upon him by descent, is in by descent and not by purchase, yet the case is different where there is a difference in quantity between the estate which the devisee would take as heir and that which he takes under the devise. (Kinney *v.* Glasgow, 3 Sm. 143; Reading *v.* Royston, 1 Salk. 242.) But as purchaser he only took an equitable life estate. He had nothing in it which could descend to his heirs. The fee remained in the trustees for the remaindermen, to whom it was given by the will, and these remaindermen are described as "such person or persons as would, by the intestate laws of this Commonwealth, be entitled to the same if the said Samuel had died intestate, seized thereof in fee." What persons were intended by Mrs. Johnson by these words? for it is the intention of the *testatrix*, and her intention alone, which is to prevail. We think those persons were intended who would have been entitled under the Intestate Act of 1833. That Act is entitled "An Act relating to the descent and distribution of the estates of intestates." This is what is usually understood by the Intestate Law of Pennsylvania. It is commonly called the Intestate Law, sometimes the Statute of Distributions. It is in itself a complete code of laws upon the subject to which it relates. Its provisions are in accord with the general sentiment of the people of this State upon that subject, and are founded in nature and reason. It gives the property of an intestate to his kindred, commencing with the nearest in degree, and scrupulously confines the descent of real estate to those who are of the blood of the ancestor from whom it descended, or by whom it was devised. By this law any estate derived from the mother would, upon the death of any one of her sons, go to those of her own blood; to her surviving sons, and to her grandchildren and granddaughters, the children of her deceased sons. Can it be believed that she intended that any part of it should go to strangers to her blood, or, least of all, that it should go to an appointee of a son whom she had tied up by the most rigid trusts, whom she had deprived of the least control over both the corpus and income during his life, and of all disposition of it after his death? Can she be supposed to have intended that her son should designate the heir who should succeed to her estate, when she deprived him not only of all power of appointment, but of any control whatever? Could she have intended to commit the future disposition of the estate, or of any part of it to her son's discretion, when she expressly deprived him of all discretion and power even over that which he was to enjoy himself, and subjected him absolutely, even as to the receipt of income, to the discretion and judgment of her trustees? It is impossible for us to believe this, for it is contrary to the whole spirit and tenor of her will.

But it is said that, however improbable this may be deemed, the testatrix must have intended that which she has said—that she has by express words limited the remainder to such person as would be entitled to the same by the intestate laws if Samuel B. Johnson had died intestate, seized thereof in fee. That if Samuel B. Johnson had died intestate and seized thereof in fee, the complainant, his adopted daughter, would, under the adoption Act of May 4, 1855, have been entitled to the estate. But the argument leaps to a conclusion which is totally unwarranted by law. If Samuel B. Johnson had died intestate and seized in fee, it by no means follows that the complainant would have inherited this estate. It would have been necessary in that event to have inquired from whom the estate descended, or by whom it had been given or devised to him, for the 9th section of the Act of April 8, 1833, would have excluded from the inheritance all persons who were not of the blood of the perquisitor. There is not the slightest pretence to say that the Act of 4th of May, 1855, relative to adoption, has repealed or modified in the least degree this fundamental rule of the law of descents as fixed by the intestate law of this State. It would require the plainest and most express language, or the most absolute and necessary implication, to repeal a rule of inheritance so deeply imbedded in our

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law as this. There is nothing in the Act of 1855 which lends the least countenance to the supposition that it was the intention of the Legislature to disturb in the least this long established canon of descent. The Act declares that such adopted child shall have all the rights of a child *and heir of the adopted parent.* It gives to the adopted child the right to inherit from the adopting parent, but always subject to the rules of inheritance laid down by the intestate law. It does not repeal the 9th section of the Act April 8th, 1833, which demands the indispensable qualification of blood to enable her to inherit an estate coming to the adopting parent by descent or devise. As was said by Mr. Justice STRONG, in Schafer *v.* Eneu (4 Sm. 306) the statute of 1855 "does not attempt the impossibility of making the adopted person the child of the adopting parent. It gives to such person the rights of a child without being a child." That is, the right to inherit from the adopting parent an estate of which he is the true *perquisitor.* But there is no ground to allege that an adopted child, not of the blood of the ancestor from whom the estate is derived, could inherit such an estate from his adopting parent. The argument therefore that the complainant is entitled to this estate because if her adopted father Samuel B. Johnson had died intestate, seized in fee, she would have taken from him, is founded in an erroneous conclusion. She could not have inherited an estate derived to him by descent or devise from his ancestor, unless she was herself of the blood of that ancestor. When Mrs. Johnson, therefore, by her will gives the remainder to such person or persons as would by the intestate laws be entitled to the same if her son Samuel had died intestate seized thereof in fee, her words must be construed with reference to the facts of the case, and the words, "had died intestate seized thereof in fee," must be taken to mean the same as if she had said, had died intestate seized thereof in fee of an estate derived from herself.

That the Act of 1855 confers only a limited right upon an adopted child, and does not substitute him in the place of a real child under the intestate laws, is proved by the decision in Commonwealth *v.* Nancrede (8 Casey, 389), where it was held that a child by adoption is subject to the payment of the collateral inheritance tax; and Tharp *v.* Commonwealth (8 Sm. 500), is to the same effect. There is an analogy between the Act of May 4, 1855, relative to adopted children, and the Act of 27th of April, 1855 (Purd. Dig. 810), which enables illegitimate children to inherit from their mother, and *vice versa.* That Act declares that they shall have capacity to take and inherit from each other personal estate as next of kin, and real estate as heirs in fee simple. In Grubb's Appeal (8 Sm. 55), it was held that the next of kin of the mother could not under this Act inherit as heirs of the child; in other words, the Act was held to have no operation in altering the intestate laws beyond the letter of the statute. A like rule may with propriety be applied to the Act of May 4, 1855. The application of that rule, while it gives the adopted child the right to inherit from the adopting parent, would exclude the possibility of such child inheriting from an ancestor of the adopting parent, and preserve intact the rule always so zealously maintained in this State, that one who claims an estate descended to or devised to an intestate must show himself heir to him by whom it was devised, or from whom it descended as *perquisitor.*

When, therefore, Mrs. Johnson directed that the estate, the income of which was to be appropriated during his life to the maintenance of her son, should after his death go to such persons as would by the intestate laws be entitled to the same if he had died intestate, seized thereof in fee, she cannot be supposed to have intended that the estate should be taken out of the ordinary rules of descent prescribed by the intestate laws, and she must be presumed to have known that such an estate derived from her must be confined in its descent to heirs of her own blood. That this was her true intention, and that she did not contemplate the possibility of its being diverted from her own kindred to a stranger by any act of the son, we think is plainly apparent from the whole will.

We have considered the question exclusively in respect to the real estate devised by the testatrix. We are of opinion that the same result would follow as to any personalty which might be embraced in the residuary estate, for it is obvious she intended the same persons to take both. But it is unnecessary to decide this, because the bill, while suggesting the possibility of some personal estate being comprehended in the residuary estate, does not explicitly charge that any such personal estate came to the hands of the trustees.

Bill dismissed with costs.

Opinion by THAYER, P. J.

C. P. No. 4. Dec. 18, 1877.

Times Publishing Co. v. Ladomus.

Roads and highways—Width of Chestnut Street—New line thereof, as provided by Act of April 28, 1870—Encroachment—No protection is afforded by invoking the provisions of a repealed law, except to those who have acquired vested rights prior to its repeal—Injunction.

Hearing on bill, as amended, and answer.

The original bill, filed to March Term, 1876, averred that the complainant was a body politic about to occupy the premises, erect a building, and conduct its business at the southwest corner of Eighth and Chestnut streets in the city of

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Philadelphia; that the defendant owned and occupied the premises adjoining those of the complainant on the west, having a front of fifteen feet on Chestnut Street; that by an Act entitled "An Act defining the line of Chestnut Street in the city of Philadelphia," approved April 28, 1870 (P. L. 1870, 1291), it was enacted as follows:—

"That the south line of Chestnut Street, between the rivers Delaware and Schuylkill, shall be at the distance of 539 feet southward of the south side of Market Street; *provided*, that this Act shall not interfere with any buildings now erected on the south side of Chestnut Street."

That the defendant proposed to erect a new front wall, about eleven inches south of the line of the former wall, which said new wall would encroach about five feet on the line established by the Act of April 28, 1870; and that such erection would injure the complainant in the use of its property. The bill prayed that the defendant might be enjoined from erecting any wall on Chestnut Street unless on the line of said street as defined by the Act of April 28, 1870.

A preliminary injunction was awarded as prayed, which decree was, upon appeal to the Supreme Court, reversed, the injunction dissolved, and the record remitted to the Court below for a final hearing. The complainants thereupon amended their bill, averring that since the filing of the original bill they had acquired the legal title to their said premises, and had commenced the demolition of the old building and erection of a new building thereon on the line prescribed by the Act of 1870; that since the filing of the original bill, the defendant had erected on his said adjoining premises a new front wall, which was built neither on the line of the old wall nor on the line established by the Act of 1870, but encroaching on the south line of Chestnut Street about five feet; the complainants averred special damage, and prayed that the defendant be decreed to take down the wall so erected by him.

The defendant demurred for want of equity, which demurrer was overruled. (See opinion by BRIGGS, J., reported 3 WEEKLY NOTES, 557.) The defendant then filed an answer setting forth that both his house and the former buildings on complainants' premises were erected upon lines furnished by the city surveyor and regulator more than seventy-five years ago, and were all nine inches beyond the true line of Chestnut Street; that when about making interior changes, he was informed by the city solicitor of his encroachment; that in pursuance of such notice, he, without altering the front foundation wall, was in process of retiring his front wall nine inches to the southward, when his work was arrested by the special injunction (above referred to); that upon the dissolution of the said injunction by the Supreme Court the alteration was continued and completed, with the knowledge and approval of the officers of the city. The defendant averred that he was protected by the *proviso* of the Act of April 28, 1370, saving buildings then erected; and, while denying injury to the complainant, averred that, if any there were, it was the result of its own voluntary act.

Sellers, for the complainant.

Geo. Junkin, for the defendant.

C. A. V.

Jan. 5, 1878. THE COURT. The defendant admits that for more than seventy-five years his building has encroached nine inches northward into Chestnut Street, and that distance beyond the south line of said street, as established prior to the passage of the Act of April 28, 1870, and that he has removed his building southward to the old or repealed line, thus keeping it still five feet north of the line fixed by said Act; but claims that he is protected by the proviso of the Act referred to. This might be so had he moved back before the old line was repealed. This, however, he did not do for more than five years after the repeal of said old line. While the old line continued in existence he disregarded it, and cannot now seek refuge behind it, for it is not there.

The rule is too familiar to need the citation of authority to show that no remedy or protection is afforded by invoking the provisions of a repealed law except as to those who had acquired vested rights prior to its repeal. It seems to us quite clear, that, as the defendant must remove his building back from where it was, he must not stop short of the line designated by the Act of 1870. This view we expressed when the case was first before us (33 Leg. Int. 130; 34 Id. 133; 3 WEEKLY NOTES, 557). Nor do we understand that the Supreme Court in dissolving our special injunction meant to express more than that, in its opinion, it was prematurely granted; as that Court remitted the record with the order that we proceed with the case to final hearing. This is now done; and the plaintiff, who then had but an equitable title, has since acquired the absolute legal title, thus removing any doubt which might have existed at the time of the special injunction touching the propriety of enjoining the defendant before the plaintiff had possessed themselves of the legal title to the premises which they allege the defendant was injuring.

We therefore order that a perpetual injunction issue.

Opinion by BRIGGS, J.

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Common Pleas—Law.

C. P. of Tioga Co. Jan. 15, 1878.

Navel v. Elliot.

Compulsory arbitration—Notice of meeting of arbitrators — Manner of service — Implied waiver by agreement of attorneys—Act of June 16, 1836—How far affected by Act of March 23, 1877—The latter Act construed.

Rule to show cause why award should not be set aside.

Appeal from proceedings before Justice of the Peace. The docket contained the following entries:—

Oct. 3, 1877. Plaintiff enters rule to refer, etc.

Oct. 23, 1877. Both parties appear, by attorney, and agree upon arbitrators to meet at office of J. W. Donaldson, Esq., Nov. 22, 1877, at 10 A.M.

Nov. 22, 1877. Award of $14.34, in favor of plaintiff. On defendant's default, entered of record same day.

M. F. Elliott, for the rule.

Mitchell & Cameron, contra.

Jan. 19, 1878. THE COURT. The reason urged in support of the motion in this case is, that no notice was given of the time or place of meeting of the arbitrators, as required by the Act of 1836.

The reply made is that such service of notice was rendered unnecessary under the provisions of the Act of 1877, by reason of the fact that, upon the return of the rule to refer, the attorneys of both parties met at the prothonatory's office, and entered into an agreement in writing, naming the persons to serve as arbitrators, and the time and place when and where the trial should take place. The position taken is that the Act of 1877 was intended to permit service upon the attorney in all cases, and that the agreement in writing, signed by the attorneys, is a virtual waiver of further service, and an acceptance of notice.

The question in this case turns, therefore, upon the construction of the Act of 1877. The Act of 1836 made service upon the defendant necessary, if he resided in the proper county. If not a resident in the county, service could be made upon the agent or attorney. If he had no agent or attorney, and personal service could not be made upon him, his family might reside in the next house, yet the party by whom the rule was entered was without remedy, and the proceedings under the rule were at an end. This was a great inconvenience, and one often encountered in attempting to proceed under the compulsory arbitration law.

Now the Act of 23 March, 1877, is in these words:—

"That in all cases where arbitrators shall be chosen . . . . a certified copy of the record containing the names of the arbitrators, and the time and place of meeting, shall be served on the opposite party, his agent or attorney; but, if said party have no agent or attorney, then it shall be lawful to serve said certified copy upon the opposite party in the same manner as a writ of summons in a personal action is now served."

Sec. 2 provides: "That so much of the Act of 1836, relating to compulsory arbitrations, as is inconsistent herewith be and the same is hereby repealed."

This provides a remedy for the incovenience felt under the Act of 1836, by authorizing a service in the case of a resident party who has no agent or attorney, and who cannot be served personally, by permitting the service at his dwelling in same manner as a summons is served. The remedy is exactly adapted to meet the defect under the Act of 1836, and must have been the sole purpose of the Act of 1877.

It is argued, however, that the construction we have suggested is too narrow to give effect to the legislative purpose, which was to change the mode of service upon a party who has an agent or attorney by authorizing the service on the agent or attorney, notwithstanding the party is a resident of the county, and within reach of personal service.

We cannot agree with this view of the subject. It is an established rule of construction that "every affirmative statute is a repeal of a previous affirmative statute when its matter necessarily implies a negative; but only so far as it is clearly and indisputably contradictory to the former act in the very matter, and the repugnancy must be such that the two acts cannot be reconciled." (Wright *v.* Vickers *et al.*, 31 P. F. Smith, 122.)

Another rule, equally well established, is that acts relating to the same subject matter are to be construed together.

The Act of 1877 is an affirmative statute. It is "contradictory and contrary" to the Act of 1836 only in that provision which permits service of the certified copy in the manner in which a summons is served. All the other provisions are reconcilable with the Act of 1836.

This construction harmonizes the provisions of both statutes, and makes a complete system.

Section 1st should, therefore, be read as follows: "That in all cases . . . . a certified copy . . . . shall be served on the opposite party, his agent or attorney (in accordance with existing laws); but if said party have no agent or attorney, then it shall be lawful to serve said certified copy . . . . in the same manner as a writ of summons in a personal action is now served."

This construction assigns to the Act of 1877 its true place, without disturbing, in any manner, the provisions of the Act of 1836, or the decisions under them. As this is conclusive of the motion in this case, the award must be set aside.

Rule absolute.

Opinion by H. W. WILLIAMS, P. J. 4th Dist.

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C. P. No. 1. Dec. 20, 1877.

Pancoast v. Houston, defendant, and Ackley et al., trading as the Philadelphia Stock Exchange, garnishees.

Execution—Attachment—The right of a member of the Philadelphia Stock Exchange to a seat in that body, is not such property as can be attached at the suit of a creditor of the member—The nature of such a privilege.

Rule for judgment against garnishees upon the answers filed, and thereupon execution to issue to sell the seat of defendant, who was a member of the Philadelphia Stock Exchange.

The answers of the garnishees to the interrogatories filed admitted that defendant was a member of the Philadelphia Stock Exchange, but set forth that his seat, as such, was not liable to attachment, it being property only between members of the said Exchange, according to certain sections of the constitution and by-laws of that body, which provide that a member shall have a right to sell his membership *only* upon the following conditions: The proposed purchaser shall be balloted for, "and, *if elected*, the transfer may be made, *provided* the member selling has no unsettled contracts with, or claims against him, by any member of the Stock Exchange;" and where such claims or contracts exist, the standing committee may refuse to permit the seat to be sold until the same are settled. The proceeds of the seat, if sold, shall belong to the creditors of the owner who are members of the Stock Exchange, and their claims shall be first paid in full, and, if anything then remains, the balance shall be paid to the owner.

It further appeared that at the time the attachment issued there were no such claims existing against the defendant, but that some had accrued since that date, which, it was claimed, should be first paid, and if there was then any balance it might be attached.

Rothermel, for the rule.

This seat is not a mere personal right, but possesses all the attributes of property; and the fact that the rights of the owner therein are limited and defined by the constitution and by-laws does not take from it its character as such. Subject to the limitations thereby expressed, it may be treated as any other thing of value, and, when taken in execution, the balance, after all the claims of members of the Board, accrued at the time the attachment was issued, have been fully satisfied, should be paid to plaintiff.

Hyde *v.* Woods, 4 Otto, 523.

The limitation with regard to the parties to whom it may be sold cannot affect defendant's right of property, or the right of himself or of those who would take his place as attaching creditors, to dispose of this incorporeal privilege. If the Board should not accept the person to whom it might first be sold, it would have to be sold to another, and so on until a purchaser should be found who might prove acceptable to the members of the Exchange. This the owner of the seat could do, and since the attaching creditor stands in the same relation to the property attached as the owner formerly did, he may do the same.

A. Sidney Biddle, contra.

The Act permitting attachments does not mention any species of attachable property under which a privilege such as this seat could be classed. A chose in action cannot be attached, except as provided by statute in case of stock; hence plaintiff should be compelled to wait until this seat be sold, and then he may attach the proceeds, subject to the rules and rights of the Board. If this personal privilege could be taken in execution, a stranger might be forced into the Board.

C. A. V.

Dec. 29, 1877. THE COURT. The words of the constitution of the Stock Exchange show that this seat, or right of membership, is property, since it is held as security for payment of debts due members of the Board. But it is the property of the Philadelphia Stock Exchange until all questions of claims against its owner by members of the Board are settled. Until we have some means of knowing that all such claims have been fully settled, or that none exist, we do not think an attachment could be lawfully issued against the Board, or the privilege sold.

Rule discharged.

Oral opinion by ALLISON, P. J.

[*Cf.* Thompson *v.* Adams, 4 WEEKLY NOTES, 445; Singerly *v.* Johnson, 3 Id. 541, and note.]

C. P. No. 1. Jan. 19, 1878.

Exchange Ins. Co. v. Michener et al., defendants, and Doyle, terre tenant.

Practice—Rule for production of books and writings—Act of February 27, 1798—Private acts of incorporation.

Rule to produce certain documents; among others the plaintiffs' charter of incorporation.

This was a scire facias sur mortgage given by defendants to the insurance company, in which the defendants obtained the foregoing rule. Plaintiffs answered that the books of the company had been stolen; and that their charter of incorporation was not such an instrument as was required to be produced at the trial under the Act of Assembly of February 27, 1798, because (1) it is matter of record; (2) this being a suit upon a mortgage executed by defendants, they are estopped from denying the existence of the corpo-

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ration plaintiffs, who are the mortgagees, or from questioning their rights or authority under their charter; and (3) that there is not within plaintiffs' possession or control any charter of incorporation.

Hennershotz, for the rule. The answer is insufficient, in that it does not account for the present inability of plaintiffs to produce the charter, and makes no reference to the Act of Assembly incorporating the company.

Evans (with whom was *R. L. Ashhurst*), contra, cited in support of the answer—

Geyger *v.* Geyger, 2 Dall. 332.
Angel and Ames on Corp., sec. 635.
Den *v.* Van Houten, 5 Halst. 270.
Duchess M'fg Co. *v.* Davis, 14 Johns. 238.
Mayor of Carlisle *v.* Blamire, 8 East, 487.
Henriques *v.* West India Co., 2 Ld. Ray. 1532.
Irvine *v.* Lumberman's Bank, 2 W. & S. 204.
Dyer *v.* Walker, 4 Wh. 160.
Cochran *v.* Arnold, 8 Sm. 407.
Grant *v.* Coal Co., 30 Sm. 208.

C. A. V.

January 21, 1878. THE COURT. The answer of plaintiffs concerning the charter of incorporation is insufficient; for, although both public and private Acts of Assembly are evidence, yet the answer fails to state that plaintiffs exist, or do business by authority of any act.

Rule absolute.

Oral opinion by PEIRCE, J.

C. P. No. 2. Dec. 29, 1877.

Dickson v. Wolf.

Principal and surety—New contract with the principal lessening the creditor's claim does not discharge the surety.

Rule for judgment for want of a sufficient affidavit of defence.

Covenant, on a lease, by the lessor against the surety. The lease was dated August 1, 1876, and demised certain premises at a monthly rental of thirty-five dollars. The defendant signed the lease as surety on the same day.

The affidavit of defence set forth (1) That there was another suit pending in C. P. No. 1, for the same cause of action at the time the writ issued in the present suit. (2) That on May 21, 1877, the plaintiff without the knowledge or consent of the defendant, entered into a contract with the lessee for the renting of the premises at a different rent from that which had been reserved in the lease, to wit, twenty-five dollars a month.

The record in Common Pleas No. 1, showed that the suit had been discontinued before the filing of the affidavit of defence.

Frederick S. Dickson, for the rule.

A suit pending at the time the writ issued is no defence, for a plea of *lis pendens* is not good unless there be an averment that the other suit remains undetermined at the time of plea pleaded.

Toland *v.* Tichenor, 3 R. 320.
Findlay *v.* Keim, 12 Sm. 112.

The release of one of two sureties will only release the co-surety *pro tanto*.

Moreland *v.* Himes, 8 B. 265.
Schock *v.* Miller, 10 Id. 401.

And the release of a portion of the property of the principal from the lien of the creditor will only be a satisfaction *pro tanto* as regards the sureties.

Commonwealth *v.* Vanderslice, 8 S. & R. 452.
Commonwealth *v.* Haas, 16 Id. 252.
Holt *v.* Bodey, 6 H. 207.
McNamee *v.* Cresson, 3 WEEKLY NOTES, 450.

The waiver of the power to imprison the debtor on terms actually beneficial to the surety, will not discharge the surety.

Berks County *v.* Ross, 3 Binn. 520.

The release of the principal by the creditor of a part of the obligation only releases the surety *pro tanto*.

Pittman on Surety, 40 Law Lib. 178.
2 Story Eq. Juris. § 833, b. n. 3 (and cases cited).
Hunt *v.* Knox, 34 Miss. 655.
Schock *v.* Miller, *supra*.

Upon the above principles a surety is not released by the acts of the creditor if the responsibilities of the surety are not thereby increased, or his remedies interfered with.

C. W. Beresford, contra.

The case of Berks County *v.* Ross (3 Binn. 520), decides that any agreement entered into by the creditor with the principal debtor which tends in any degree to lessen his responsibility will discharge the surety. Any material variation in the subject matter of the contract discharges the surety.

Tull *v.* Serrill, 1 WEEKLY NOTES, 373.
Neff's Appeal, 9 W. & S. 36.
Clippinger *v.* Creps, 2 W. 45.

Rule absolute.

C. P. No. 2. Dec. 29, 1877.

Leary v. Meredith.

Draft—Contradicting the effect of an acceptance.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit, on the following draft.

Phila. Aug. 9, 1877.

MR. S. MEREDITH: Please pay the bearer Mr. John Leary two hundred dollars and charge the same to me.

REUBEN E. DIEMER.

Accepted Aug. 10, 1877.
SAM'L MEREDITH.

The affidavit of defence set forth that the draft was accepted by the defendant upon the express agreement with Leary (the plaintiff) that it should not be payable until certain houses being built by defendant were completed, and that said houses

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are not yet completed, and that the suit is therefore premature.

J. Henry Williams, for the rule.

In the absence of fraud a written instrument cannot be varied by parol.

Anspach *v.* Bast, 2 Sm. 356.
Heist *v.* Hart, 23 Id. 286.
Hunt *v.* Morris, 1 WEEKLY NOTES, 95.
McNeil *v.* Calligan, Ibid. 282.

The agreement set up in this affidavit is only an agreement to give time, without consideration, and therefore not binding.

Hartman *v.* Danner, 24 Sm. 40.
Zane *v.* Kennedy, 23 Id. 193.
Brubaker *v.* Okeson, 12 Cas. 519.

(No counsel appeared contra.)

THE COURT. It has been decided that the legal effect of an endorsement, being only a conclusion of law, may be explained or varied by parol. (Ross *v.* Espy, 16 Smith, 481.) Here the same rule applies; the draft is not *in terms* payable at any particular time. The affidavit does not contradict anything in the note, but only the legal inference that it is payable on demand.

Rule discharged.

Oral opinion by MITCHELL, J.

[*Cf.* Bank *v.* Cleaver, 4 WEEKLY NOTES, 480.]

C. P. No. 2. Dec. 29, 1877.

Lippincott v. Milling.

Practice—Judgment in another Court must be averred with particularity—Judgment confessed by a debtor to one as a trustee for several creditors no bar to a suit by an individual creditor.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit, on a book account for goods sold. The affidavit of defence set up that the identical claim in this suit "is already in judgment against this deponent in the Court of Common Pleas No. 4, December Term, 1877."

The record of Court No. 4, being produced, showed that a judgment had been confessed by the defendant in favor of one McAvoy as trustee for several creditors, of whom the present plaintiff was one.

Ernst, for the rule.

The judgment was not properly set forth; the number should have been given.

[HARE, P. J. That is the proper practice.]

Besides it is no bar.

Lane, contra.

A judgment given by a firm to a person as trustee for its creditors is not forbidden by law.

Breading *v.* Boggs, 8 H. 33.

[MITCHELL, J. But it is nowhere held that such an arrangement would prevent a creditor from proceeding in his own suit.]

Rule absolute.

C. P. No. 2. Jan. 19, 1878.

Fougeray v. Fougeray.

Divorce—Practice—Demand for an issue after reference to an examiner.

Rule to withdraw the case from an examiner, and to allow an issue to be framed.

Libel in divorce. In the usual course an examiner had been appointed to take testimony, and had held one meeting.

Diehl, for the rule, cited—

Allison *v.* Allison, 10 Wr. 321.
Derringer *v.* Derringer, 8 Phil. 269.
Magill's Appeal, 9 Sm. 430.

Rule absolute on payment of examiner's costs.

[*Cf.* Mattson *v.* Mattson, 1 WEEKLY NOTES, 414; Newbold's Appeal, 2 Id. 472.]

C. P. No. 4. Dec. 10, 1877.

Kindt v. McDonald.

Insolvent bond—Continuance—Practice—Record—Proof of an application for a continuance at the term after "the next term" is no defence in a suit on an insolvent bond.

Rule for a new trial.

Action on insolvent bond.

On the 17th of July, 1875, Andrew J. McDonald, one of the defendants, being in custody, gave bond with his co-defendant, to appear at the next term of the Court of Common Pleas of this county, and that the said Andrew should then and there present his petition for the benefit of the insolvent laws of this Commonwealth, and comply with all the requisitions of said law, and abide all the orders of said Court in that behalf; or in default thereof, and if he should fail in obtaining his discharge as an insolvent debtor, that he should surrender himself to the jail of said county.

The record in evidence showed that the petition for Andrew's discharge was filed September 4th, 1875, but failed to show that any other proceedings were had thereafter.

At the trial the defendant sought to supplement the record by oral testimony that Andrew appeared at the Court of Common Pleas No. 3, in December Term, 1875, and that his case was then continued until the March Term, 1876. This offer was rejected, and a verdict directed for the plaintiff.

A. L. Shields and *R. P. White*, for the rule.

The continuance could not appear on the record. The insolvent list is not of record, inasmuch as it is not necessary that there be such a list.

[BRIGGS, J. The proceedings are undoubtedly of record. Your proper way would have been to

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have had the record cured, instead of bringing evidence at the trial to supplement it.]

Mayer Sulzberger, contra.

C. A. V.

Dec. 29, 1877. THE COURT. After reciting the facts (*ut supra*): It is complained that this rejection was erroneous. But was it so? By the very terms of the bond, and the law under which it was given, Andrew J. McDonald was required to obtain his discharge at the next term, which was the *September* Term, unless he procured a continuance of his case. It was not attempted to prove that an application was made for a hearing, or that notice was given to creditors, or that anything was done, as required by the Act of Assembly, during the September Term, except filing the petition for discharge.

With the expiration of September Term, the bond became forfeited by the mandate of law, by reason of Andrew's failure to procure his discharge, a continuance to another term, or to surrender himself to jail. (Horton *v.* Miller, 2 Wright, 270; McDonough's Case, 1 Id. 275; Bartholomew *v.* Bartholomew, 14 Id. 194.) Nor is it an answer to say that he appeared at the December Term, and procured a continuance to the March Term, 1876; for, as already shown, the bond was then forfeited. This being so may account for the fact that the defendant's offer did not propose to show that anything had been done in the insolvent case since the alleged continuance in December Term, 1875, to the March Term, 1876. Even if there were regular continuances up to the last named term, Andrew's supineness since then is fatal to the defence.

The position of counsel for the defence, so earnestly pressed, that the plaintiff in any event should move the Insolvent Court to a final disposition of the case before suing here on the bond, is alike unavailing. The creditor of a petitioner for insolvency has nothing to do—can do nothing—except oppose the discharge for want of compliance with the provisions of the law and the conditions of the bond.

The petitioner, as is said in Bartholomew *v.* Bartholomew, *supra*, "is the actor and the only one to set in motion the machinery of the law which is to result in his discharge. His creditor performs no part of it, is not bound to appear, and cannot prevent his discharge, except by showing that he is not a fit subject of relief. He may appear, to do this, but it is not an act in furtherance of the discharge, but against it. The purpose then is relief; the provisions of the law must be pursued, and the debtor is the only one who sets them in motion and keeps them moving."

It is, therefore, evident that no error was committed in the rejection of the defendant's offer, as, had it been sustained by proof, it would have been entirely insufficient to prevent the plaintiff's recovery.

Rule discharged.

Opinion by BRIGGS, J.

C. P. No. 4. Jan. 5, 1878.

Kelly v. Snyder & Moore, defendants, and Montgomery, garnishee.

Attachment execution—What funds may be attached—Advances due to defendant under contract for building operation—Such advances may be attached by a judgment creditor of defendant, in hands of vendor of the land, although the buildings have not been completed.

Rule for judgment against garnishee.

The plaintiff, a judgment creditor of Snyder & Moore, attached funds in the hands of the garnishee, as the property of Moore.

The answer of the garnishee to interrogatories filed, disclosed the following facts: In June, 1877, Montgomery, in pursuance of a building operation agreement, conveyed to one Haddock certain lots of ground in Philadelphia, Haddock covenanting to erect houses thereon, and Montgomery agreeing to make certain advances from time to time as the buildings progressed, to aid Haddock "in buying materials for and erecting said buildings." Haddock executed mortgages of the lots to Montgomery to secure the purchase-money and advances in the usual manner. Immediately afterwards Haddock, with the knowledge and consent of Montgomery, conveyed and assigned all his title and interest under said deed and contract to William J. Moore, one of the above defendants, who, at the time this attachment was served, was carrying out the contract by erecting buildings, etc.

The garnishee admitted that he had under his control the sum of $600, which was due by him for the building of said houses according to the terms of the contract.

S. Wagner, Jr., for the garnishee, showed cause.

The garnishee has such an interest in the advances as entitles him to resist their being taken in execution as the defendant's property. If the money is due the defendant, it is due on the contract, which must be considered as a whole, and is not severable. It was "*do ut facias.*" The fund, being to aid the defendant in "buying materials for and erecting said dwellings," was evidently an appropriation for a specific purpose. If the defendant were to apply the payments except as stipulated, he would commit a fraud on the garnishee; and the action of the defendant's

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creditor has the same effect. A mortgage like this to secure advances, if recorded before the commencement of the buildings, is good as against lien creditors, even as to the last advances. By what principle, then, can a stranger have greater rights than material-men and mechanics, and interfere in the security of the mortgage? The advances are plainly the property of the garnishee until paid to the defendant, and are then to be used by him only according to the contract, and hence are not such debts as are liable to attachment by the defendant's creditors.

R. Alexander, for the rule.

The garnishee admits that advances largely in excess of the plaintiff's claim were due on the contract. The defendant could recover these, and the attaching creditor stands exactly in his shoes.

Fessler *v.* Ellis, 4 Wr. 248.
Patton *v.* Wilson, 10 C. 299.

The garnishee, as mortgagee, is not prejudiced by the recovery of this debt, nor is this security of the mortgage weakened, since the building had progressed as far as he had a right to expect at the time the money due the defendant was attached. Nor are mechanics' liens thereby injured, since they look to the houses themselves for security, and not to the funds paid to aid the builder in their erection.

Rule absolute.

C. P. No. 4. Dec. 3, 1877.

Williamson v. Earp.

Affidavit of defence law—Insufficiency of copy filed—Copy of book entries charging defendant by his last name only insufficient—Admission of liability in the affidavit will not bring the copy within the Act.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit by Williamson against G. Bakewell Earp. The copy of book entries filed was as follows:—

"EARP.

"9 Mo. 1, 1876. 1 lb. butter, 50; 3¾ lbs.
"steak, $1.13 . . . . . $1.63."
etc. etc. etc.

The following affidavit of defence was filed:—

"G. Bakewell Earp, the above named defendant, being duly sworn, says that he is advised that the copy filed is not sufficient to entitle the plaintiff to a judgment for want of an affidavit of defence, in this that the copy filed does not show any charge against this defendant, but only a charge against "Earp," the bill-head in said copy being evidently not transcribed from the book of original entries. He further shows that for a portion of said claim he gave plaintiff his judgment note for $500, entered up C. P. No. 3, June term, 1877, No. 1599, and that he verily believes and hopes to be able to prove that the balance of said claim is largely in excess of what he justly owes plaintiff.

"G. BAKEWELL EARP."

Geo. T. Bispham (with whom was *Wayne MacVeagh*), for the rule. The affidavit admits with sufficient certainty that the party charged is the real party liable. The defect, if any there was, is therefore cured by the appearance and admission of record on the part of the defendant.

J. Cooke Longstreth, contra. The copy filed must, on its face, import the liability of the defendant.

Wall *v.* Dovey *et al.* 10 Sm. 212.

This is a statutory requisite to give jurisdiction, and the want of it cannot be cured by admission or consent.

C. A. V.

Jan. 7, 1878. THE COURT. We decided, in Collins *v.* O'Toole (3 WEEKLY NOTES, 564), that book entries charging the defendant by his last name only, were not sufficient to sustain a judgment for want of an affidavit of defence. The entry filed in this case has this fatal defect, but it is supposed that it is aided by the defendant's affidavit of defence, in which, after suggesting the insufficiency of the copy filed, he proceeds to state other grounds of defence, thus admitting, as it is argued, that he was the person intended to be charged. A copy, however, which is totally insufficient under the affidavit of defence law to put the defendant to an affidavit, and upon which no judgment could be entered consistently with the Act of Assembly, cannot be made good in any such manner. The defendant is not bound to answer such a copy, because the copy itself is not within the act, nor is it made a good book entry within the act, because the defendant admits he bought the goods which are charged. The argument from his silence would be quite as strong as the argument from his admission, and yet it is not pretended that if he had filed no affidavit a valid judgment could have been entered against him upon such a copy. The right to judgment is only predicated of certain specified instruments and copies. Such as are not within the act cannot be brought within it by any admission of the defendant, especially when in the same breath he protests against the right of the plaintiff to file such a copy.

Rule discharged.

Opinion by THAYER, P. J.

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WEEKLY NOTES OF CASES.

VOL. V.] *THURSDAY, FEB.* 14, 1878. [No. 3.

Supreme Court.

Oct. & Nov. '77, 256. Nov. 9, 1877.

Bidwell v. City of Pittsburgh.

Equitable estoppel—Constitutional law—Waiver of constitutional rights—Municipal claim—City of Pittsburgh—Penn Avenue Act of April 2, 1870—Improvement of streets in rural districts—Assessment per foot front—Illegality thereof—When property-holder in rural district is estopped by conduct from availing himself of the unconstitutionality of the Act, as a defence to a per foot front assessment—City of Pittsburgh bonds.

Where a party by decided and persistent conduct induces the action of a municipal corporation, under the provisions of an Act of Assembly, whereby expense is incurred for the advantage of the former's property, he is estopped from denying his liability to assessment according to the method provided by the Act, although the Act, in that respect, was subsequently declared by the Supreme Court to be unconstitutional.

The facts that the Act was, at the time of such action thereunder, believed by all parties to be valid; that no intent existed on the part of the defendant to deceive; that other individual property-owners, who took no part in urging the improvement, are not liable to the frontage assessment; and that defendant will be again assessed, in common with other tax-payers, for the cost of the general improvement, are immaterial in considering the question of defendant's estoppel.

B. joined in a petition to Councils, asking for an ordinance directing the grading and paving of Ellsworth Avenue, in a rural district of the city of Pittsburgh, on which his property was situated, under the Act of April 2, 1870. In pursuance of this petition the ordinance was passed. B. was elected one of the commissioners, and acted as such in directing and superintending the work, selling the bonds of the city, expending the proceeds thereof on the street, and making the assessments upon the properties by the "per foot front rule," including his own. The Supreme Court subsequently declared the Act of April 2, 1870, to be unconstitutional so far as it authorized assessments on rural property by the foot frontage rule:

Held (affirming the judgment of the Court below), that B. was estopped from afterwards denying the validity of the Act of Assembly, or its applicability to Ellsworth Avenue, or the legality and validity of the mode of assessment provided in the Act.

Per MERCUR, J. Where an act is done, or a statement made by a party, the truth or efficacy of which it would be fraud on his part to controvert or impair, the character of an estoppel shall be given to what otherwise would be a mere matter of evidence. It is not necessary, that the party against whom an estoppel is alleged should have intended to deceive; it is sufficient if he intended that his conduct should induce another to act upon it, and the other, relying on it, did so act.

Error to Common Pleas No. 2. of Allegheny County.

Scire facias sur municipal claim, brought by the city of Pittsburgh against D. W. C. Bidwell to recover the cost of grading and paving Ellsworth Avenue, done under the authority of the Act of April 2, 1870, entitled "An Act for the improvement of Penn Avenue and other streets in the city of Pittsburgh" (P. L. 796).

Under the provisions of this Act the cost and expenses of the improvement of any street or avenue were to be ascertained by five commissioners, elected for that purpose by the property-holders of the street, who were to have charge of the improvement and make the assessments. The cost of the improvement was to be assessed equally per foot front upon the property abutting, and such assessment was made a lien on the property to a limit of one hundred and twenty feet in depth. This assessment was made payable in ten annual instalments. For the purpose of paying the cost of the improvement as the work progressed, the commissioners were authorized to make requisition for and sell city bonds, the assessments being pledged and set apart as a fund to pay the bonds. This Act was originally prepared as a special Act for the improvement of Penn Avenue, but its last section made it general by providing that the Act might be extended to any street or avenue in the city of Pittsburgh on petition of the owners of a majority in interest of the property abutting thereon.

Ellsworth Avenue, extending through a rural district in the eastern portion of the city, was graded and paved under the provisions of this Act, and city bonds were issued to pay for the same to the amount of $166,000.

Mr. Bidwell was the owner of property on this avenue. He signed the petition to councils praying for an ordinance directing the grading and paving of the same under the provisions of the Penn Avenue Act. He was elected and acted as one of the commissioners who made the contracts for the work, sold the city bonds and applied the proceeds, made the assessments on the properties, and generally supervised and controlled the whole proceeding.

In the case of Seely *v.* City of Pittsburgh (1 Norris, 360, 3 WEEKLY NOTES, 413) it was decided by the Supreme Court that the method of assessing the cost of street improvements on the abutting property by the foot front rule in suburban districts was unconstitutional. Soon after the announcement of this decision, city councils instructed their solicitor to proceed upon a lien against some property owners who had taken a part in procuring some improvement, so that it

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might be determined whether there was not an estoppel by which a part at least of the owners of property might be made to pay their respective assessments. Mr. Bidwell having been thus prominent in promoting the improvement on Ellsworth Avenue was selected and this suit was brought as a test case.

The collection of the assessment was resisted on the following grounds: (1) That Ellsworth Avenue was a great public thoroughfare and it was unjust and illegal to assess private property on that avenue for the cost of improving it for public use. (2) That the rule of assessment per foot front was unjust and illegal when applied to property on Ellsworth Avenue. (3) That the "Penn Avenue Act," under which Ellsworth Avenue was improved, was unconstitutional. (4) That it was not just that those who were active in promoting the improvement, should be held liable, while those who reap equally with them the benefit, and by their silence acquiesced in the work being done, should be exempt from paying their share of the cost. (5) That while the defendant assented to and promoted the improvement, he did so on the understanding that each street should pay for its own improvement, and each property-holder his proportion per foot front, and, as many assessments cannot be collected and will have to be paid by the general taxpayers, including defendant, it would be unjust to make him pay also his own assessment, thus causing his property to be doubly taxed.

THE COURT (WHITE, J.) charged the jury *inter alia*, as follows: "I therefore instruct you, that if the defendant signed a petition to councils asking for an ordinance directing the grading and paving of Ellsworth Avenue under the Penn Avenue Act; that in pursuance thereof the ordinance was passed; that the defendant was duly elected one of the commissioners, and acted as such in directing and superintending the work, selling the bonds of the city, expending the proceeds thereof on the street, and making the assessments on the properties, including his own, for which this suit is brought, he is now estopped from denying the validity of the Act of Assembly, or its applicability to Ellsworth Avenue, or the legality and validity of the mode of assessment provided in the Act, and your verdict should be for the plaintiff."

Verdict and judgment for plaintiff for $4625, with leave to issue execution for the instalment due, and on instalments that might fall due thereafter.

Defendant took this writ assigning for error *inter alia* the portion of the charge given above.

T. Mellon, *D. D. Bruce*, and *M. A. Woodward*, for plaintiff in error.

Excepting the one question of estoppel this case is ruled by the principles laid down in—

Seely *v.* City of Pittsburgh, 1 Norris, 360, 3 WEEKLY NOTES, 413.
Washington Avenue, 19 Sm. 361.
Hammett *v.* City of Philadelphia, 15 Sm. 151.

Three ingredients are necessary to constitute an estoppel: (1) Misrepresentation or wilful silence by one having knowledge of the fact: (2) That the actor having no means of information was by the conduct of the other induced to do what otherwise he would not have done. (3) That injury would ensue from a permission to allege the truth.

Commonwealth *v.* Moltz, 10 Barr, 527.
Eldred *v.* Hazlett's Admrs., 9 Casey, 307.
Helser *v.* McGrath, 2 Sm. 531.
Miranville *v.* Silverthorn, 12 Wr. 149.
Dezell *v.* Odell, 3 Hill (N. Y.), 215.
Bigelow on Estoppel, pp. 9 & 480.
Hermon on Estoppel, sec. 325.

In Commonwealth *v.* Moltz (*supra*), the Court says: "It is obvious there can be no such fraud when the purchaser or other actor was, or ought to have been, acquainted with the subject of his action, or even had the means of knowledge, and neglected to avail himself of them; or where the silent person was himself unacquainted with the important fact uncommunicated; or where the party was not influenced to act on the faith of the false suggestion or silence of one bound to speak."

To the same effect are the following authorities:—

Alexander *v.* Kerr, 2 Rawle, 90.
Brown *v.* Spalding, 1 Pitts. Rep. 361.
Hill *v.* Epley, 7 Casey, 331.
Crist *v.* Jack, 3 Watts, 240.
Epley *v.* Witherow, 7 Watts, 163.
McCormick *v.* Murtrie, 4 Watts, 195.
Wilton *v.* Harwood, 23 Maine, 131.
Bigelow on Estoppel, p. 473.
Bispham's Prin. of Eq., sec. 288–9, *a*.
Baring *v.* Corrie, 2 Barn. & Ald. 137.
Maans *v.* Henderson, 1 East, 335.

The city cannot claim not to know that the street lay through rural lands, for it is rural property by the city charter, classified and assessed as such. It cannot be pretended that regarding this fact, or the Act of Assembly, we were inquired of, or looked to, or were guilty of any concealment, or made any representations either true or false.

Dungan *v.* Am. Life Ins. Co., 2 Sm. 257.
Hermon on Estoppel, sec. 420.
Bigelow on Estoppel, pp. 473 and 520–1.
1 Story's Eq. Jur., sec. 191.
Kent's Com., v. 2, pp. 484–5, 4th ed.
Plumer *v.* Lord, 9 Allen, Mass. 455.

But it is said we petitioned for the improvement, and acted as commissioner, and by these acts are estopped from showing that the street is in rural or farming lands, and the method of assessment thereby invalid. There is, however, no color of deception as to that fact or any other, and there cannot, therefore, be found in them any element of estoppel. The city extended her limits over the adjoining rural districts against

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the will of the people there residing. She procured the passage of the Penn Avenue Act, and offered it, with its long credits and promises of great benefits, to all who would accept. We made the formal application, and it was granted. We became commissioner, and simply did official duty without reward. The city looked to the Act alone, and neither asked nor wanted of us any opinion, information, any confidence or form of engagement. For her advancement she relied wholly upon the lien and legal remedies in her favor, provided in the Act, or upon her broader, clearer powers of general taxation, in case the other proved inadequate. Neither by analysis nor by combination of all we have done or left undone can a single element of estoppel be discovered.

Half of the property holders never petitioned for the improvement, and are therefore not estopped from denying the validity of the assessment. Much of the land assessed was covered by mortgages, and has since been bought in by the mortgagees, who cannot be estopped by the action of their mortgagors. Many of the owners were infants or married women, who cannot be estopped, and therefore, as so many of the assessments cannot be collected under the decision in the Seely case, in the language of the Court below: "If the city must meet all deficiencies, it would be unjust to a part to make them pay their assessments in full, and then contribute by general taxation to make up deficiencies. Manifestly all must be held liable or all released."

D. T. Watson (with him *Thos. S. Bigelow*), contra.

By the direct averments and prayers contained in the petition to councils, asking for the ordinance directing the grading and paving of Ellsworth Avenue, it is evident that inferentially and just as strongly as if it had been so written, Mr. Bidwell asserted that Ellsworth Avenue was a street proper to be improved under the Penn Avenue Act, and he agreed that if it was so improved he would pay for the improvement, in accordance with the assessments "per foot front," made under and in accordance with the provisions of the Act.

"A party who is illegally assessed may be held to have waived all his rights to a remedy by a course of conduct which renders it unjust and inequitable to others that he should be allowed to complain of the illegality. Such a case would exist if one would ask for and encourage the incurring of the tax of which he subsequently complains."

Cooley on Taxation, p. 573.
Cooley on Con. Lim., p. 181.
Baker *v.* Braman, 6 Hill, 47.
Embury *v.* Cannor, 3 N. Y. 511.
Heyward *v.* Mayor, 8 Barb. 489.
Mobile and Ohio R. R. Co. *v.* State, 29 Ala. 586.
People *v.* Murray, 5 Hill, 468.
Lee *v.* Tillotson, 24 Wendell, 337.
Kellogg *v.* Ely, 15 Ohio St. 66.
People *v.* Goodwin, 1 Selden, 573.
Ferguson *v.* Landram, 5 Bush (Ky.), 233.
Tash *v.* Adams, 10 Cushing, 252.
Van Hook *v.* Whitlock, 26 Wendell, 43.
Mayor of Pittsburgh *v.* Scott, 1 Barr, 309.

That misrepresentation is not essential to estoppel, see—

Miller's Appeal, 4 WEEKLY NOTES, 405.

Jan. 7, 1878. THE COURT. The seventeen assignments of error may be considered together. They all involve the question whether the plaintiff can avoid the payment of the assessments made on his lands on the ground of alleged unconstitutionality of the law authorizing them.

The claim is to recover the cost of grading and paving Ellsworth Avenue, on which plaintiff's lands front, under the Act of 2d of April, 1870 (P. L. 796). The main provisions of the Act to which reference need be made, providing for this improvement, are: 1. It requires a petition from a majority of property holders along the line of the proposed improvement before the councils can act. 2. When authorized by councils, the improvement is placed under the exclusive control of the commissioners elected by the owners of property abutting on the improvement. 3. The cost of the improvement is to be paid in ten equal annual instalments with interest.

The legislative power to apportion a local tax, for a local improvement, within the limits of a municipal corporation, has frequently been recognized by this Court. So has the validity of municipal claims assessing on lots fronting on streets their due share of the cost of grading, paving, curbing, building sewers, and culverts, in proportion to the respective fronts. (Pennock *v.* Hoover, 5 Rawle, 291; Northern Liberties *v.* St. John's Church, 1 Harris, 104; The City *v.* Wistar, 11 Casey, 427; Commonwealth *v.* Woods, 8 Wright, 113; Magee *v.* Commonwealth, 10 Id. 358; Wray *v.* The Mayor of Pittsburgh, Id. 365; Smith *v.* McCarthy, 6 P. F. Smith, 359; City *v.* Field, 8 Id. 320; Stroud *v.* City, 11 Id. 255; Washington Avenue, 19 Id. 352.)

In Seely *v.* The City of Pittsburgh (1 Norris, 360), it was held, that while the frontage rule of valuation might be a just mode of assessing the cost upon compact city lots, where the properties do not materially differ in value, yet it could not be applied to a street made through rural districts, and so far as the Act of 2d April, 1870, applied this mode of assessment to the latter districts it was unconstitutional. The validity of the law generally is there conceded; but the right to apply it to the land in question is denied. Assuming that to be a correct exposition of the law, we will consider its application to the facts in the present case.

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It is conceded that Ellsworth Avenue was made through a rural district, and that the property of the plaintiff sought to be charged was rural land. It would then be relieved from this mode of taxation, unless other facts made it so chargeable. What are the other facts? As a first step towards procuring this improvement, a petition to which the name of the plaintiff and twenty-seven other names were subscribed, was presented to the councils of the city of Pittsburgh. It declared the petitioners were the owners of a majority in interest of the property abutting on Ellsworth Avenue, and that they desired to avail themselves of all the privileges of the Act of the 2d of April, 1870, and asked for the passage of an ordinance directing the grading, paving, and curbing of the same, and authorizing the election of commissioners. To this petition was added the affidavit of the plaintiff and two other signers thereof, averring the petition to be signed by the owners of a majority in interest of the property abutting on the avenue, and that the signatures were the genuine signatures of the petitioners.

The court substantially charged the jury that if they found the plaintiff in error signed the petition asking for the ordinance directing the grading and paving of Ellsworth Avenue under the Penn Avenue Act, that in pursuance thereof the ordinance was passed, that he was duly elected one of the commissioners, and acted as such in directing and superintending the work, selling the bonds of the city, expending the proceeds thereof on the street, and in making the assessments upon the properties, including his own, for which this suit was brought, he was estopped from denying the validity of the Act, or its application to Ellsworth Avenue, or the legality and validity of the mode of assessment provided in the Act.

It is not alleged that the evidence of these facts was insufficient to submit to the jury, nor that its finding thereof was unjustified. Conceding the facts, it is contended by the plaintiff in error that they are insufficient to prevent his alleging the unconstitutionality of the Act, for the purpose of relieving himself from its operation.

In Pickard *v.* Sears (6 Ad. & El. 469), a leading case of estoppel by conduct, it was said, "the rule of law is clear, that where one by his words or conduct wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter, a different state of things as existing at the same time." It may now be declared, as a general rule, that where an act is done or a statement made by a party, the truth or efficacy of which it would be a fraud on his part to controvert or impair, the character of an estoppel shall be given to what otherwise would be mere matter of evidence.

It is not necessary that the party against whom an estoppel is alleged should have intended to deceive, it is sufficient if he intended that his conduct should induce another to act upon it, and the other, relying on it, did so act. (Bispham's Eq. § 290.)

Prior to the presentation of the petition of the plaintiff in error, the city authorities had taken no steps towards the improvement of Ellsworth Avenue. In fact, under the Act they had no power so to do. This power was called into action by the petitioners. They asked to have the avenue brought under the operation of the Act. They voluntarily asked for the privilege of becoming subject to all its provisions. They asked for the passage of the ordinance directing the work; for the assessment of their lands according to the frontage rule, in order to pay the bonds to be given to raise money to make the improvement. The authorities acceded to the request. They altered their previous position. They assumed the large additional indebtedness, relying upon the words and conduct of the petitioners. The latter declared they would submit themselves to all the charges and responsibilities imposed by that Act. They wilfully caused the authorities to believe this as a matter of fact. So believing, they acted upon it. They accepted the offer in the terms in which it was made. The petitioners directed the work. They received and enjoy the benefits. To now permit them to deny the truth or efficacy of the assurance given, and continued during the progress of the work, would work a fraud on the city, which cannot be sanctioned.

It is true every one is presumed to know the law, and knowledge thereof is said to be equally open to all. Conceding that the city had knowledge of the law, or ought to have had it, the like legal presumption applies to the plaintiff in error, and his equities derive no strength from that presumption. The city had no reason to believe that he would allege any invalidity in the law which he was praying to have extended over him. The city was misled, not by expressive silence merely of the plaintiff in error, but by his decided and persistent action. It has been held that a party, who has acted upon a particular construction of a contract which has been acquiesced in by the other, is estopped from contesting it as the proper construction. (Mercer Mining and Manufacturing Co. *v.* McKee, 27 P. F. Smith, 170.)

The constitutional right against unjust taxation, which the plaintiff in error invokes, is given him for the protection of his private property. He may waive that protection, and consent to such action in regard to it, as would otherwise be invalid. Having consented, and the other party having acted thereon, and made expenditures

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and incurred expense predicated thereon, the consent cannot be withdrawn. Hence an Act appropriating the private property of one person for the private purpose of another on compensation made, was held valid when he whose property was taken assented thereto; and receiving the compensation awarded was a sufficient assent. (Cooley on Cons. Lim., 181.)

The valid waiver of constitutional rights, both of person and of property, is of frequent occurrence. The constitution guarantees the right of trial by jury to one charged with a crime, yet he may waive that right, and plead guilty in a case where his life will pay the penalty. So his private property may not be taken for a public highway without compensation paid or secured; yet he may just as effectively divest his right by a voluntary dedication to the public, followed by acceptance and expenditure.

It is objected that inasmuch as some lands abutting on this avenue may not be held liable to the specific tax for grading and paving the same, in consequence of the owners thereof not having subjected themselves to the application of an estoppel, and in that case a portion of the cost of the improvement will fall on the taxpayers generally, of whom the plaintiff in error is one, it would be unjust to impose on him this special tax in addition thereto. We are unable to see any force in this objection. His own direct action has charged his land with this special tax. If one of the consequences of that action has been to throw a portion of the cost of the improvement on the taxpayers generally, on what principle ought he to claim exemption therefrom? He has not derived less benefit than they from this improvement.

No voluntary act of theirs caused the expenditure. Why, then, shall he not bear his share of the obligation, which his voluntary action has created, and not cast it wholly on others? As, then, a portion of any general tax levied for this purpose would justly fall on him, it cannot furnish any ground for relieving his property from the payment of the special tax. If so relieved, his conduct would have the effect of imposing larger taxation on others, and thus work still greater injustice.

Numerous authorities sustain the conclusion at which we have arrived. Among them are City of Burlington *v.* Gilbert, 31 Iowa, 356; Story *v.* Furman, 25 N. Y. 230; Tash *et al. v.* Adams, 10 Cush. 252; Ferguson *v.* Landram, 5 Bush. (Ky.) 233; 18 Michigan, 528; Lee *v.* Tillotson, 24 Wend. 337; The People *v.* Murray, 5 Hill, 468; Mayor of Pittsburgh *v.* Scott, 1 Barr, 309.

Whether other property on Ellsworth Avenue has or has not become liable to assessment under the Penn Avenue Act, is not a question now before us. The bonds issued by the city for the improvement of various streets under that Act, amount to about five million of dollars. It may be that all who passively enjoy the benefits of the improvements may not be liable to specific assessments to pay the bonds under the Act; yet it by no means follows that the plaintiff in error is discharged from his obligation. (City of Burlington *v.* Gilbert, *supra;* Kellogg *v.* Ely, 15 Ohio St. 66.) The conduct or action of each may determine his own liability, where the law would not otherwise make him liable. We discover no error in the record.

Judgment affirmed.

Opinion by MERCUR, J. STERRETT, J. did not sit.

Oct. & Nov. '77, 98. Oct. 30, 1877.

Kaiser v. Weise.

Municipal claims—City of Pittsburgh—Act of January 6, 1864—Foot front rule of assessment—When not applicable—When the six months allowed for filing the lien commences.

The method of assessing the cost of grading and other similar municipal improvements by the foot front rule is inapplicable to lands along Hazlewood Avenue, in a rural district of the city of Pittsburgh.

The six months allowed by the Act of January 6, 1864, for filing liens for unpaid assessments commences to run from the day when the work is completed, and not from the day when the work is approved by committee of councils.

Seely *v.* City of Pittsburgh, 1 Norris, 360, S. C., 3 WEEKLY NOTES, 413, followed.

Error to Common Pleas No. 2, of Allegheny County.

Scire facias sur mortgage, by John Weise against John Kaiser.

The following facts appeared. In September, 1873, Weise conveyed to Kaiser, for the sum of $4000, a lot of ground fronting on Hazlewood Avenue, in a rural district of the city of Pittsburgh, containing a little more than three acres. He received in payment a portion of the purchase money, and took a purchase money mortgage for the balance, $1700, payable in two annual instalments from date. The first instalment was paid when due, but payment of the last was refused, whereupon this writ of *scire facias* was issued.

By virtue of ordinances of councils passed in 1870 and 1871, Hazlewood Avenue had been surveyed and the work of grading the same commenced in November, 1872, under the provisions of the Act of January 6, 1864, concerning streets and sewers in the city of Pittsburgh (P. L. 1131).*

* By sections 6 and 19 of this Act councils are authorized to have streets graded, paved, etc., and also "to levy

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On Dec. 2, 1874, the contractor ceased work, and on the day following the avenue was approved by the street committee of councils. The assessment for said grading was made in accordance with the Act at an equal sum per foot front. The assessment on the property of Kaiser was $906.93 which he paid June 3, 1875, just six months after the avenue was approved by the committee of councils, being told by the city attorney that if the assessment was not paid that day, a lien would be filed and additional expense incurred.

At the trial (before EWING, P. J.), defendant claimed, under a plea of set-off, that as the lien of the assessment attached in 1872, when the work on the avenue was commenced, and the property had been conveyed to him free from all encumbrances, he had the right to set off this payment of the assessment against the remaining instalment due on the mortgage. The Court instructed the jury, that their verdict should be for the plaintiff for the amount of the last instalment with interest and attorney's commissions.

Verdict and judgment for plaintiff accordingly. Defendant took this writ, assigning for error, *inter alia*, the instruction of the Court.

Jas. Fitzsimmons (with him *John Robb*), for plaintiff in error.

The rule regulating the liability of property for the *grading* of an avenue differs essentially from that of *paving*. The former is a necessity, the latter a mere matter of convenience. This differs materially from the case of Seely *v.* City of Pittsburgh (1 Norris, 360; S. C., 3 WEEKLY NOTES, 413), which arose on a paving lien on a great city thoroughfare. There is no reason why the foot front rule should not apply on Hazlewood Avenue. It is not a general thoroughfare, but accommodates only a limited number of citizens. The improvement inures only to the property abutting on the avenue, and the several pieces of property are nearly the same in extent and location. It is unfair to charge this expense to the general public, who are not directly benefited.

The six months given for filing the lien date from the time the work was approved and taken off the hands of the contractor. The city attorney, who files the lien, can only then have it brought to his notice. A different rule would but introduce uncertainty, and increase the difficulty of the city in collecting her assessments.

Geo. Oliver (with him *Rodgers* and *Callahan*), contra.

The defendant, Kaiser, by contesting the validity of the assessment, or notifying Weise to do so, could have undoubtedly escaped the payment or it. Under the decision of this Court in Seely *v.* City of Pittsburgh (*supra*), the assessment is clearly illegal.

[AGNEW, C. J. That case decided not that the property holders should not pay for paving, but that the foot front rule was not a proper one for rural property; this Court did not decide that there might not be a jury of inquest.]

The assessment was not paid until the lien had expired. By the terms of the act a secret lien is allowed to exist against the property during the entire continuance of the work and for six months after its completion. Such liens should be construed strictly; the right to extend them a day involves the right to extend them a year. If the improvement is not complete until the work is accepted, it would be in the power of councils to indefinitely extend the time of filing the lien.

Nov. 7, 1877. THE COURT. This case falls directly within the ruling in Seely *v.* The City of Pittsburgh (1 Norris, 360), that the per foot front rule of assessment is inapplicable to lands such as these along Hazlewood Avenue.

The payment by Kaiser of the assessment of $906.93 was voluntary, the lien upon the premises, even if rightly assessed, having expired at the time of payment.

On both grounds the Court below was right.

PER CURIAM. Judgment affirmed.

Oct. & Nov. '77, 137. Oct. 8, 1877.

Lofink v. City of Allegheny.

Municipal claims—City of Allegheny—Act of April 1, 1870—Assessment of benefits conferred by city improvements—Time for filing liens not limited to six months after completion of improvement.

Under the 12th Section of the Act of April 1, 1870, "relative to streets in the city of Allegheny" (P. L. 751), an assessment for municipal improvements is a first lien when the claim is filed within six months after the completion of the improvement. It will be sufficient, however, to constitute it a lien, though not a first lien, if filed at a period later than six months.

Error to Common Pleas No. 2, of Allegheny County.

Scire facias sur municipal claim, by the City of Allegheny against Joseph Lofink, to recover $66 with interest, being the assessment on defendant's property for benefits conferred by the change of

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and collect the cost and expense of the same, from the owners of property bounding or abutting on the portions of said streets, lanes, or alleys, thus improved, by an assessment of an equal sum per foot front of said properties.

"The assessments, authorized by this Act, shall be liens upon the properties assessed, from the commencement of the improvements for which they were made, and shall, if filed within six months after the completion of said improvements, continue liens for five years, and be revived by *scire facias* as other liens."

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grade of Troy Hill Road in the city of Allegheny.

This road had been improved under a special Act of Assembly approved May 10, 1871 (P. L. 655), and supplement thereto approved April 1, 1872 (P. L. 707), which provided for the grading, paving, and otherwise improving said road, but made no provision for damages caused by the grading. The work on the road was completed in November, 1874. In February, 1875, councils passed an ordinance, in pursuance of an Act of Assembly of April 1, 1870, relative to streets in the city of Allegheny (P. L. 751), appointing viewers to appraise the damages and assess the benefits caused by the change of grade of said street. The report of the viewers thus appointed was confirmed by councils Nov. 29, 1875. On the 18th of December, 1875, an appeal was taken from this report of viewers to the Quarter Sessions of Allegheny County, and upon said appeal new viewers were appointed by the Court, whose report was confirmed July 15, 1876. By this report defendant's property was assessed $66.00, for which sum the lien in this case was filed Nov. 28, 1876.

At the trial plaintiff gave in evidence said Act of April 1, 1870 (*supra*), which provides, *inter alia*, as follows:—

"Section 11. The liens authorized by this Act shall be filed in the District Court, in the municipal lien docket, in like manner as now provided for the city of Allegheny, in same manner as mechanic's liens are filed. . . . .

"Section 12. The assessments authorized by this Act shall be first liens upon the property assessed, said liens to date from commencement of the improvements for which they were made, and shall, if filed within six months after the completion of said improvements, continue first liens for five years, and be revived by *scire facias* as other liens. . . .

"Section 19. That when any appeal shall be taken from any appraisement or assessment made in pursuance of this Act, the lien of such assessment shall continue for six months after the final determination of such appeal, and the time of filing such liens shall be extended until the expiration of six months after such final determination."

Plaintiff's counsel asked the Court to instruct the jury, "that the viewers' report in the proceedings for the assessment of damages by change of grade of Troy Hill Road, showing an assessment upon defendant of amount claimed in this suit, having been confirmed by the Court of Quarter Sessions on 15th July, 1876, the same is conclusive upon the defendant, and their verdict should be for the plaintiff, even though the work on the road was completed in December, 1874." *Answer.* "This point is affirmed."

Verdict and judgment for plaintiff. Defendant took this writ, assigning for error, *inter alia*, the affirmance of plaintiff's point given above.

Robert Wood, and *J. F. Slagle* (with them *S. Woods* and *Wiley*), for plaintiff in error.

The Act of April 1, 1870, is not clearly expressed, but, surely, when it says (§ 12), "if filed within six months," it shall continue a lien, the converse must be understood, that is, if not filed within six months it shall cease to be a lien; and if there is any doubt as to this, it would be solved by the reference to mechanic's liens, which furnished the model upon which these claims are constructed.

The lien in this case was not filed until two years after the work was completed. The defendant in error attempts to avoid this by reference to the 19th section of the Act, which in case of appeal extends the time of filing the lien until six months after final determination of the appeal. But this appeal was not commenced till after the lien had expired. The law provides for continuing and extending the lien, not for reviving one already dead. The 19th section supports our view that sections 11 and 12 were not intended to continue the lien beyond the term of six months, unless within that time a claim should be filed as provided in the Act.

W. B. Rodgers, City Solicitor, contra.

The lien in this case dates from the decree of the Court confirming the viewers' report, but even if the time should run from the completion of the work, a lien could be filed more than six months thereafter, but such a lien would not be a first lien, and the question would then be one of distribution merely.

Oct. 15, 1877. THE COURT. The effect of the legislation for the city of Allegheny relating to the assessments upon lots for benefits conferred upon them by city improvements to pay the damages due to other lots, is to create a lien or charge on the property, to be enforced by *scire facias* and execution. The proceeding is *in rem*, and not by a personal judgment. For this purpose the laws relating to this claim against the property have not limited the charge or lien to a period of six months after the completion of the improvement.

To hold otherwise in the absence of express legislation would in most cases exempt the property from its fair share of the cost of the improvement, for as a general rule owing to delays the assessment for benefits can rarely be filed as a lien within six months.

The 12th section of the Act of 1870 is intended to confer a first lien where the claim is filed within six months, and is intended as a protection to *bona fide* purchasers, mortgagees, and other lien creditors, in order that they may always be able to ascertain whether the property is encumbered by a municipal lien. We think, therefore, that no error was committed by the Court below.

PER CURIAM. Judgment affirmed.

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Jan. '78, 87. Jan. 14, 1878.

Blake et al. v. The Commonwealth.

School law—School Directors of the 25th Section of Philadelphia — Abolition of offices by implication—Acts of 2 February, 1865, and 13 April, 1876—Quo warranto.

The Act of February 2, 1865, and its supplement (P. L. 1865, 77, and 1866, 248), provided for the organization of the Board of School Directors of the Twenty-fifth School Section of Philadelphia, under which a large Board of sixty-six members was in existence in February, 1877. By the Act of April 13, 1876 (P. L. 188), both of the above Acts were repealed, and it was enacted that the Twenty-fifth Section should be managed and its Directors elected in accordance with the general school law in force in the First School District of Pennsylvania. Under this latter Act, a new Board was elected in February, 1877, and claimed to be the only School Directors entitled to hold office. Upon quo warranto by the Commonwealth against the old Board:

Held, that the Act of 1876 constituted a new and repugnant system of School Boards, and carried down with it the existing Board, upon the election and organization of the new Board under the repealing Act.

Error to the Common Pleas No. 3, of Philadelphia County.

Quo warranto, by the Commonwealth of Pennsylvania *ex relatione* the Attorney-General against C. C. Baker *et al.*, to inquire by what warrant they claimed to hold and exercise the office of school directors of the Twenty-fifth School Section of Philadelphia.

The suggestion of the Attorney-General set forth as follows:—

(1) By the Act of February 2, 1865 (P. L. 77), it was enacted:—

"That at the next general election, the qualified voters of each election division of the Twenty-fifth Ward of the city of Philadelphia, shall vote for three citizens of the said division to serve as School Directors, and the three persons having the highest number of votes in each division shall be elected, one of whom shall serve for one year, one for two years, and one for three years, and at each annual election thereafter the qualified voters of each election division shall vote for one citizen of said division to serve for three years, and the whole number of Directors elected from the several election divisions shall constitute the Board of Directors for said Twenty-fifth Ward: the term of each director to be determined by lot at the first meeting of the Board after their election."

(2) By the act of March 21, 1866 (P. L. 248), it was enacted:—

Section 3. "That every vacancy in the Board of School Directors of the Twenty-third and Twenty-fifth Wards, caused by death, resignation, or otherwise, shall be filled by the remaining directors of the election district in which such vacancy occurred, until the next general election, when the qualified voters of such election district shall elect a director for the unexpired term caused by said vacancy, and that the directors elected in the said election districts of said Twenty-third and Twenty-fifth Wards, shall have the sole control and management of the schools within said election divisions, subject to the general supervision of their respective Boards of School Directors."

(3) By the Act of April 13, 1876 (P. L. 188), it was enacted that both of the above Acts—

"Be and the same are hereby repealed, and that the election of School Directors and the management of the public schools of the Twenty-fifth School Section be in accordance with and under the general laws governing and regulating the schools of the First School District of Pennsylvania."

(4) That at the election held February 20, 1877, twelve School Directors were elected in pursuance of the Act last mentioned under the general laws governing the First School District of Pennsylvania, and had regularly met for the transaction of business.

(5) That C. C. Baker and sixty-five others who had been elected School Directors prior to the passage of the Act of April 13, 1876, had usurped and still usurped the offices of School Directors to the great damage of the Commonwealth.

The answer of C. C. Baker *et al.* admitted the facts above set forth, but submitted that the Act of April 13, 1876, did not, by its terms or by necessary implication, vacate the office of any School Director, its only effect being, as the words were not retroactive, to provide for the election at each subsequent municipal election of a less number of directors than were previously required, and to restore to them the control of the schools of the Twenty-fifth Ward. Further, that if the said Act was construed to abolish the existing Board of Directors, it could not go into effect until the first Monday in January, 1878, the time when all School Boards in the First District are required to organize under the general law; and also that the said Act would be in conflict with Section 6th of Article III. of the Constitution, which provides: "The General Assembly shall not pass any local or special law . . . regulating the affairs of counties, cities, townships, wards, boroughs or *school districts*."

To this answer the Attorney-General demurred.

The Court, after argument on the demurrer, entered a judgment against the respondents, holding that the Board of School Directors elected and organized under the Act of April 13, 1876, were the only persons entitled to hold the offices of School Directors in the Twenty-fifth School Section.

The respondents took this writ, assigning for error the judgment of the Court.

J. Alexander Simpson, for plaintiffs in error.

Public officers can not be legislated out of office by an implication. If the Legislature had intended by the Act of 1876 to create a new Board they should have said so, and it is a significant fact that on the first reading of the bill in the Legislature it contained a section providing for the organization of a new Board, which

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section was stricken out before the passage of the Act.

Edward R. Worrell (*Thomas P. Judge* with him), contra.

The intention of the Legislature should govern in the construction of the Act of 1876, and that intention evidently was to relieve the Twenty-fifth Section of an irresponsible and unusual school management and bring the ward within the system in force in the rest of the city.

The Legislature, having created an office, has absolute power to destroy it.

Commonwealth *v.* McCombs, 6 Sm. 439.

Jan. 21, 1878. THE COURT. The Act of 13th April, 1876, was evidently intended to supersede the former system of School Boards under the Act of 2d February, 1865, and substitute a new or different system. The systems are repugnant to each other, and consequently the repeal of the Act of 1865 by that of 1876 carried down with it the then existing Board, upon the election and organization of the Board under the repealing Act.

Judgment affirmed.

PER CURIAM. WOODWARD, J., absent.

May, '77, 90. June 20, 1877.

Johnston v. The Commonwealth.

Criminal law—Burglary—Constructive breaking—Entering by means of artifice and trick—Felonious entry, without breaking under Act of April 22, 1863—Province of Court and jury—Right of Judge to express opinion on facts in criminal prosecution—Sentence—Cumulative or concurrent sentences under counts for different offences—Merger of lesser crime in higher.

The procuring the voluntary opening of the door of a dwelling house by an inmate, at night, by means of artifice, or on pretence of friendly intercourse, followed by a permissive entering, with intent to commit a felony, is a *constructive breaking*, and will support an indictment charging burglary by "breaking and entering."

Per PAXSON, J. "When a person rings a door-bell of a house, the owner has a right to presume that his visitor calls for the purpose of friendship or business. If in obedience to the summons he withdraws his bolts and bars and the visitor enters to commit a felony, such entry is a deception and fraud upon the owner and constitutes a constructive breaking."

A., having by systematic artifice and a course of friendly and business dealing gained the confidence of a bank cashier, called one evening with B., a confederate, at the cashier's residence, in the bank building, and rang the door-bell. Being informed by the person who opened the door that the cashier had gone out, A. stated that his companion wished to transact some business with the cashier, and that they would call again later in the evening. On their return, about twenty minutes afterwards, learning that the cashier had come in, they were admitted without further remark, and thereupon committed an assault and robbery. Upon the separate trial of B. under an indictment of both for burglary:

Held, that the entry was a constructive breaking, and that, therefore, a conviction was proper under a count charging burglary by "breaking and entering."

In his charge, the Judge, referring to the evidence under a count charging felonious entering without breaking (under the Act of April 22, 1863), said, *inter alia*: "I cannot for my part see how the jury can hesitate a moment to convict the prisoner on the third count."

Held, that although a strong expression of opinion, yet taking it in connection with the entire charge, it did not amount to a binding instruction, and was not, under the circumstances of this case, error.

The prisoner having been found guilty under two counts charging a higher and a lesser crime, but for the same offence, the Court below sentenced him to imprisonment for six years and four months under one count, and to imprisonment, at labor, for three years and ten months under the other count, both terms of imprisonment to commence from the date of the sentence.

Held, that this was technical error, and so much of the judgment as imposed the shorter term of imprisonment was reversed.

Error to the Oyer and Terminer of Franklin County.

Indictment of Ralph L. Rolland and B. Johnston for burglary, and entering with intent to steal. (The case came before the Supreme Court upon a former writ of error, when the judgment of the Court below was reversed. See 1 Norris, 306; 3 WEEKLY NOTES, 230.)

The indictment in the present case contained three counts, viz: (1 and 2) charging burglary by *breaking and entering* the dwelling house of George R. Messersmith, Cashier of the National Bank of Chambersburg, at night, with felonious intent, (3) charging *entering* the said dwelling house at night, with felonious intent. This last count was drawn under the second section of the Act of April 22, 1863. (Purd. Dig. 353, pl. 195.)*

The defendant Johnston pleaded Not guilty, and he was tried alone, Rolland having temporarily escaped from jail. The evidence was similar to that taken on the former trial. The material facts, in brief, were that Rolland, having by false pretences during a considerable period of time acquired the confidence of Messersmith and the inmates of his residence, in company with Johnston, on the evening in question, obtained amicable, peaceable, and permissive admission into the said dwelling house, when they attacked and gagged Messersmith, the cashier of the bank, stole a package of money, and escaped. The details of the evidence are set forth at length

* This Act provides: "If any person shall . . . either by day or night, with or without breaking, enter . . . with intent to commit any felony whatever therein, the person so offending shall be guilty of felony," etc.

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in the opinion of the Supreme Court (*infra*), and in the reports of the former case (*supra*).

In answer to numerous points presented by defendant's counsel the Court (ROWE, P. J.), instructed the jury, in substance, that to constitute "burglary," there must be both a *breaking* and *entering* of the dwelling house, in the night time, with intent to commit a felony therein; that there was no evidence of an *actual* breaking, but that a *constructive breaking*, if proved, was the full equivalent of actual breaking; that the *procuring admission* by fraudulent pretence, trick, or artifice, with felonious intent, would in law constitute constructive breaking; and that such fraud might be perpetrated by a series of artifices devised for the ultimate purpose of gaining admission, the last link in the chain resulting in the fraudulent entry. Further, that if the jury believed that the admission was not procured by means of the false arts and pretences, but solely by reason of the gentle manners and agreeable conversation of the defendant, then it would not be a constructive breaking.

Referring to the charge of *entering* without breaking, under the third count of the indictment the Judge, after referring to the evidence, said: "The Commonwealth claims that evidence can establish nothing if this evidence will not establish the facts alleged in the third count, and I cannot, for my part, see how the jury can hesitate a moment to convict the prisoner on the third count."

Verdict, "Guilty of felony and burglary charged in the second count," and "guilty of the felony in entering the dwelling-house . . . with intent feloniously to steal, charged in the third count of said indictment."

The Court, having overruled a motion for a new trial, sentenced the prisoner, under the second count, to imprisonment by solitary confinement for six years and four months from the date of sentence, Dec. 12, 1876; and, under the third count, to imprisonment by solitary confinement, at labor, for three years and ten months from the said date of sentence, Dec. 12, 1876.

The defendant took this writ, assigning for error in numerous assignments, the answers to points and charge of the Court (as stated above and more fully quoted in the opinion of the Supreme Court *infra*), and the sentence of the Court.

J. McDowell Sharpe (with him *Duncan & McGowan*), for plaintiff in error.

On the question of constructive breaking, while admitting the general principle of law that the procuring the opening of a door at night by trick, etc., followed by an *immediate* entry, with felonious intent will constitute constructive breaking, we contend that the evidence showed that the alleged artifices and fraud *were not the means by which the defendant obtained admission.* Mr. Kindline, who opened the door, in response to the ring of the bell, testified that on the first visit of the defendant, with Rolland, on the evening in question, he *invited them in*, before they made the pretence of business; but they did not then enter, owing to Messersmith's absence. On their second visit, within half an hour, when the actual entry occurred, Kindline testified that they then made no pretence about business, but simply asked if Mr. Messersmith had returned; that he (Kindline) was not influenced in admitting them by anything said on the first occasion, and that he would have admitted them if they had made no pretence about business.

There was no connection established by the evidence between the previous conduct of Rolland, and the final entry of the defendant Johnston, in company with Rolland. There was nothing in the evidence to warrant a belief that the pretence of business was the culminating point of the prior fraudulent practices. To construe the simple entry, in the manner usual in paying an evening visit, into a burglarious breaking, would be to give the doctrine of constructive breaking a bolder sweep than any precedent will justify.

The learned Judge, in charging, "I cannot for my part see how the jury can hesitate a moment to convict the prisoner on the third count," in effect gave a binding instruction, and took from the jury all consideration of the evidence, both as to its weight and the credibility of the Commonwealth's witnesses. In a civil action a binding or one-sided instruction on the facts is ground for a reversal, *à fortiori* in a criminal prosecution for felony.

Wenrich & Co. *v.* Heffner, 2 Wr. 207.
Keister *v.* Miller, 1 Cas. 481.
Rhodes *v.* Commonwealth. 12 Wr. 396.
Lane *v.* Commonwealth, 9 Sm. 372.

There was error in the sentence, which imposed the anomaly of *concurrent* sentences, under different counts, to different terms of imprisonment commencing on the same day.

O. C. Bowers, District Attorney (with him *Kennedy & Stewart*), for the Commonwealth, defendant in error. The doctrine of constructive breaking as applied to the crime of burglary, is firmly established in our criminal jurisprudence. The theory upon which it proceeds is that the law, in denouncing burglary, contemplates an offence which could only be committed by the putting aside, or removal of an obstruction placed in the dwelling for its protection against intrusion, hence the word breaking; and that it could make no possible difference whether these obstructions be removed by the hands of the wrongdoer himself, or the innocent hands of another, who by the deceit and artifice of the thief is made to serve his purpose in this regard. *Qui facit per*

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alium, facit per se. He is a burglar who lifts the latch of a dwelling at night time, and enters with intent to commit a felony. Is he guilty of a minor offence who, with the same intent, procures another to lift the latch unwittingly, and then enters an open door and accomplishes his purpose? The law will not allow itself to be mocked or trifled with, and so it declares that the trick or artifice that procures the latch to be lifted by another, shall not avail him who contrived or practised it, and that his offence is burglary.

The operative fraud was the whole series of actions by which Rolland established confidence in himself, and thereby achieved an entry; and it is trifling to argue that the final pretence of business made on the first call did not relate to the second call, twenty minutes later. Under the circumstances proved, the ring of the bell, to procure the opening of the door, and thereby gain admission, under even a silent pretence of friendly intercourse, was a sufficient fraud and trick to constitute constructive breaking, had there been no prior actual pretence of business. The prisoner Johnston, by adopting and availing himself of Rolland's deception to procure an entry, was equally guilty of the constructive breaking.

Oct. 1, 1877. THE COURT. The assignments of error from the first to the fifth inclusive, refer to the same question, and may be considered together. They allege error in the application by the Court below of the doctrine of constructive breaking to the facts of this case. We may remark in passing, of the first assignment, that the defendant's third point was affirmed. This left him nothing to complain of. The point itself wholly omits any reference to the felonious intent existing in the mind of the defendant when he rang the door-bell. Without this, the point was without point. An entering of the character referred to would not be burglarious in the absence of any design to commit a felony. In affirming it the learned Judge of the Court below ruled the law more favorably to the defendant than he had a right to claim.

Without going into extended details, there was abundant evidence to show a conspiracy between the defendant (plaintiff in error) and his confederate Rolland, to rob the bank. This design had evidently existed for a period of some weeks, and the plan carefully arranged. There were well-matured preparations for disguise and flight: masks and gowns, and a horse saddled, and kept waiting near at hand; a pistol and dirk for defence, or attack if necessary; and gags to silence those who might be in the bank. There was a completeness of preparation that marks the experienced and accomplished burglar. This was especially the case with Rolland, who appears to have cultivated pleasant social relations with many of the citizens of Chambersburg, and particularly with Mr. Messersmith, the cashier of the bank intended to be plundered. This enabled him to become familiar with the plan of Messersmith's house and banking-room. The evidence was abundant to justify the conclusion that the object of all this social intercourse was to throw the cashier off his guard. To further inspire confidence, Rolland deposited one or more sealed packages represented to contain valuables, but which were of course but waste paper. It was a cunningly devised scheme, planned with skill, and executed with boldness. It would have succeeded, in all probability, but for Mr. Messersmith's unexpected and stubborn resistance. This was probably unlooked for in view of the disposition of the modern cashier to hand over the keys upon demand. The defendant and his confederate having thus laid and matured their plans, the next step was to effect an entrance into the bank. Mr. Kindline states how this was done: "I reside in the bank with Mr. Messersmith. I was in the bank on night of 24th of March last. I answered the call of the bell. Between eight and nine o'clock that night, a bell rang from the outside. I was in the main hall when the bell rang; it was then night time. The door was fastened with a dead-latch. It could not have been opened from the outside. I sprung back the dead-latch; I found two men there; one I recognized as Rolland. He asked me whether Mr. Messersmith was in; I said he had just walked out. He said he was sorry; that he had a friend from New York that wanted to transact some business with him, and he introduced a Mr. Johnston. Defendant is the man. He said he would call later in the evening. I said it was a disagreeable evening, and Rolland said 'Yes, we may have some sleighing yet.' Then they left. Shortly after Mr. Messersmith came; we walked into the parlor. I did not tell Mr. Messersmith that these parties had been there to see him. I went upstairs, and Mr. Messersmith to his office. Some time after, fifteen or twenty minutes, I heard the bell ring again. I answered it a second time; the dead-latch was down; the door was locked. It was a front door, leading from the street into the hall of the house. I opened the door, and found there Rolland and the man he had before introduced as Johnston. He asked me if Mr. Messersmith was in, and I said he was. They came in and put their hats on the rack. Johnston had an overcoat, took that off and hung it up. They had an umbrella this time. I led the way through the hall into the dining-room; they followed to Messersmith's office. I opened the door of the cashier's room, leading from the dining-room in, and saw Messersmith at the grate, with his back towards the door."

Was there evidence here of a constructive

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breaking? of an entrance obtained by artifice and fraud, by means whereof Mr. Messersmith was deceived, and the law evaded? The Court below said in answer to the defendant's fourth point: "If you believe that long before the 24th of March, 1876, Rolland had conceived the idea of entering the bank at Chambersburg with intent to rob or steal, and concocted a plan by which he might effect such purpose; that he cultivated the acquaintance of the cashier, and placed himself on as familiar terms as he could with him and his family, and began to talk to him of the buying of farms, and finally stated that he had a friend whom he wished to have come to Chambersburg to reside, and spoke of the Stouffer farm, and thought it was too small, and on the night in question presented himself with a friend, who he stated had some business with the cashier; and if you believe this was false and fraudulent, and intended to obtain admission to the house, and that it was by means of this that Rolland and Johnston did in fact obtain admission into the house, then this was such a fraud as amounted to a constructive breaking. If Rolland, by fraud and tricks and artifices, deceived the cashier, and induced him to believe that he was concerned to buy a farm for a friend, and that if he would call at his house with such a friend, it would be for that purpose, and that he was received into the house, and the whole household was so deceived, and Kindline opened the door under the influence of Rolland's deceptions as to his true character and purpose, it was a constructive breaking."

This ruling was not only free from error, but it was more favorable to the defendant than he was entitled to. It was laying an unnecessary burden upon the Commonwealth. If, when Rolland and Johnston rang Mr. Messersmith's bell, they did so with the intent of entering under the guise of friendship or the pretence of business, and then robbing the bank, it was a burglarious entry; it was a breaking within the meaning of the law. Nor could it matter that one of the burglars had established such social relations with Mr. Messersmith that he would have been admitted without question. It makes the fraud the greater. The dead-latch was down, and the door was locked. The bolts were withdrawn upon the implied if not express assurance that they came there as friends for social intercourse, or to transact business. This assurance in either case was a trick and deception. The law is not so impotent as to permit a burglar to enter a house under such circumstances, and yet evade the responsibility of his act.

We are not asserting any new doctrine, nor extending the application of an old one. The principle is fully sustained by the authorities cited in Rolland *v.* The Comm. (*supra*). In addition I will refer to Sharswood's Blackstone, Vol. 2, p. 226; Wharton's C. L., Vol. 2, § 1539; Roscoe's Crim. Ev. 307; Bacon's Abridgment, title Burglary (a), 133; Chitty's C. L., Vol. 3, p. 856, where numerous authorities are cited in support of the text. In Ducher *v.* The State (18 Ohio R. 317), the facts were these: Sarah Brown was living in the house with her son John Ondery. On the night mentioned in the indictment, they were awakened by some one knocking at the door, in answer to which John said "come in." The persons outside pulled the latch-string without being able to open the door, when they stated that they could not come in. John then got up and opened the door, when two men walked into the house. After they had entered, one of them nearly closed the door, and stood by it; the other stated that they had a warrant for John Ondery from the prosecuting attorney of Pickaway County. John asked for time to put on his clothes, and after he had done so, one of the men told him that they wanted his money, and asked for his mother's money. John said it was in a chest. They told her to get the key, which she did. They tried to open the chest where John told them the money was, and being unable to do so, with threats of violence induced her to do it, and then took from the chest the money described in the indictment: *Held*, that this was a constructive breaking under the Ohio statute, which provides against a "forcible" breaking and entering. It will be observed in the case above cited that the door was opened in obedience to a knock. Not a word was said by way of inducement to open it, yet it was a manifest trick and fraud. When a person rings the door-bell of a house, the owner has a right to presume that his visitor calls for the purpose of friendship or business. If, in obedience to the summons, he withdraws his bolts and bars, and the visitor enters to commit a felony, such entry is a deception and fraud upon the owner, and constitutes a constructive breaking.

That portion of the charge of the learned Judge of the Court below, which forms the subject of the sixth assignment of error, was certainly a strong expression of opinion, but taking it in connection with the entire charge did not amount to a binding instruction. It really amounted to no more than saying that if the jury believe the evidence, he did not see how they could fail to convict upon the third count. This was not error under the facts of the case. The evidence for the Commonwealth was overwhelming. It stood unchallenged and uncontradicted by the prisoner. The jury had no right to disregard the evidence, and the case was precisely of that class to which Mr. Justice STRONG referred in Kirkpatrick *v.* The Commonwealth (7 Casey, 198), when he said, "a Judge may rightfully express his opinion respecting the evidence, and it may sometimes be

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his duty to do it, yet not so as to withdraw it from the consideration and decision of the jury." If the case were in the least doubtful upon the evidence, if there had been anything for the jury to hesitate about, there might have been more force in this assignment of error. As it stands the defendant could not have been injured by that portion of the charge complained of.

The seventh and last assignment alleges error in the sentence. The prisoner was sentenced upon the second count charging burglary. He was also sentenced upon the third count which charges an entry without breaking. Both sentences take effect from the same day, so that the sentence upon the third count imposes no additional imprisonment. It was probably imposed by the learned Judge of the Court below, in order to avoid bringing the prisoner up for re-sentence in case this Court reversed the judgment on the second count. It was however, technical error, and as we have sustained the judgment on the second count, the judgment on the third count must be reversed. The offence of entering was merged in the higher offence of breaking and entering; the greater includes the less. Commonwealth *v.* Birdsall (19 P. F. S. 482) does not apply. There the different counts in the indictment showed different offences. Here the offence was the same, and this appears from the indictment itself.

So much of the judgment of the Oyer and Terminer as imposes an imprisonment of six years and four months under the second count of the indictment is affirmed; and so much of the judgment as imposes imprisonment of three years and ten months under the third count of said indictment is reversed.

Opinion by PAXSON, J.

[See Rolland *v.* Commonwealth, next case.]

May, '77, 149. June 20, 1877.

Rolland v. Commonwealth.

Criminal law—Burglary—Breaking and entering—Entering without breaking—Opening an inner door with intent to steal, after entering without breaking, is an actual breaking—Act of April 22, 1863.

The opening of an inner door of a dwelling house, at night, with intent to commit a felony in the house, constitutes a sufficient *actual breaking* under an indictment for burglary; *aliter* if the door is opened only for the purpose of escape.

Whether the intent was to commit the felony in the very room to which an entrance was effected by opening such inner door, or in another part of the house, is immaterial.

Per PAXSON, J. "We do not think the Act of April 22, 1863, § 2 (P. L. 531), was intended to apply to, or affect the offence of burglary at common law, but to define and furnish a new offence, unknown to the common law, yet partaking of the nature of burglary, viz., breaking and entering by day, and entering by day or by night without breaking; and also to apply to a class of buildings which are not the subject of common law burglary, and that it was to such buildings only that the words 'with or' in the Act of 1863 have reference."

Error to the Oyer and Terminer of Franklin County.

The indictment of Ralph L. Rolland, charged, in two counts, burglary by *breaking and entering*, etc., and *entering* without breaking; the latter count being framed under the second section of the Act of April 22, 1863 (Purd. Dig. 353, pl. 195). Plea, not guilty.

Upon the trial (before ROWE, P. J.) the same facts were proved as in the case of Johnston *v.* Commonwealth (reported *supra*). In addition thereto, there was testimony in this case to the following effect:—

After the two men, Rolland and Johnston, were admitted to Mr. Messersmith's house by Mr. Kindline, the latter conducted them into the cashier's room, and left them there with Mr. Messersmith, Kindline returning to his own room upstairs. Messersmith testified, that when Kindline withdrew from the cashier's room, he *latched and closed the door* leading from the cashier's room into the dining-room, as he went out. Kindline also testified that on admitting the men, and conducting them into Mr. Messersmith's presence in the cashier's room, he left, *closing and latching* the door leading into the dining-room; and passing through the dining-room into the hall *closed and latched that door*, and went up to his room. Messersmith, after describing the murderous attack upon him, and his resistance and outcries, said: "During this struggle some one fell over a chair. At this point I thought I heard my brother-in-law (Mr. Kindline) coming down the back stairway. Rolland released his hold upon me at that moment, *opened the door of the dining-room*, and rushed out. . . . The door from the cashier's room into the dining-room had not been opened from the time Kindline left until Rolland opened it."

Rolland was captured in the yard of the house almost immediately after the occurrence. While in jail it appears that he, on several occasions, spoke freely to several persons as to his motives, plan, and actions in relation to the robbery, and gave more or less full accounts of the struggle with Messersmith and its incidents. Several witnesses testified to statements by Rolland, *inter alia*, as follows: "He (Rolland) said his intention and main object in coming here was to rob the bank; that he was disappointed in the resistance of Messersmith; and that, when he thought he was overcome in the struggle, he left him in

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charge of Johnston, while he went upstairs to *secure Mr. Kindline;* and that, on going into the entry, he was surprised to see Mr. Kindline coming down stairs at so rapid a rate; and was further surprised, on looking round, at seeing Johnston and Messersmith coming in at the other end of the hall. He said he presented a pistol at Kindline and it had not the desired effect. He said he found that the servants were raising an alarm, and that nothing was left but to attempt an escape. He said that he got out the back door, and that he fell down."

Another witness testified: "I understood him that Messersmith was on the floor. He said he was going out *to attend to Mr. Kindline.*" Another witness: "He said he left Messersmith there, after he was subdued, in charge of his comrade, and started to go upstairs *to quiet Mr. Kindline.* . . . I asked him if his intention was not to escape when he came out of the cashier's room with the $30,000. He said 'No, that was a small matter; *he intended to take all the funds of the bank.*'" And another witness testified: "He said there was no use of his denying that he attempted to rob the bank; that a package belonging to the bank was found on his person. 'It was not the contents of that package I wanted, but to go through the bank and get all that was there. We had Messersmith down and completely intimidated. I knew Kindline was in the house, and must be shut up. I told my friend to hold Messersmith, but not harm him; I must see to the front. I left Messersmith in charge of my friend, and went to the hall. When in the hall I saw Kindline, and would soon have intimidated him; I had him under cover of my pistol, when, to my surprise, my friend followed me quickly, with Messersmith on his heels, crying *murder.* I had nothing more to do than to attempt an escape, and capture was the result.'"

Counsel for the Commonwealth contended that the two elements proved by the above testimony, to wit: (1) the opening of an inner door or doors, (2) with felonious intent; constituted an *actual breaking* under the first count of the indictment. This was the only material question of law in the case.

The prisoner's counsel requested the Court to charge, *inter alia:* (2) The Commonwealth has failed to show any *actual* breaking. *Answer.* "That is refused. I submit to the jury, on all the evidence, the question whether an actual breaking of the dwelling house of George R. Messersmith on the night of the 24th of March, 1876, has been proved.

"There cannot be burglary without a breaking; and the opening of a door, whether an inner or an outer door, *in an effort to escape,* is not a burglarious breaking. So much was decided by the Supreme Court in this case on a former trial.

"But the breaking requisite to constitute a burglary is not confined to the external parts of the house, but may be of an inner door, after the offender has entered by means of a part of the house which he has found open. Thus, if one enters the dwelling of another in the night time, the outer door being open, and when within the house, unlatches an inner door, with intent to steal, this will be burglary.

"If the prisoner Rolland's design was to get the contents of the vault of the bank, and if, having succeeded, as he thought, in subduing Messersmith, so that he might safely leave him with Johnston, he unlatched and opened the door leading from the cashier's room to the dining room, and went out thereat for the purpose, *not of escaping,* but of securing and quieting Kindline, and with the intention, after that should be done, of prosecuting further his design to rob the bank, *with the intention of coming back to the banking room and continuing an effort already begun to rob the bank* of its moneys and valuables, then such unlatching and opening of that door was a breaking within the meaning of the law.

"But if Rolland, in unlatching and opening the door—either door—did so with the *intent to escape,* it would not be such a breaking as is requisite in burglary."

The Judge, in his general charge, said further: "The great struggle in this case has been about the point of the breaking. The counsel for the Commonwealth have insisted that the evidence delivered before you shows a breaking as well as an entrance. The prisoner's counsel claim that it does not do so.

"Now, breaking is either actual or constructive. Actual, as when one unlocks or unlatches a door which is closed and enters. Constructive, where admission to the house is procured by trick or fraud.

"You have nothing to do with a constructive breaking in this case. I must instruct you that there can be no conviction for constructive breaking on the evidence in this case. The counsel for the Commonwealth have explicitly declined to ask such instruction, or to claim conviction on that ground, and have so notified the counsel for the prisoner and the Court. We are, therefore, relieved from any trouble on this score. The Commonwealth rests her case on an *actual* breaking.

"Now, in order to prove an actual breaking, the Commonwealth relies on the evidence of John M. Pomeroy, W. C. M'Knight, Frank Keefer, and John S. M'Ilvaine. These witnesses testify to conversations with Rolland at the jail. Pomeroy and M'Knight were together, and they agree substantially in saying that Rolland said that he left Messersmith in charge of John-

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ston, supposing that he was overcome in the struggle and would be safe in Johnston's hands, and would give no further trouble, and that he left the room with the intention of going up stairs to secure Kindline, and that on going into the hall he was surprised to find Kindline coming down stairs, and on looking round, to see Johnston and Messersmith coming into the hall; that he then saw that nothing remained but to escape. To the same effect is the testimony of Keefer and M'Ilvaine.

"The Commonwealth relies upon the evidence of Messersmith and Kindline to show that the door was shut and latched; on the evidence of Messersmith to show that Rolland opened it; and on the four witnesses whom I have named above to prove that he went out of this room with the intention of securing, or quieting, or shutting up Kindline, and that the intention to escape was only formed when he saw Messersmith follow him into the hall; and on Keefer and M'Ilvaine to show that after Kindline should be secured, the vault was to be robbed, and all the funds of the bank taken.

"If you believe these witnesses, and that Rolland meant to do what he told them was his intention when he left the room of the cashier and entered the hall—that is, if you believe that the door was latched and Rolland opened it after he thought Messersmith subdued, and went out into the dining room and thence into the hall, with the design of securing Kindline, and after that of proceeding to rob the bank, *then such unlatching of the door was a burglarious breaking*, and he may be convicted on the first count of the indictment. If he is, he will be condemned out of his own mouth, for without the declarations made by him at the jail to the four witnesses who speak as to them, there would be no evidence of an actual breaking."

Verdict, guilty in manner and form as indicted. A motion for a new trial having been overruled, the prisoner was sentenced by the Court to an imprisonment of eight years by solitary confinement at labor.

The prisoner took this writ, assigning for error the answer of the Court to his second point, and the portion of the charge above quoted.

J. McDowell Sharpe (with him *Duncan & McGowan*), for the plaintiff in error.

In every case, English or American, from Edmond's case (Hutton's Rep. 20, and Kelynge's Rep. 67) down to the present time, where the opening of an inner door and passing through it have been held a sufficient breaking in law to constitute burglary, the intention to commit a felony *in the very room into which such entrance was effected*, was clearly present and constituted the very essence of the offence; and that element was absent in this case. The facts did not warrant the learned Judge in charging that there was an *actual breaking* under the Pennsylvania Criminal Code, and the Act of April 22, 1863, which was intended to meet the *casus omissus* of a nocturnal entry without breaking, and which really applies to this case.

O. C. Bowers, District Attorney, and *John Stewart*, contra, cited—

State *v.* Wilson, 1 Coxe (N. J. Law), 441.

Oct. 1, 1877. THE COURT. This record presents but a single question. Was there such a breaking as constitutes felonious burglary? That the opening of an inner door may be such breaking is too well settled to need discussion. If a person leaves his doors or windows open, it is his own folly and negligence, and if a man enters therein it is no burglary; yet, if he afterwards unlocks an inner or chamber door it is so. (Sharswood's Blackstone's Com., Book iv. p. 226). The same rule is asserted in Wharton's Crim. Law, § 1536; 2 Bishop's Crim. L. § 97, Roscoe, p. 302, and numerous authorities cited, in which the point has been decided. It was conceded at bar that the law is so, but it was contended that in the case of the opening of an inner door, it must be accompanied with an intent to commit a felony in the very room so entered.

We do not assent to this qualification of the common law rule. If a burglar, entering by an outer door or window incautiously left open, with the intent to commit a felony in a particular room in the house, as if he intends to rob a safe, with the location of which he is familiar, and in furtherance of his design, and to enable him to accomplish it successfully, opens the door of the adjoining room in the same house to gag and bind the owner sleeping therein, it is a breaking within the meaning of the law defining the offence of burglary. Yet in such case there would be an entire absence of an intent to commit a felony in the bedroom. The binding of the owner, standing alone, would be a mere assault and battery, punishable as a misdemeanor. Taken in connection with the main object it assumes a different character, and becomes a necessary incident of the felony, as much so as the lifting of a latch or the breaking of the door of the safe.

The true test as applied to an inner door of a house is whether it was opened in the perpetration of, or attempt to perpetrate a felony. If it was a necessary act in the perpetration of the felonious design, it can make no difference that the felony was to be committed in an adjoining room. There may be cases in which the qualification referred to would apply, as in the case of a lodger at an inn who intends to commit a felony in another room in the same house. But if such qualification exists in any case, we fail to see its application to the facts of the case at bar. We

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will not strain the law to meet a particular case, nor will we define it away in the interest of burglars. We think the Court below submitted the question of intention fairly to the jury. They were told that if the prisoner opened the door for the purpose of escaping, he could not be convicted of burglary; but if it was done in furtherance of a design to commit a felony in the house, the offence was complete. This ruling was clearly correct. Our attention was called to the Act of 22d of April, 1863 (P. L. 531), and it was urged that the second section of said Act was intended to meet such cases as this; that is, where there is an entering without the breaking of an outer door, but the opening of an inner door, with intent to commit a felony. In Rolland *v.* The Commonwealth (1 Norris, 306) we endeavored to make the meaning of this Act plain, and to reconcile it with the 135th section of the Act of 31st of March, 1860 (P. L. 415). I will repeat now, what was said at greater length in that case: That we do not think the Act of 1863 was intended to apply to, or affect the offence of burglary at common law, but to define and furnish a new offence, unknown to the common law, yet partaking of the nature of burglary, viz., breaking and entering by day, and entering by day or by night without breaking; and also to apply to a class of buildings which are not the subject of common law burglary, and that it was to such buildings only that the words "with or" in the Act of 1863 have reference. We cannot make this subject any clearer.

There is an admitted obscurity in the section referred to, and a necessity for such a construction as would reconcile their seeming repugnancy. We could not assume it to have been the legislative intent to abolish the offence of burglary. In the case before us the offence of common law burglary was complete, and the provisions of the Act of 22 April, 1863, have no application.

The judgment is affirmed.

Opinion by PAXSON, J.

May, '77, 197. May 21, 1877.

Lydia Smith's Appeal.
Estate of Thaddeus Stevens.

Will—Annuity, or legacy, in the alternative, with condition affixed—Election—"Further" defined.

The testator's will contained the following bequest: "I give to Mrs. L. S., my housekeeper, five hundred dollars a year during her natural life, to be paid semi-annually, or, at her option, she may receive five thousand dollars; she may make her election, and then release all further claim on my estate:"

Held, that the "release of all further claim" was a condition affixed to the bequest in either of its forms, and that an acceptance thereof in either form precluded any further claim on the estate.

Appeal from the Orphans' Court of Lancaster County.

The will of Thaddeus Stevens, containing the clause quoted in the above syllabus, was duly proved, and the sum of five thousand dollars was paid to and accepted by Mrs. Smith. The executors having filed their account, auditors were appointed to make distribution. Mrs. Smith made no claim before the auditors on account of the bequest, but claimed compensation for services as housekeeper and nurse for a period of six years prior to the death of Mr. Stevens, amounting, with interest, to $7749. This claim was resisted by the executors and rejected by the auditors, on the ground that having accepted the legacy, she thereby released all claims as creditor, and was estopped from claiming compensation for her services. Exceptions to the auditors' report filed by the claimant were overruled, and the report confirmed, whereupon this appeal was taken, the overruling of the exceptions being assigned for error.

Thomas E. Franklin and *H. M. North*, for the appellant.

By the terms of the will, the election required to be made was between two different legacies, and not between appellant's lawful demands and a legacy. She has made "no other claim" *under the will*, which is what we take the words to mean.

The doctrine of election is one of intention, and the intention of the testator must be clear, requiring legatees or devisees to abandon repugnant rights, or they will not be required to do so.

Crosbie *v.* Murray, 1 Ves., Jr. 557.
Finch *v.* Finch, Id. 541.
Blake *v.* Bunbury, Id. 524.
Dashwood *v.* Peyton, 18 Ves. 41.
Philadelphia *v.* Davis, 1 Wh. 502.
Van Dyke's Appeal, 10 Sm. 482.
Horner's Ex'r *v.* McGaughy, 12 Id. 189.
Zeigler *v.* Eckert, 6 Barr, 19.

The word "further" in the will means, as defined by Webster, "additional;" it is not as if he had said "all *other* claims."

George M. Kline, for the appellees.

This is not a case of equitable election, as where a testator gives money or land to A., and by the same will gives something of A.'s to B., in which case A. must elect whether he will accept under the will or retain his own property, upon the general principle that a man shall not be allowed to claim the benefit of any instrument unless he is willing to carry out its provisions.

City of Phila. *v.* Davis, 1 Wh. 510.
Van Dyke's Appeal, 10 Sm. 47[illegible].
Zimmerman *v.* Zimmerman, 11 Wr. 380.
Story's Eq., secs. 1075–6 and notes.

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It is a case of express election, "where a condition is annexed to a gift, a compliance with which is distinctly made one of the terms upon which the gift can alone be enjoyed."

Bisph. Eq., sec. 296.
Hall *v.* Hall, 2 McCord Ch. 269, 306.
Noys *v.* Mordaunt, 1 Leading Cases in Eq. 331 (notes).
Cox *et al. v.* Rogers, 27 Sm. 160.

This is a legacy on express condition. The legatee is to select between an annuity and a gross sum, and having made her selection, "*then release all further claim*" on the estate.

May 21, 1877. THE COURT. The question in this case is one of interpretation of that clause in the will of Mr. Stevens, in which he gave to Mrs. Smith, his housekeeper, in these words: "Five hundred dollars a year during her natural life, to be paid semi-annually, or at her option she may receive five thousand dollars. She may make her election, and then release all further claim on my estate." We are of opinion the last clause is a condition affixed to the legacy in either of its forms. She might elect to take it in the form of an annuity or of cash down; but "then" (this is the word) she must release all further claim; that is, all claim beyond the legacy. The word further is a word relating to distance, and in its application, as used here, refers figuratively to everything in the distance beyond the legacy. Unless it means this, the condition was useless, as an election of the cash would necessarily exclude the right to demand the annuity.

Decree affirmed, with costs, and appeal dismissed.

PER CURIAM.

Common Pleas—Law.

C. P. No. 1. Sept. 18, 1877.

Platt v. Kelso.

Affidavit of defence—Bankruptcy—The adjudication of the defendant as a bankrupt is a sufficient defence to a suit on a promissory note to prevent judgment—That the adjudication was on a voluntary petition makes no difference.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit on a promissory note. The affidavit of defence set forth that the defendant had been adjudicated a bankrupt, and that the question of his discharge had not yet been determined.

The defendant had applied to the U. S. District Court to be adjudged a bankrupt on his own petition, on Saturday, September 1st, 1877. The following Monday was judgment day in the Common Pleas.

Dolman, for the rule.

Fletcher, contra, cited—

U. S. Bankrupt Act, § 5106.
Frostman *v.* Hicks, 3 WEEKLY NOTES, 202.

Dolman, in reply.

The case of Frostman *v.* Hicks only refers to suits commenced after an adjudication in bankruptcy. Here this Court already had jurisdiction, and the case was ripe for judgment. The Federal Courts have no power to stay the hands of this Court.

Rule discharged.

C. P. No. 1. Feb. 2, 1878.

Bank v. Parrish.

Practice—Assignment of causes under the organization of the Courts on the adoption of the new Constitution—Original and alias writs—Rule of Court.

Rule to strike a case from the trial list.

The object of this rule was to determine whether the case was triable in this Court (C. P. No. 1) or in C. P. No. 3.

The original summons was issued to June Term, 1869, and was returned *nihil habet;* an *alias* issued to December Term, 1873, which was duly served, and the cause proceeded to issue.

By the rule for assignment of old causes to the several Courts of Common Pleas as re-organized under the new Constitution, all actions brought to or commenced during the *June* Term of any year were transferred to C. P. No. 3, and those brought to *December* Term of any year were transferred to C. P. No. 1.

By the rule of Court relating to Records (Sec. 116 of Rules of C. P. No. 3, and Sec. 112 of the other Courts), it is provided that "Alias and pluries writs, ... and all other writs and process of every kind, which are founded upon and ancillary to some other action, judgment, claim, or proceeding, shall be entitled as of the same term and number as said original."

S. C. Perkins, for the rule. The suit, having been commenced to June Term, falls within the allotment to C. P. No. 3.

Parrish, contra. The original summons having been returned *nihil habet*, the alias, issued several years afterwards, was, in effect, the beginning of the suit, and in this view of the case, it was properly transferred to this Court.

Rule absolute.

C. P. No. 2. Dec. 29, 1877.

Frankish v. Marsh.

Practice—Demurrer to magistrate's transcript.

Rule to strike off a demurrer.

This was an appeal from the decision of a Magistrate's Court.

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Plaintiff entered a rule on defendant, to plead to the magistrate's transcript. Defendant demurred to the transcript on technical grounds. Whereupon the present rule was taken by plaintiff.

E. B. Watson, for the rule.

Charles Fry, contra.

THE COURT. A demurrer cannot be struck off unless plainly inappropriate as being to a question of fact or for similar reason. The proper practice is to put it on the argument list, and if it is plainly frivolous and for delay we will give judgment on it for plaintiff.

Rule discharged.

C. P. No. 2. Dec. 29, 1877.

Wheeler v. Goldbeck.

Practice—Affidavit of defence law—Book entries—Omission of year—Insufficiency.

Rule for judgment.

Assumpsit, on the following book entries:—

Mr. CHAS. F. GOLDBECK, Phila.,
To WALTER G. I. WHEELER, Dr.,

Ap'l 3.	1 keg Weinstein, 100 lbs. nett, @ 5½,		$58 00
June 7.	2 bbls. Nation, 1525 " " @ 5½,		59 01
	etc.	etc.	etc.

The defendant filed a suggestion that the copy filed was insufficient in law to entitle the plaintiff to judgment, for the reason that there is no year specified when the goods are alleged to have been furnished.

Louis F. Benson, for the rule.

E. O. Michener, contra.

A defendant is entitled to know with certainty what goods he is expected to pay for. Suppose he had been purchasing goods for a number of years from the plaintiff, he might have different defences for the charges of different years.

[HARE, P. J. It is certainly applying the rule with great rigor, but we are obliged to refuse judgment.]

Rule discharged.

C. P. No. 4. Dec. 5, 1878.

Bement et al. The Philadelphia Impact Brick Machine Co., Limited.

Limited partnership—Under the Act of June 2, 1874, the capital must be subscribed in cash—Liability of individua members for debt of partnership where no p operty found un ler an execution against partnership—Production of books and papers — A limited partnership formed prior to the Act of May 1, 1876, not having adopted it nor complied with its requirements, cannot invoke its provisions against creditors.

Rule for the production of books, and to show cause why execution should not issue against the individual members of the association defendant.

Defendants were a limited partnership association, organized under the Act of June 2, 1874 (P. L. 271; Purd. Dig. 1891). Their statement, filed April 22, 1876, in the Recorder's office at Philadelphia, set forth that the amount of their capital was $50,000, divided into 1000 shares of $50 each, and specifically stated the number of shares subscribed for by each member. The object of the association was therein stated to be, *inter alia*, the purchase from some of the members of the territorial right in a certain patent for the price of $50,000, and the manufacturing and selling machines thereunder.

On April 12, 1877, plaintiffs, in an action at law, recovered a judgment against the association, and an execution was issued thereon, which was returned "No goods found belonging to defendants."

Section 2 of the Act of 2d June, 1874, after providing that if on an execution against the association no property shall be found, then execution may issue against any of the members to the extent of the portions of their respective subscriptions not paid up, proceeds as follows:—

"Provided, always, that no such execution shall issue against any member except upon an order of Court, or of a Judge of the Court in which the action, suit, or other proceeding shall have been brought or instituted; and the said Court or Judge may compel the production of the books of the association, showing the names of the members thereof, and the amount of capital remaining to be paid upon their respective subscriptions; and from them or other sources of information ascertain the truth in regard thereto, and may order execution to issue accordingly."

Plaintiffs then, on application to the Court, obtained, under the provisions of the above Act of June 2, 1874, a rule to show cause why the books of the defendant association should not be produced in open court, and why execution should not issue against the individual members for the amount of their subscriptions not paid up. After argument the books were ordered to be brought into court. The secretary and treasurer of the association defendant then filed affidavits that no books had ever been kept by the association. Plaintiffs then, by leave of the Court, proceeded to take the depositions of the chairman, secretary, and treasurer, to ascertain the amounts of the individual subscriptions remaining unpaid. These depositions showed that not a dollar in cash had been paid by any of the subscribers, and that no formal meeting of the association or of its board of managers had ever been held. It appeared, however, that an assignment of the territorial right to said patent to the association had been executed by the members to whom it originally belonged, and that, by a private arrangement between these owners and the other members, this assignment was considered in full payment of the subscriptions of all the members.

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Frank P. Prichard, for the rule.

Although the Act of 1874 does not expressly provide that the subscriptions to a partnership association shall be payable only in cash, yet such is the evident intention of the Legislature as gathered from the whole Act. This view is strengthened by the subsequent passage of the Act of May 1, 1876 (P. L. 89; Purd. Dig. 2028), providing for subscription in property upon certain conditions. Defendants were organized before the passage of this later Act and have never complied with its provisions.

The defendants' statement, as recorded, provides for a capital of fifty thousand *dollars*, and there is no stipulation for a payment in property. One of the objects of the association was stated to be the manufacture of machines, and as this would require a cash capital creditors had a right to presume that cash subscriptions were intended.

Wm. M. Smith, and *George S. Selden*, contra.

There is nothing in the Act of 1874 requiring payment of the subscriptions in cash, and in the absence of any such provision a payment in property made in good faith is valid. The principal object of the association was the purchase for $50,000 (their whole capital) of a territorial right to a patent. The evidence shows that this right has been assigned to them. It would have been a useless form to have paid in $50,000 in cash, and then immediately paid it out again, nor would plaintiffs have been benefited thereby.

C. A. V.

January 7, 1878. THE COURT (after stating the facts). The testimony before us shows that notwithstanding the large subscriptions on paper made to the association, amounting in the aggregate to $50,000, not a dollar in money was paid by any subscriber into the treasury of the association. In lieu of money the subscribers assigned to the association their respective interests in certain patent rights. These rights may have been valuable to the association, and perhaps necessary to enable them to carry on their business, which was the manufacture of brick machines and the sale of rights to manufacture such machines. But the capital intended by the Act was clearly, where not otherwise designated in the recorded statements required by the Act of 1874, a cash capital—money, not such other descriptions of property as the subscribers might choose to call capital, and to put into the concern at any fanciful valuation they might see fit to put upon it, and thereby mislead and deceive the public.

A subsequent Act of May 1st, 1876 (Purd. Dig. 2028), enables persons who desire to form a limited partnership association under the Act of 1874 to contribute to the capital in real or personal estate, mines, or other property, at a valuation to be approved by all the members subscribing to the capital of such association; *Provided*, that in the statement required to be recorded, such subscriptions shall be certified *according to the fact;* that is, that the certificate and schedule filed shall contain a true description and valuation of the property contributed as capital. This Act plainly shows that by the first Act (June 2d, 1874) the Legislature intended a cash capital. They relaxed that requirement in the subsequent Act, but only upon condition that the members of such associations should truly set forth in their certificate the exact nature of the property contributed as capital and a correct valuation thereof. The defendants were associated under the Act of 1874, not under the Act of 1876. Their association, indeed, was formed before the passage of the Act of 1876. They might have subsequently availed themselves of the Act of 1876 by complying with its requisitions, at least as against subsequent creditors, but they have never done so. If we were to write the Act of 1876, therefore, into the Act of 1874, the defendants would not be within its protection, for they have never filed any veracious certificate. The certificate which they filed was a false certificate. When they stated that 1000 shares had been subscribed at $50 a share, and that the capital stock of the association was then $50,000, they made a statement which did not correspond with the truth, and which was well calculated to deceive all who dealt with them. But they are to be held to those statements nevertheless. Not having paid in any part of this pretended capital, the subscribers are all answerable for the debt due to the plaintiffs. Execution is accordingly awarded against them individually, and an order to that effect may be drawn up and entered of record.

Opinion by THAYER, P. J.

Orphans' Court.

Jan. 22, 1878.

Power's Estate.

Devise—Religious, charitable, and superstitious uses—Statute of 1 Edw. VI. c. 14—Bequest of money to be expended in masses for benefit of testator's soul not a charitable use within the Act of April 26, 1855.

Sur exceptions to adjudication.

Martin Power, the decedent, by his will, after various bequests, directed as follows:—

"Item. All the rest, residue, and remainder of my estate I give and bequeath to St. Mary's Catholic Church, to be expended in masses for the benefit and repose of my soul."

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John Mellen and Ulurtin Pizec were appointed executors. The testator died within thirty days of the execution of his will.

Before the auditing Judge it was contended on behalf of the children of the decedent, that the will, not having been executed one calendar month before death, the above legacy was void, and the amount thereof should be awarded to the heirs of the testator.

On the other hand, it was claimed that the residuary clause was valid, as the object of the bequest was not contemplated by the Act of April 26, 1855 (Purd. Dig. 1477, pl. 22).

The Auditing Judge awarded the residuary fund to the heirs-at-law, holding the legacy to be for "charitable" and "religious" uses, and consequently void within the Act.

A. A. Hirst, for the exceptants.

H. F. Hepburn, contra.

James L. Clifford, for the accountants.

Feb. 9, 1878. THE COURT. The testator, after making provisions for all the members of his family, devised the residue of his estate "to St. Mary's Catholic Church, to be expended in masses for the benefit and repose of my (the testator's) soul." He died within thirty days after the execution of his will. The residue of his estate amounted to $649.79.

The question is, was this a devise to a charitable or religious use, within the meaning of the Act of 26th April, 1859 (Purd. Dig. 1477, pl. 22).

There can be no doubt that in England it would be regarded as a superstitious use, and therefore void. The making of a gift to procure the saying of masses for the soul of a devisor, was one of the superstitious uses prohibited by the statute of 1 Edw. VI., c. 14. But a superstitious use can hardly be said to exist in this country, where, in the absence of any State religion, there can be no standard of orthodoxy. (Methodist Church *v.* Remington, 1 W. 224.)

It was said in McLean *v.* Wade (5 Wr. 266), that "a religious purpose is a charitable purpose." Sir THOMAS PLUMMER defines a charitable use in these words: "Where the donor appropriates a gift either to charity or to some public purpose, such as the repair of bridges, forts, and havens, not apparently in any manner to the benefit of himself." (Mellick *v.* The Asylum, 1 Jac. Ch. C. 180.)

But the best definition of what constitutes a charitable purpose is that of Mr. Binney, adopted by the Court in Price *v.* Maxwell (4 Cas. 23), and in other cases: "Whatever is given for the love of God or for the love of our neighbor, in the catholic and universal sense, given from these motives and to these ends, free from the stain of everything that is personal, private, or selfish, is a gift for charitable uses."

A religious use may be said to be such a charity with the infusion of a religious element.

It is difficult to see how the present devise can be brought within the terms of this definition. So far from being free from everything of a personal, private, or selfish nature, it had its origin in a motive, which was in the highest degree laudable, and yet in the highest degree personal and selfish. The fact that the Church might remotely profit by the money the testator chose to pay for its mediation, in no sense elevated the gift to the rank of a gift for the advancement of religion. The object of the testator was as purely private and selfish as if he had bequeathed a fund to the Church for the erection of a monument to himself, or the purchase and maintenance of a pew for his family, both of which gifts have been held not to be charities. (Roper on Leg., vol. 2, p. 138.)

It may be said that the practical effect of this construction would be to evade the statute. We do not believe that any such intention was in the mind of the testator; but even if the fact be admitted, the remedy is with the legislature, and not with the Court. In Schultz's Appeal (30 P. F. Smith, 396), which arose under this Act, the Court expressly admitted that the evident intention of the testator was to avoid the statute, but it nevertheless gave effect to his gift.

It has been long the practice to award a moderate sum in payment of the service of mass in cases where the decedent is of the Catholic faith, as a part of the funeral expenses. If the testator's belief in the continued efficacy of these prayers leads him to devote his property to securing them after death, we should be careful that, under cover of a statute intended to protect him from imposition, we do not hinder him in the exercise of what he may regard as a religious duty. It is not pretended that the question is free from embarrassment. The Act of 1855 was meant to save men from the force of solicitations addressed to them under the sanction of religion in the near view of death. But as that Act is in derogation of the absolute right of all men to control the disposition of their own property, it should be strictly construed.

It is easy to imagine cases in which the testator might leave the bulk of a large estate to the Church in payment for masses for the repose of his soul. But it must be remembered that the fund can never be diverted, for the benefit of the Church, from its original purpose, and that, on the attempt at diversion equity will intervene and raise another trustee to administer it according to the intention of the donor. (Schnorr's Appeal, 17 Sm. 138.)

The exceptions are sustained.

Opinion by ASHMAN, J.

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WEEKLY NOTES OF CASES.

VOL. V.] *THURSDAY, FEB. 21, 1878.* [No. 4.

Supreme Court.

Oct. & Nov. '77, 253, 254. Nov. 8, 1877.

Kilgore v. Magee.
Central Board of Education v. Phelps.

Constitutional law—Art. III., Sect. 7, of Constitution—Local and special legislation—Classification of cities according to population—Court has no jurisdiction to inquire whether the forms prescribed by the constitution have been observed, in the passage of a bill—Abridgment of powers and emoluments of public officers—Act of March 22, 1877.

Section 7, Article III., of the new constitution, prohibiting local or special legislation, does not prevent the classification of cities according to their population, and the fact that some of the classes contain each but one city, does not invalidate such classification.

Wheeler *et al. v.* Philadelphia *et al.* (27 Sm. 338), followed.

The provisions of Art. III. of the constitution, as to the mode of procedure in the passage of bills, are binding only upon the consciences of the members of the legislature, and when a law has been passed and approved and certified in due form, it is no part of the duty of the judiciary to go behind the law as duly certified, to inquire whether the forms prescribed by the constitution have been observed in its passage through the legislature.

The legislature in the exercise of its power of repeal and revision may abridge the powers and emoluments of those who occupy merely official positions unprotected by any special constitutional provisions.

Appeals from the Common Pleas No. 2, of Allegheny County.

These two cases came before the Court below on bills in equity—one filed May 4th, 1877, by Samuel Kilgore, a citizen and taxpayer, and the treasurer-elect of the city of Pittsburgh, against C. L. Magee, treasurer, R. M. Snodgrass, controller, and the members of the finance committee of councils of said city.

(*a*) This bill set forth, that said C. L. Magee, city treasurer, claimed the right and was about to appoint some person, then unknown to complainant, as collector of outstanding or delinquent taxes and water rents, under a pretended Act of Assembly entitled "An Act in relation to cities of the second class, providing for the levy, collection, and disbursement of taxes and water rents," and which purported to have been approved March 22, 1877 (P. L. page 16). The bill averred that said Act was unconstitutional and void and did not legally confer said right or authority, because (1) It was not passed or enacted conformably to the requirements of the constitution of the Commonwealth. (2) It contains more than one subject, not clearly expressed in its title. (3) It was altered and amended on its passage through both Houses of the General Assembly so as to entirely change its original purpose. (4) It was not read at length on three different days in each or either House of the General Assembly. (5) It is a local or special law, only applicable to and intended to operate upon and regulate the affairs of the city of Pittsburgh, under a pretended classification made by the said General Assembly, whereby said city is alone created a city of the second class, contrary to Art. III. of the constitution. (6) It was passed for the purpose of increasing the emoluments of C. L. Magee, city treasurer, and indirectly extending his term of office indefinitely, in that it provides that his appointee shall hold his office for a term of five years and "until his successor shall be duly appointed and qualified." (7) It was passed after the election of complainant to the office of city treasurer, and diminished his rights and emoluments, contrary to Art. III., Sec. 13, of the constitution.

The bill prayed that said pretended Act of Assembly be declared unconstitutional and void, and that the city treasurer, the controller, and the finance committee of councils, be enjoined from doing or allowing any matter or thing provided or directed in said Act, and that the person appointed by said city treasurer as collector of delinquent taxes and water rents (should any such appointment be made) be enjoined from performing any duties pursuant to said pretended law or appointment.

The Act in question made a number of important changes in regard to the levying and collection of taxes in cities of the second class, and provided, *inter alia*, as follows:—

"SECTION 3 The educational school and poor departments shall be departments of the city government and the amount set apart for educational school and poor purposes shall be sacred to such purpose and shall be paid out by the city treasurer only upon warrants drawn by the mayor and countersigned by the city controller The educational school and poor funds shall not be divested warrants on said fund shall only be drawn upon requisitions being filed with the city controller by the proper educational school or poor boards

"SECTION 7 That the city treasurer in cities of the class aforesaid shall previous to the first day of August eighteen hundred and seventy-seven (1877) appoint a person to be denominated collector of outstanding or delinquent taxes and water rents the person so appointed shall hold his office for the term of five years from the date of appointment and until his successor shall be duly appointed and qualified . . . .

"SECTION 8 All taxes and water rents unpaid at the

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end of the month in which by the terms of this act the same are payable shall be deemed delinquent and it shall be the duty of the city treasurer to prepare a registry or list of all taxes unpaid . . . and place the same in the hands of such collector for collection . . . The compensation of such collector shall be ten per centum on the amount collected and paid into the city treasury which said ten per centum shall be added to said delinquent taxes and water rents as penalty for non-payment at the time herein prescribed . . . .

"SECTION 9 Upon the list aforesaid being furnished to such collector he shall immediately thereafter proceed to collect all such delinquent taxes and water rents either out of the personal or real estate of such delinquent owner wherever the same may be found and for such purpose he shall be and is hereby invested with full authority to levy on and sell the personal property after the taxes and water rents have become delinquent thirty days and the real estate of any owner where the taxes or water rents remain unpaid for six months may be sold by direction of such collector" . . . .

The defendants jointly demurred to the bill, on the ground, *inter alia*, that the proceedings in the Senate and House of Representatives were not proper matters for investigation and adjudication by the Court, and that the bill did not contain any matter of equity whereon the Court could ground any decree, or give to the plaintiff any relief.

The city treasurer, Magee, subsequently appointed Thos. H. Phelps as collector of delinquent taxes, who on August 1, 1877, entered upon the duties of his office in accordance with the provisions of the Act.

(*b*) On the 21st of September, 1877, the Central Board of Education of Pittsburgh filed a bill in equity against said Thos. H. Phelps, setting forth that said board under certain recited Acts of Assembly was authorized to maintain certain public schools, to determine the amount of school taxes to be levied, to borrow money and issue bonds therefor, and to have the taxes thus assessed collected by the city treasurer and paid over to the treasurer of the board; that said defendant, Thos. H. Phelps, had been appointed, under the alleged Act of Assembly approved March 22, 1877 (P. L. p. 16), as collector of delinquent taxes, and threatened to collect the school taxes remaining due and unpaid, which money belonged to the Central Board of Education, and if collected by defendant the recovery of said amount could not be enforced by law; that said Act is unconstitutional in that it regulates the affairs of the school districts of the city of Pittsburgh, in violation of Art. III., Sec. 7, of the constitution, and also because it in effect amended the charter of the Central Board of Education, contrary to Art. III., Sect. 7, of the constitution. Other objections were made to the constitutionality of the Act—being the same as were set forth in the first bill (*supra*).

To this bill a demurrer was filed similar in substance to that filed to the first bill.

By agreement of counsel judgment was entered *pro forma*, and without argument, sustaining both these demurrers, and the plaintiffs respectively appealed, assigning for error the entry of the respective judgments.

Jeremiah S. Black, *A. M. Brown*, *J. F. Slagle*, and *Thos. M. Marshall*, for appellants.

The right of the plaintiff Kilgore to maintain this suit rests on these grounds: If the Act is put into operation it will diminish the rights and emoluments of the plaintiff, who was elected to the office of city treasurer prior to the passage of the Act; it will impose an enormous burden upon the taxpayers of the city, to be levied and collected directly for the emolument of the collector or paid to him out of the city treasury in cases where he may fail to collect his royalty; it will cause large expenditures from both the city and county treasurers for the maintenance of the system or scheme created by the Act; and it will establish a new and important municipal office, non-elective by the people, and confer upon the incumbent duties and excessive emoluments to the injury and oppression of the citizens.

The right of the Central Board of Education to the relief sought for consists mainly in that the money which it is alleged the defendant Phelps is about to collect, belongs to the Board, and is necessary for the maintenance of the schools and payment of the obligations of said Board.

That individuals have the right to ask the Courts to restrain the illegal action of public officers has been repeatedly decided. The Act under which these officers claim to act was not passed according to the requirements of the constitution, therefore was not passed at all. It has been decided in many States that the Court has not only the power but it is their duty to inquire into and determine whether the proceedings of the Legislature have been in conformity with the provisions of the Constitution, where questions of public or private rights are the subject of litigation.

Cooley's Const. Lim. 3d Ed. pp. 78, 139, and 150.
Supervisors *v.* Heenan, 2 Minn. 330.
State *v* Johnson, 26 Ark. 281.
Jones *v.* Hutchinson, 43 Ala. 722.
Solomon *v.* Cartersville, 41 Ga. 157.
People *v.* Allen, 42 N. Y. 378.
Spangler *v.* Jacoby, 14 Ills. 297.
Ills. Cent. R. R. Co. *v.* Wren, 43 Ills. 79.
Ryan *v.* Lynch, 77 Ills. 18.
People *v.* De Wolf, 62 Ills. 253.
Turley *v.* County of Logan, 17 Ills. 151.
Prescott *v.* I. & M. Canal Co., 19 Ills. 324.
Ryan *v.* Lynch, 68 Ills. 160.
Berry *v.* Railroad Co., 41 Md. 446.
Gardner *v.* The Collector, 6 Wall. 511.
Ottawa *v.* Perkins, S. C. of U. S., Pitts. Leg. Journal of May 23, 1877.
Legg *v.* Mayor of Annapolis, Am. L. Reg. vol. 16, p. 25.
Steckert *v.* East Saginaw, 22 Michigan, 104.
Oliver *v.* Washington Mills, 11 Allen, 268.

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Evidence will be received to show that the Legislature exceeded its powers and disregarded constitutional limitations.

Jones *v.* Jones, 2 Jones, 350.
Miles *v.* Stevens, 3 Barr, 41.
Southwark Bk. *v.* Commonwealth, 2 Casey, 446.
De Chastellux *v.* Fairchild, 3 Harris, 18.
Cronise *v.* Cronise, 4 Sm. 262.
Dorsey's Appeal, 22 Sm. 192.

The Act of May 23, 1874, making Philadelphia a city of the first class and Pittsburgh one of the second class, makes all Acts in regard to these cities local and special, and is virtually a repeal of section 7, Art. III. of the Constitution. The test to discover whether a law is local or not, is not whether the place of its application is named, but whether it applies singly to one place. This law applies as directly and exclusively to Pittsburgh as if it had been entitled "An Act in relation to all cities situated between the rivers Monongahela and Allegheny at the point of their junction with the Ohio." On the same principle every city and county in the State might be separately legislated for on the basis of population. Class is a noun of multitude, and you cannot call one city a class any more than you can speak of one sheep as a drove, or one wolf as a pack.

[SHARSWOOD, J. Suppose a law is made applying to all manufacturers of whiskey, and there are one hundred of them, would such an Act be constitutional?] Yes.

[Then suppose ninety-nine of them afterwards die, does the Act thereby become unconstitutional?]

Different classes of persons and things exist, and the law must recognize the distinction between them. So laws are properly passed for infants, married women, insane persons, etc. This is not special legislation. It is simply the operation of general rules which apply uniformly to all who come within them.

[SHARSWOOD, J. Suppose the city of York shall attain to a population of 100,000, will it not then come within the operation of the laws applicable to cities of the second class?]

That is a question this Court will some day have to answer. The city of Scranton is fast approaching to that population which would make it a city of the second class. Will all those laws passed professedly and exclusively for Pittsburgh be then imposed upon Scranton, and Pittsburgh, when she shall one day number her people at 300,000, will she lay down these burdens which the Legislature has imposed upon her, only to find herself subject to another set of enactments formed for "all cities of the first class," viz., Philadelphia?

The interpretation we contend for has been pronounced unsound in Wheeler *v.* Phila. (27 Sm. 338). The opinion of the Court in that case seems to be predicated upon the case of Walker *v.* Cincinnati (21 Ohio St. Rep. 14), and no other precedent or authority for the ruling is cited. That case, however, is not at all like this, nor could the question arise in Ohio, where there is no constitutional provision similar to ours. The importance of the question is such that we feel justified in asking this Court to reconsider their judgment given in Wheeler *v.* Phila., believing that a more careful consideration will lead to a different conclusion.

M. W. Acheson and *George Shiras, Jr.* (with them *Geo. P. Hamilton* and *D. T. Watson*), contra.

This Court cannot try the constitutionality of a legislative Act by the motives and designs of the lawmakers, however plainly expressed. If the Act is within the scope of their authority, it must stand. Its effect, not its purpose, must determine its validity.

Penna. Railroad Co. *v.* Riblet, 16 Sm. 164.

The law in question was enrolled, signed by the speakers of the two houses, approved by the Governor, deposited in the office of the Secretary of State, and published by authority among the laws passed at the session of 1877. A law thus authenticated and certified is conclusive upon the courts of its existence, and they cannot go behind the authentication and inspect the journals of the Legislature in order to ascertain whether it be a law or no law.

Evans *v.* Browne, 30 Indiana, 514.
Bender *v.* State, 53 Id. 254.
People *v.* Develin, 6 Tiffany, 269 (33 N. Y. Rep.).

The constitutional requirements are only directory, and addressed to the legislative body, who is the sole judge of what is, and what is not, compliance therewith.

Miller *v.* State, 3 Ohio (N. S.), 483.
Pim *v.* Nicholson, 6 Ohio (N. S.), 179.
People *v.* Supervisors of Chenango, 8 N. Y. 328.
McCulloch *v.* State, 11 Indiana, 432.
Lehman *v.* McBride, 15 Ohio, 602.
Washington *v.* Page, 4 Cal. 388.
Pierpont *v.* Crouch, 10 Cal. 316.
McPherson *v.* Leonard, 29 Maryland, 377.
Anderson *v.* Baker, 23 Maryland, 531.

The Pennsylvania cases cited on the other side are all cases where the power of the Legislature to act at all on the particular statement of facts, was impeached.

[AGNEW, C. J. Suppose it appears by the journal that a majority did not vote for, but against, the bill, yet the Governor signs it. Could the Courts inquire into the proceedings of the Legislature?]

That is one of those cases, being so great a mischief, the Legislature has not anticipated nor provided against. Suppose the proceedings of the Legislature are allowed to come before the Court, and the fact as to whether or not the prescribed forms have been complied with is left to

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the jury. One jury finds one way, another jury at the same time in another place finds another way. Can the Court go behind either of these verdicts?

That this is not a local or special law this Court has already decided in Wheeler *v.* Philadelphia (27 Sm. 338).

Nov. 19, 1877. THE COURT. The merits of the Act of 22d of March, 1877, "In relation to cities of the second class, providing for the levy, collection, and disbursement of taxes and water rents," are not a subject for our opinion. The only question before us in these cases, is upon the power of the Legislature to pass this law. After a thorough argument and a careful consideration, we are unable to pronounce the law unconstitutional. The power to classify cities according to the number of their population was fully discussed and decided in Wheeler *v.* Philadelphia (27 P. F. Smith, 338). We adhere to that decision, and indeed cannot see how the question of power could have been decided differently. To say that no general law can be passed to regulate a certain subject, because some of the classes contained in the regulation do not yet exist, or exist only in a limited number, is to hold that no law can be passed to provide for future wants or necessities. The welfare of the State, and one of the chief purposes of legislation, would be struck down by such a decision. If the classification had been different, and the number of the population to constitute a city of the first class had been fixed at one million, would the classification be void because no city had yet reached that number? The absurdity of such a proposition is manifest, and it is simply to say that no law can provide for a state of affairs to which the subject is rapidly approaching, but which it has not yet reached. If the power to classify and regulate the subject of cities generally be admitted, and clearly it cannot be successfully denied, the question of local legislation is at an end, for though it may happen that but one city may fall within the class, *non constat* that others will not shortly do so, and therefore may be provided for. The law was not passed for Pittsburgh as the only city happening within the second class, but for all cities having the population to bring them within that class. If I agree to sell all my lands at a certain rate, according to a classification of tracts I have adopted, and only one tract falls within the rate of a given class, will any one be guilty of the absurdity of saying that it is not governed by my classification? The motives of those who passed the law are not involved. Suppose they did perceive that Philadelphia was the only city falling within the first class, and Pittsburgh the only one in the second, yet the motive influencing this classification cannot be inquired into. If the power to classify for wise purposes exist, that ends the matter.

This Act concerns a municipality, a division of the State for governmental purposes, and falls within the power of repeal and revision. Those who occupy merely official positions, unprotected by any special constitutional provisions, cannot set themselves up against the exercise of this governmental power. We know of no constitutional right of Mr. Kilgore or of the Central Board infringed by this law. They fill the place of public servants merely.

In regard to the passage of the law, and the alleged disregard of the forms of legislation required by the constitution, we think the subject is not within the pale of judicial inquiry. So far as the duty and the conscience of the members of the Legislature are involved, the law is mandatory. They are bound by their oaths to obey the constitutional mode of proceeding, and any intentional disregard is a breach of duty and a violation of their oaths. But when a law has been passed and approved, and certified in due form, it is no part of the duty of the judiciary to go behind the law as duly certified, to inquire into the observance of form in its passage. The presumption applies to the act of passing the law that applies generally to proceedings of any body whose sole duty it is to deal with the subject. The presumption in favor of regularity is essential to the peace and order of the State. If every law could be contested in the Courts on the ground of informality in its enactment, the floodgate of litigation would be opened so widely society would be deluged in the flood. It is not a question of fraud, in which that is set up as a law which never was so in form or in fact, but a question of regularity in the conduct of those who have the power to enact the law, and who declare it to be such. The evidence of a law—its actual existence, we may inquire into, for before we are bound by it, we must be satisfied it is the act of the Legislature, however informally they may have conducted the process by which they have made it a law.

Upon the whole case we discover no substantial error, and the decree in each case sustaining the demurrer is affirmed, with costs of the appeal to be paid by the appellants in each case, and the appeals respectively are dismissed.

PER CURIAM.

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July, '77, 86. Jan. 10, 1878.

Gramlich v. Wurst et al.

Negligence—When a question for the Court—Trespasser—Injury caused by excavation on land—When owner not liable.

When one in the legitimate exercise of dominion over land makes an excavation upon it, at some distance from the public way, into which another, who would be a trespasser before he reached it, falls and is injured, the former is not liable for the accident, nor is he bound in the absence of exceptional hazards to provide exceptional safeguards.

An owner of land may improve it in his own time and way, so that he violates no duty to any adjacent owner nor to the public.

W., a workman, while passing from his work, at evening, across a vacant lot, fell into an excavation which had recently been dug thereon, and striking his head against a cart left there by those employed in the work, was killed. It appeared that he had been engaged during the day in removing the debris of a fallen building on the adjoining lot, from whence the excavation must have been visible, and that the excavation was eighty feet distant from the street, the grade of which was considerably below the level of the lot where the accident occurred. In an action by his widow and children against the contractor, who had possession of the lot for the purpose of making the excavation and other improvements:

Held, that they could not recover, and that the jury should have been instructed to find for the defendant.

PER WOODWARD, J. When there is no conflict of testimony, and either the standard of individual duty has been judicially determined, or the rights of owners of property have been judicially defined, the decision of a question of negligence affecting individual action in the one case, or the exercise of dominion over property in the other, becomes the duty of a Court. Negligence is to be found upon evidence, and is not to be presumed from the bare fact of the occurrence of an accident on a defendant's land.

Hydraulic Works *v.* Orr, 2 Norris, 332, 3 WEEKLY NOTES, 552, distinguished and affirmed.

Error to the Common Pleas No. 2, of Philadelphia County.

Case, by the widow and minor children of John Adam Wurst against Frederick Gramlich for negligently causing the death of said Wurst. Plea, not guilty.

Upon the trial (before MITCHELL, J.), the following facts appeared, as stated by WOODWARD, J., in the opinion of the Supreme Court.

"John Adam Wurst was killed by falling into a vault which Frederick Gramlich, the defendant below, was employed in excavating on a lot belonging to Adam Miller on the east side of Thirty-first Street above Jefferson.

"The work was done under a contract between Gramlich and Miller, and for the purposes of the contract, Gramlich had exclusive possession of the lot. Another person had fallen into the vault, and in approaching to aid him in response to his cries for help, it is probable that Wurst met with the accident that caused his death. In falling, his head struck the shaft of a cart that was in use in doing the work, and which had been left over night in the excavation.

"It was after dark on the evening of the 13th of February, 1874, that the accident happened. On the morning of that day, the roof of an ice-house on a lot of Henry Miller, intervening between Adam Miller's land and Jefferson Street, had broken down, and Wurst, who was a carpenter, had been at work at that building during the whole of the afternoon. Michael Gossey, one of the witnesses for the plaintiffs, said he saw him about half past three o'clock on the top of the brewery, getting wood down, and Henry Miller said: 'Wurst was there before I was, cleaning off the roof. It was a little after twelve o'clock when I arrived there. As long as I stood there, he was working there; he was there until after seven o'clock. He was hatfling away timber; it was hauled to the north side, between my brewery and the vault. Mr. Gramlich was digging.' There was an open space between Henry Miller's buildings and Adam Miller's line, and from the account which the plaintiffs gave of Wurst's employment during the day, the fact that the excavation was being made must have been known to him, and the situation of the vault when the work ceased that evening, must have been within his view. When he fell, he was passing from the land of Henry Miller near the rear of Adam Miller's lot, and perhaps eighty feet eastwardly from the Thirty-first Street front."

There was some conflicting testimony as to the existence of paths across the lot.*

Defendant's counsel submitted, *inter alia*, the following point.

(3) The place of this excavation being on private property, and not on any line of street or public highway, but some distance therefrom, the said decedent (not being engaged in any manner whatever by the said defendant or his agents) had no right to be there, and was a trespasser, and the verdict should be for the defendant.

The Court refused to instruct the jury as requested in the point, but charged them, *inter alia*, substantially as follows:—

"Now as to the defence it is contended by defendant—*First*, That there is no direct evidence how the accident happened, and therefore no sufficient evidence of defendant's negligence. In support of this view defendant's counsel has

* There was some testimony, in the Court below, that the excavation was up to and over the party line by the lawful space of half a party wall; in which case the dead man, Wurst, being lawfully on the adjoining land, did not become a trespasser until *eo instante* that he fell into the pit. But this testimony was not brought up in the bill of exceptions, nor was there anything in the record, as it came before the Supreme Court, to show the above-mentioned fact, and the contrary was apparently assumed on the argument, and in the opinion of the Court.

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called your attention to the fact that Wurst, when he fell in, was not on his route home from the place where he was last seen at work. His home was in another direction. Further, he was a trespasser on the lot where the excavation was, and had no legal right to be there at all. I instruct you that those facts do not absolutely prevent a recovery by the plaintiff. A man is bound to exercise reasonable care even toward a trespasser. But these facts bear very strongly on the question of what was reasonable care on the part of defendant under the circumstances—in other words, of his negligence, and also of the negligence of the deceased. A trespasser is bound to proceed with more care than where he has a right, and on the other hand, the defendant was not, in ordinary circumstances, bound to anticipate a trespass.

"*Secondly*, Has the plaintiff proved to your satisfaction, that under all the circumstances of the case, the defendant was guilty of negligence?"

(Here his Honor reviewed the evidence as to the nature of the ground—the testimony for and against the existence of paths across the open lots, the habit of people to cross the lots, etc., and continued):—

"Now you are to judge from all this evidence whether the defendant was negligent in leaving his excavation without lights and without a fence, under the special circumstances of that night. There had been a serious accident resulting in loss of life, and there was, according to all the testimony, a crowd of people about the place all the afternoon. This in itself would impose on the defendant more care in regard to his excavation than under ordinary circumstances—it increased the danger of injury to trespassers, as to whom, as I have already said, the defendant owed the duty of reasonable care—not such degree of care as required as to people who should be habitually and lawfully there, but such as under all circumstances was reasonable to require even as to others.

"In judging of this care, however, the defendant is entitled to have you consider the facts that this was an extraordinary occurrence, such as he was not bound and in fact could not anticipate—that the street was not opened through for public travel—that the ground between the fallen ice-house and the edge of this excavation was not only steep and up-hill, but was also encumbered with piles of lumber and the debris of the fallen ice-house—so as to make it unlikely that any one would clamber over them from that direction—and in general the want of probability that any person would be injured by falling into his excavation."

The Judge further instructed the jury that if they believed that Wurst had been guilty of contributory negligence it would bar a recovery.

Verdict for the plaintiffs, for $4000, and judgment thereon, after filing of remittitur by plaintiffs of all over $3000.

The defendant took this writ, assigning for error the refusal of the Court below to instruct the jury as requested in his point.

David W. Sellers (*Dedrick* with him), for the plaintiffs in error.

There was no duty upon the defendant to protect trespassers. He could not have anticipated this accident, and least of all was it incumbent upon him to protect the deceased from injury, who it appears from the evidence was aware of an excavation.

Injury to trespassers is without remedy, because property is used without any contemplation of them.

Railroad *v.* Hummell, 8 Wr. 375.
Gerety *v.* Railroad, 31 Sm. 275.

In Allen *v.* Willard, 7 Sm. 374, the injured man was traversing the highway, adjoining which was the excavation.

W. J. Budd (*J. B. Devine* with him), contra, submitted no paper-book.

On the day of the accident, hundreds of citizens were upon the lot to assist in rescuing those who were among the ruins of the fallen building; they were not trespassers. A duty was owing to all who were upon the land with the consent of the owner.

Hydraulic Works *v.* Orr, 2 Nor. 332.
Railroad *v.* Hummell, 8 Wr. 375.

[SHARSWOOD, J. The authorities were all reviewed in Gillis *v.* The Railroad, 9 Sm. 129.]

Jan. 28, 1878. THE COURT (after stating the facts, *ut supra*). Under these facts—and all of them that are material are gathered from the testimony on behalf of the plaintiffs—what duty did Gramlich owe to Wurst? The contract for digging the vault was a perfectly lawful one, and it has not been alleged that the work was done otherwise than in the accustomed way. It was all done within Adam Miller's lines. No adjacent land was encroached upon, and no danger to passengers on any highway was created. Indeed there was no highway to be involved in danger. Thirty-first Street, north of Jefferson, had only been opened along the property of Henry Miller, and the surface of Adam Miller's lot at the line of the street was from ten to fifteen feet above its established grade. There was some conflicting testimony as to paths alleged to have traversed the lot, but if there were such paths, they entered eastwardly or northeastwardly in the direction of a lampblack factory, and it was not contested that Wurst fell into the vault as he approached it from the southern side. The existence or non-existence of paths across the property was immaterial.

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In the ordinary case, the jury must pass upon evidence given in support of a charge of negligence. They must do this always when the measure of duty is ordinary and reasonable care, and the standard of the degree of care shifts with the change of circumstances, and they must do it also where essential facts are controverted. But where there is no conflict of testimony, and either the standard of individual duty has been judicially determined, or the rights of owners of property have been judicially defined, the decision of a question of negligence affecting individual action in the one case, or the exercise of dominion over property in the other, becomes the duty of a Court. Negligence is to be found upon evidence, and is not to be presumed from the bare fact of the occurrence of an accident on a defendant's land. Gramlich was in the lawful occupancy of the lot on which Wurst was killed, and was engaged in an employment that was entirely legitimate. In the absence of evidence to show the existence of exceptional hazards, he was not required to provide exceptional safeguards. An owner of land may improve it in his own time and in his own way, so that he violates no duty that he owes to any adjacent owner, or to the public. A case as old as Blyth *v.* Topham (Cro. Jac. 158) held, that "an action doth not lie if a man makes a ditch in his waste, which lies near the highway, into which the horse of another falls; for the ditch in his own soil was no wrong to the other, but it was his fault that his horse escaped into the waste." Where A., who was the owner of a store-house and lot, left at the rear of the store-house an excavation walled up to give light to the cellar, and B., who on an alarm of fire, went down to the store-house, adjoining the house in which the fire was, and entering at the front door went through the store, and going through the back door, turned off the gangway across the opening, and fell in and was injured; it was held that the digging of an open space in the rear of the store-house by A. upon his own ground was a lawful act by him, and he had the right to keep it there as an appurtenant right for the use of his property, and B. falling in by accident, the same not being near a public street or crossing, gave no right to recover damages from A. as a wrong-doer, and B.'s going there on account of the fire did not change the rule. (Kohn *v.* Lovett, 44 Ga. 251.) The law fully recognizes the right of him who, having the dominion of the soil, without malice does a lawful act on his own premises, and leaves the consequences of an act thereby happening where they belong, upon him who has wandered out of his way, though he may have been guilty of no negligence in the ordinary acceptation of the term.

It is purely *damnum absque injuria*. (Morgan *v.* City of Hallowell, 57 Me. 377.) "When an excavation is made adjoining to a public way, so that a person walking on it might, by making a false step, or being affected by sudden giddiness, fall into it, it is reasonable that the person making such excavation should be liable for the consequences. But when the excavation is made at some distance from the way, and the person falling into it would be a trespasser upon the defendant's land before he reached it, the case seems to me to be different." (MARTIN, B., in Hardcastle *v.* The South Yorkshire Railway Co., 4 Hurl. & N. 67.) So where the defendants were owners of waste land which was bounded by two highways, and they worked a quarry in the waste, and the plaintiff, not knowing of the quarry, passed over the waste in the dark, and fell into the quarry and broke his leg, and then brought an action for the injury, it was held that the action could not be maintained, as there was no legal obligation in the defendants to fence the quarry for the benefit of the plaintiff, who was a mere trespasser on the land. (Hounsell *v.* Smyth, 7 Com. B., N. S. 731.) This rule was laid down by Chief Justice GIBSON in Knight *v.* Abert (6 Barr, 472), which decided that, though no action lies in Pennsylvania for trespass by cattle pasturing on uninclosed woodland, yet, that not being a matter of right, the owner of the land is not liable for injury sustained by such cattle falling into a hole dug by him within the boundaries of his land, and left uninclosed.

And the opinions of Mr. Justice STRONG in The Philadelphia and Reading Railroad Co. *v.* Hummel (8 Wr. 378) and of Mr. Justice SHARSWOOD in Gillis *v.* The Pennsylvania Railroad Co. (9 P. F. S. 129) illustrated and enforced substantially the same rule.

Reliance has been placed on the case of The Hydraulic Works *v.* Orr (2 Norris, 332), to support this judgment. The distinction between that case and this is marked and obvious. There the accident happened in a private passage or cartway adjoining a factory where several kinds of business were carried on in different stories, and was caused by the falling of a heavy platform employed as an inclined plane to move heavy articles into and out of the building. When used, it was lowered so as to cover the pavement of the cartway. When not in use it was raised on hinges that connected one side of it within eighteen inches of the wall, was not fastened at the upper side, and was so nearly at equipoise that slight force only was required to draw it down. The cartway opened from a public street where people were constantly passing and children were often at play. There was a gate at the street end, and this was frequently left open. It was so left at the time of the accident, when four children intruded into the cartway, and their thoughtless tampering with the platform

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resulted in drawing it down upon themselves and in producing injury to the child of the plaintiffs from which he died. This Court affirmed a verdict and judgment for damages in the Common Pleas. No cause was ever more justly decided. It was the case suggested by Baron MARTIN in Hardcastle *v.* The South Yorkshire Railway Company, of a dangerous appliance adjoining a public way. The children were trespassers certainly, but then they were children, and the defendants were bound to have regard to the reckless and thoughtless tastes and traits of childhood. The entrance to the cartway was open and unguarded, and the facts in the record showed the strong probability of danger from the structure. It had once fallen against the wheels of a wagon and when other wagons passed it was held up by hand. Even a trespasser may have redress for negligent injuries inflicted on him. Though he is liable to an action for his own wrong, he does not necessarily forfeit his right of action for injuries he has sustained, as for example, by falling into a hole newly excavated on a defendant's premises adjoining a public way, and rendering it unsafe to persons lawfully using the same with ordinary care. (Barnes *v.* Ward, 9 C. B. 392, 420.) The owner of open land has no right to plant in it spring guns by which ordinary trespassers may be wounded. (State *v.* Moore, 31 Conn. 479.) In this country, while a house may be thus protected from burglars, no man has a right to place on his land any instruments to injure persons merely straying on such land. (Johnson *v.* Patterson, 14 Conn. 1.) A party may be acting in violation of some particular statute, and still be under the general protection of the law. (Spofford *v.* Harlow, 3 Allen, 176.) The Hydraulic Works *v.* Orr (*supra*) rested on principles and precedents that sustained it amply, but which have no application here. The undisputed facts proved the defendant to have been guiltless of all wrong, and the prayer for instruction to the jury that he was entitled to a verdict should have been granted.

Judgment reversed.

Opinion by WOODWARD, J.

Jan. '77, 3. Jan. 16, 1878.

West Philadelphia Passenger Railway Co. v. Whipple.

Common carrier—Passenger railway company—Liability for injury to passenger—Negligence—Contributory negligence—When a question for the jury—Duties of passengers to use appliances provided for their safety—Personal inconvenience in using such appliances, when an element in the question of contributory negligence.

A woman became a passenger on a crowded street car, and being unable to obtain a seat, held the hands of a friend, testifying in excuse of not holding on to a hand-strap within her reach, provided for the use of standing passengers, that it was inconvenient and would have disarranged her dress. She was thrown down and injured by the sudden stopping of the car by a wheel-rest at the terminus of the route. The Court submitted to the jury the questions of negligence and contributory negligence, and instructed them that if the plaintiff could not conveniently reach the hand strap, but took hold of the hands of a fellow passenger, it was for the jury to judge from all the evidence whether or not this was sufficient precaution, and all that a prudent woman would do under the circumstances:

Held, that the instruction was not erroneous.

PER CURIAM. "Possibly a woman may be so fantastically and foolishly hooped, wired, and pinned up, as to deprive her of her natural power to help herself; but if so, the question is one of fact and not of law, and so we incline to leave it, instead of imposing upon our brethren below the difficult duty of prying into the artificial stays of the plaintiff's case."

Error to the Common Pleas No. 4, of Philadelphia County.

Case, by Clara M. Whipple against the West Philadelphia Railway Co., to recover damages for personal injuries caused by alleged negligence of defendant's servant. Plea, not guilty.

Upon the trial (before ELCOCK, J.), the following facts appeared: In July, 1873, the plaintiff, accompanied by Mr. and Mrs. Coates, and a child, entered a Market Street car of the defendant going east, at Eleventh and Market Streets in the city of Philadelphia. The car was then full, and some passengers were standing; Mrs. Coates, however, obtained a seat, taking the child in her lap; the plaintiff and Mr. Coates stood.

The defendant's route terminates on a down grade at Front and Market Streets. At its end the rails are provided with wheel-rests, or "bumpers," which are designed to prevent the cars, while the driver is changing the horses, from running by gravity down Market Street towards the Delaware River. The plaintiff stood sideways in the aisle, facing Mrs. Coates, and holding both of her hands. The car stopped first at a switch a short distance above the bumpers, and was then driven to the bumpers where it stopped short, and the plaintiff was thrown down and received the injuries, to recover damages for which this suit was brought. No other passenger in the car fell or was in any way injured. The testimony was conflicting upon the question of the violence with which the car struck the bumper.

The car was fitted in the usual manner with bars fastened to the roof of the car, from which hung eighteen hand-straps. Each strap was five feet four inches from the floor. One at least of these straps was within the reach of the plaintiff, —who appeared on the trial to be above the ordinary height of women. Two of the defendant's

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witnesses testified "that a person four feet high, or one foot and a half shorter than the plaintiff, could, without difficulty, take hold of the straps in the car," and that "a person five feet high could hang his arm over the pole," *i. e.* the bar from which the straps hung.

The plaintiff testified: "The strap in that car was too short for me to reach. I could touch it, but I could not hold it. A lady's stays prevent her holding the strap. . . . . The fact that the body and skirt of my dress would have been separated may have been a part of my reason for not taking hold of the strap. I made efforts to do so. I could touch the strap. I think I could put my fingers through part of the way. I abandoned the attempt to hold by the strap. I do not remember about the length of the straps in other cars. I seldom ride in the cars, and when I do ride, I do not often stand. I have never taken hold of a strap in a car. . . . The two parts of the reason why I did not take hold of the strap on this occasion were, first, I could not grasp it; second, it would have disarranged my dress."

A motion for a non-suit at the close of the plaintiff's case was refused.

The plaintiff's counsel presented the following point: If the jury find that the plaintiff could not conveniently reach the hand-strap in the car, and, being a standing passenger, that she took hold of the hands of a fellow passenger to keep her in position; this is evidence of some care upon her part, and you are to judge from all the evidence whether or not this was sufficient precaution, and whether or not this was not as safe for her as to take hold of the strap; and if you find it was as secure and safe, you are at liberty to find a verdict for the plaintiff. *Answer.* Affirmed as a general proposition; but it is not for me to say whether the evidence established the facts stated. That is for you. You must determine that question from the evidence.

In the general charge the Judge said, *inter alia:* "It is contended that the plaintiff was negligent in entering a crowded car and standing therein; and, on the other side, that it was negligent for the defendant to carry the plaintiff in an overcrowded car, and allow her to stand. There is no law which forbids the crowding of street cars, or prevents any one from entering cars in such condition.

"When the plaintiff entered the car, it being so crowded that she had to stand, she took the natural risks of the situation, and neither can complain of the conduct, in this respect, of the other. Being in the car, was she guilty of any negligence? If she was she cannot recover.

"[It is said to take hold of the hand-straps, suspended from the roof of the car, is the only prudent and safe way for passengers to stand in a car. If the straps are reasonable appliances, and she could use them with ordinary convenience, she was bound to take hold of them; but if she could not reach them without extraordinary exertions, she was not. She says that she could not, without damage to or disarrangement of her dress; that, owing to the customary mode of dress, and woman's physical formation, she could not, except at the risk alluded to, reach these straps. If she could not, then did she do the next best thing in the situation, viz., hold on to the hands of her friend, who was seated; and was that prudent, or did it increase the risk of her falling?]"

Verdict and judgment for the plaintiff for $5500. A rule for a new trial was discharged by the Court (reported 2 WEEKLY NOTES, 559).

The defendant took this writ, assigning for error, *inter alia*, the answer to the above point, and that part of the charge inclosed in brackets.

C. Stuart Patterson, for plaintiff in error.

There was no evidence of negligence on the part of the company. Negligence is not to be presumed, but must be affirmatively proved.

Even if negligence were proven, the contributory negligence of the plaintiff in failing to avail herself of the proper appliances provided for standing passengers should have barred recovery.

Beatty *v.* Gilmore, 4 H. 463.
Little Schuylkill Navigation Co. *v.* Norton, 12 Id. 465.
Heil *v.* Glanding, 6 Wr. 493.
Catawissa R. R. Co. *v.* Armstrong, 13 Id. 186.
Sullivan *v.* P. & R. R. R. Co., 6 C. 234.
Pa. R. R. Co. *v.* Zebe, 9 Id. 318.
Pitts. Fort W. and Chic. R. R. Co. *v.* Evans, 3 Sm. 254.

The reasons given by plaintiff in her testimony in excuse of her contributory negligence, viz., inconvenience and a "possible disarrangement of her dress," are wholly insufficient. To introduce such an element into cases of alleged negligence, would lead to uncertainty and a failure of justice.

When the measure of the plaintiff's duty is defined by law, and is the same under all circumstances, the omission to perform that duty is negligence, and must be so declared by the Court.

Hestonville P. R. Co. *v.* Glassey, 7 Sm. 174.
Penna. R. R. Co. *v.* Barnett, 9 Id. 259.
Johnson *v.* Bruner, 11 Id. 58.
Kay *v.* The Penna. R. R. Co., 15 Id. 269.
Penna. Canal Co. *v.* Bentley, 16 Id. 30.
W. C. & P. R. R. Co. *v.* McElwee, 17 Id. 311.
Johnson *v.* W. C. & P. R. R. Co., 20 Id. 357.
McKee *v.* Bidwell, 24 Id. 218.
Philada. R. W. Co. *v.* Hassard, 25 Id. 376.
P. W. & B. R. R. Co. *v.* Stinger, 28 Id. 225.

By the affirmance of the plaintiff's point, two questions of fact were left to the jury; and a finding upon either in her favor was to disprove the charge of contributory negligence, viz:—

First. Could she *conveniently* reach the hand-strap? Something was due from the plaintiff be-

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yond a sacrifice of her mere convenience. The straps are placed by this company, and all other well-managed passenger railway companies, for the purpose of avoiding just such accidents as the one which happened here. The very existence of the straps was notice to the plaintiff of their purpose. The duties of a carrier and its passengers are reciprocal, and the latter are bound to avail themselves of all reasonable appliances provided for their safety. Necessity may excuse, but inconvenience cannot, and it would not have been "care according to the circumstances," nor "such care as men of ordinary prudence would use under similar circumstances," for the plaintiff to abandon the attempt to hold by the strap for no better reason than that "she could not conveniently grasp it."

Sullivan *v.* P. & R. R. R. Co., 6 C. 239.
Pa. R. R. *v.* Zebe, 9 Id. 318.
Same *v.* Same, 1 Wr. 420.
Adams *v.* L. & Y. R. W. Co., L. R. 4 C. P. 739.
Siner *v.* Gt. W. R. W. Co., L. R. 4 Exch. 117.

Second. Whether or not the taking "hold of the hands of a fellow-passenger to keep her in position" was "a sufficient precaution," and was "as safe for her as to take hold of the strap."

There was no evidence that the "precaution" was "sufficient," or that it was "as safe for her as to take hold of the strap." The fact that she did take hold of her friend's hands and that they did not uphold her would seem to be conclusive against the proposition.

It is error to submit to a jury a fact as to which there is no proof; or to confine the attention of the jury to one view when there is more than one to consider; or to so instruct the jury as to divert their minds from the true point of inquiry to one not supported by evidence.

Harrisburg Bank *v.* Forster, 8 W. 304.
Hersheau *v.* Hocker, 9 Id. 455.

Dougherty (with whom was *Hanson*), for the defendant in error.

The duty of the passenger may be modified by circumstances; in this case, by the height of the strap and the inability or difficulty of holding it.

Whenever the *prima facie* duty of care is changed, the alleged negligence arising from a failure to perform such duty is to be submitted as a fact to the jury.

Kay *v.* R. R. Co., 15 Sm. 269.
Johnson *v.* R. R. Co., 20 Id. 357.
M'Kee *v.* Bidwell, 24 Id. 218.

Jan. 28, 1878. THE COURT. The charge of the learned Judge, and his answers to the points, appear to be reasonably sound and quite fair to both sides.

He left both the cause of the injury and the question of contributory negligence fairly to the jury, to whom both questions properly belonged under the evidence.

To have charged the jury against the plaintiff as a matter of law upon the entire evidence, would have been a palpable invasion of their province. Even as to catching hold of the straps overhead, he could not have told the jury more than he did. He said, if the straps are reasonable appliances, and she could use them with ordinary convenience, she was bound to take hold of them. This was going quite as far as a Court ought to go, upon a matter of fact of this nature. Was she to take hold, though beyond her reach, and extraordinarily inconvenient? Who was to judge of her power to seize and hold on to them, and, if she could not, of what she should do next?

Are we to say as a matter of law that women are to dress in a certain way, and that their ordinary habits, according to the usage of society, are to be cast aside when they enter a car, for fear they should find no seat? Clearly these are facts which enter into the question of negligence, and form a part of that whole out of which the jury alone must draw the conclusion.

Possibly a woman may be so fantastically and foolishly hooped, wired, and pinned up as to deprive her of her natural power to help herself; but, if so, the question is one of fact and not of law, and so we incline to leave it, instead of imposing upon our brethren below the difficult duty of prying into the artificial stays of the plaintiff's case.

PER CURIAM. Judgment affirmed.

Oct. & Nov. '77, 155. Oct. 15, 1877.

Wilkinson et al. v. Stewart et al.

Replevin—Mixture of goods—Rights of oil owners to an aliquot part of mixture.

The fact that the plaintiff's goods have been commingled with similar goods of the defendant by the wrongful act of a third party is not necessarily a bar to an action of replevin.

J. & Co. were the owners of an oil refinery; the plaintiffs and the defendants were respectively the owners of two oil tanks; J. & Co., having, with defendants' knowledge, pipe connection with their tank, took, without authority, oil therefrom for use in their refinery, and, when called upon to return it, made connection between plaintiffs' and defendants' tanks, without plaintiffs' knowledge or consent, and made good the deficiency to the defendants with oil from the plaintiffs' tank:

Held, that no title to the oil taken from plaintiffs' tank passed to defendants, and that replevin would lie.

Per PAXSON, J. "Had the character of the oil been so essentially changed by the mixture that one barrel would not be the equivalent for another barrel, the case would have presented a different question—one that we are not now required to pass upon."

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Error to the Common Pleas of Venango County.

Replevin by Stewart and Merrick against Wilkinson, Carter, & Co. for 4100 barrels of crude petroleum, of the value of $9225.00. The writ issued in June, 1876.

Pleas, *non cepit* and property.

The facts were as follows: The plaintiffs, Stewart and Merrick, in 1874, purchased from Johnson & Co. an oil tank (called the Caledonia Tank) of the capacity of 20,000 barrels, and stored therein crude oil to the amount of about 17,000 barrels. There were also in the tank about 2000 barrels of oil belonging to Johnson & Co., which plaintiffs agreed to store for them. Wilkinson, Carter, & Co., the defendants, also owned an iron tank, in the neighborhood, of the capacity of 10,000 barrels, in which they had some 8000 barrels of oil stored, and they permitted Johnson & Co. to store 2000 barrels with them. Johnson & Co. (who had originally been the owners of both these tanks) were the owners and operators of a refinery having a pipe connected with defendants' tank.

In February, 1876, the defendants learned that Johnson & Co. had, without their consent, drawn out all the oil in their tank except about 1600 barrels, and upon demand Johnson & Co. promised forthwith to replace it, and did replace about 6000 barrels.

The evidence on the part of the plaintiffs was that about 4100 barrels of this latter amount was taken from their tank by means of a pipe connection made by Johnson & Co. for that purpose, without plaintiffs' knowledge or consent. There was some evidence on the part of the defendants that this oil had been replaced—1900 barrels at one time, 2200 at another, and the plaintiffs also produced testimony to show that, previous to the time of drawing out the 4100 barrels, Johnson & Co. had been drawing out oil from plaintiffs' tank, and replacing it with a worthless fluid thrown off from their refinery, consisting of tar and benzine. It was contended that the oil thus replaced was for the purpose of making good the deterioration in quality of their oil. There was, however, no testimony that the oil in defendants' tank was in any way injured by the mixture with it of oil from plaintiffs' tank. The evidence tended to show that worthless matter sunk to the bottom; and the introduction of testimony concerning it was mainly for the purpose of showing the amount of good oil in the tank, by deducting the "B. S." and other sediment from the entire contents shown by the gauge.

Sterrett, a witness for defendants, testified that he examined the defendants' tank prior to March 31, 1876, and found in it three feet of liquid, of which one foot was thick, or "B. S.," and the remainder he supposed to be good oil. He examined it after it was filled up with oil from the plaintiffs' tank, and found it to contain eleven feet of liquid, two feet eight inches of "B. S.," and the balance good oil.

On the trial the plaintiffs' counsel requested the Court to charge: If, without their knowledge or consent plaintiffs' oil was taken out of their tank and mingled with defendants' oil, their title was not thereby lost, and they were entitled to have out of the common mixture a quantity equal to that taken from their tank and put into such mixture, and may maintain replevin therefor. *Affirmed.*

Defendants' counsel requested the Court to charge: If the oil of plaintiffs was taken by John Johnson & Co. without right, and delivered to defendants to supply oil owed them, and defendants, being ignorant of such wrongful taking by John Johnson & Co., received the oil and mingled it with other oil of their own, so that its identity was lost, plaintiffs cannot recover in this action. *Refused.*

In the general charge, the Judge said: "If they wrongfully took oil from the plaintiffs' tank and placed it in the defendants', the right of property was not changed. If they took the oil claimed in this action, without their knowledge or consent, to replace oil which they had wrongfully abstracted from the defendants' tank, so long as the oil so taken remained in that tank, though mingled with other oil of the defendants therein, the plaintiffs may maintain replevin therefor. The mixture was by no fault of the plaintiffs. [The property, as manifest from the treatment of all parties, was uninjured by the mixture, and no wrong is done to any one by each taking out his proportion of the common mass.] When such property can be traced into a tank the owner ought not to lose, nor should the party in possession, without right, be a gainer because he was not a wrong doer in the taking and mingling it with his own. The owner has as clear a right to recover his oil as he would have had had it been placed there by his agreement with the owner of the tank for storage with other oil. . . . . [The oil that is in question, so far as the plaintiffs and defendants are concerned, is that oil that was taken from the plaintiffs' tank to defendants' tank. It is alleged, and there is evidence which will likely induce you to believe, that there was very serious injury done to the plaintiffs by Johnson & Co., prior to this, in taking oil from them and replacing it with worthless stuff to keep the tank full. Now we leave it to you, under the evidence, in case you find any oil was restored at all, to say whether Johnson & Co. restored it in replacing the oil taken to satisfy the plaintiffs' claim on them. If you so find it was restored for that purpose then the principles we have stated would apply in reference to its deduction.]"

Verdict and judgment for plaintiffs. Defen-

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dants took this writ, assigning as error the answers to the points above quoted, and the portions of the charge inclosed in brackets.

Dodd and *Lee* (with whom were *Neill* and *Heywang*), for plaintiffs in error.

The learned Judge erred in assuming and stating as a fact that the defendants' oil was uninjured by the mixture. He should have left that question to the jury, and instructed them that even if such was the case replevin was not the proper remedy.

Snyder *v.* Vaux, 2 R. 427.
Musselman *v.* R. R. Co., 2 WEEKLY NOTES, 105.

In this case the defendants below were innocent of any wrong; they were, in fact, less in fault, and more wronged than the plaintiffs. The only just and correct position is to hold that the plaintiffs and defendants became joint owners of the mixture in defendants' tank, in which case replevin would not lie.

Hilliard on Torts, 43.
Barnes *v.* Bartlett, 15 Pick. 71.

C. Heydrick (*T. A. Morrison* with him), for defendants in error.

There was no proof that the oil drawn into defendants' tank from plaintiffs' was not the equivalent of that which was in defendants' tank at the time.

In Pennsylvania, replevin lies wherever one man claims goods in the possession of another, and this, whether the claimant has ever had possession or not, and whether his property in the goods be absolute or qualified, provided he has the right of possession.

Harlan *v.* Harlan, 3 Harris, 507.

And it seems but another mode of stating the proposition, to affirm that whatever goods a man may lawfully recapture as his rightful possession, he may invoke the process of the Court to restore to or put in his possession. It would be an anomaly to hold that a man may of right do with a strong hand what the ministers of the law are powerless to do for him.

Wood *v.* Fales, 12 H. 246.
Tripp *v.* Riley, 15 Barbour, 333.
Fobes *v.* Shattuck, 22 Id. 568.
Kimberly *v.* Patchin, 19 N. Y. 330.

Jan. 7, 1878. THE COURT. The first specification alleges that the Court below erred in assuming, in its charge to the jury, that the oil in defendants' tank was uninjured by the mixture.

This would have been error had any such question of fact been distinctly raised upon the trial. The learned Judge says in that portion of the charge: "The property, as manifest from the treatment of all parties, was uninjured by the mixture, and no wrong is done to any one by each taking out his portion of the common mass." This language leaves no room to doubt that the Court was under the impression, at least, that no question had been seriously made on the trial as to the quality of the oil in defendants' tank. A careful examination of the evidence leads us to the conclusion that the Court was correct in this respect. The evidence of Mr. Sterrett, relied upon by the plaintiffs in error, is not essentially in conflict with this view. He says he examined the Carter tank prior to March 31, 1876, and there was three feet of liquid, one foot of sediment, and two feet of what the witness supposed to be good oil. He examined the tank again after it was filled up by oil from the Caledonia tank on the date last mentioned, and found about eleven feet of liquid, of which two feet eight inches was sediment, and the balance good oil. The amount of sediment would seem to bear more on the question of the quantity than the quality of the oil, the sediment being deducted in estimating quantity, and the superincumbent oil not being essentially affected in quality thereby. The evidence also tends strongly to show that Johnson & Co. practically exhausted the Carter tank prior to the last run from the Caledonia tank in the latter part of March, 1876, from which it would follow that the oil in the Carter tank after said run having been almost, if not wholly, drawn from the Caledonia tank, must have been of one quality. Not only does the evidence fail to disclose any serious contention as to the quality of the oil, but the points put to the Court by the defendants below make no reference to any such question. Had the oil been so mixed in the defendants' tank as to change its quality in an essential degree, so that one barrel drawn out would not be the equivalent of any other barrel previously put in, it was an important fact to have shown, and would not have escaped the vigilance of counsel either in the examination of the witnesses or the points submitted to the Court. We do not think this specification is sustained.

The second specification is not free from difficulty. The learned Judge, at the conclusion of his charge, submitted to the jury as a question of fact whether the oil restored to the Caledonia tank by Johnson & Co. was placed there in return for the oil which it was conceded they drew out, or whether they put it back to satisfy the claim of the plaintiffs below for the injury caused by Johnson & Co. in pumping a quantity of worthless stuff from their slop tank into the tank of plaintiffs. I find no evidence in the cause that Johnson & Co. restored any oil for any other purpose than that of replacing the oil taken out by them. There may therefore be technical error in this portion of the charge. We do not, however, think it a sufficient ground for reversal. In any proper view of the case I am unable to see how the defendants below could have been injured by this portion of the charge. The evidence on the part

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of the plaintiffs as to the quantity of slops pumped into their tank by Johnson & Co. had reference more especially to the quantity of the oil than to its quality, or to any injury resulting from the mixture. The effect of it was to show that with a given number of feet of fluid in the tank, a certain proportion of it was tar, benzine, sediment, etc. By deducting the sediment and the ten per cent. of tar and benzine diffused through the oil, the amount of the latter fluid could be ascertained with reasonable accuracy. It matters not, therefore, for what purpose Johnson & Co. put back oil in the Caledonia tank. All that had been drawn out by them into the Carter tank and not restored could be followed and replevied by the plaintiffs below. That Johnson & Co. had pumped a given number of barrels of worthless stuff from their slop tank into plaintiffs' tank was no restoration of the oil drawn out thereof by them. Hence what Johnson & Co. intended to do when they put back oil was of little consequence. The question of how much oil they took out and how much they returned was fairly submitted to the jury.

The third and fourth specifications allege error in the answer to points. It was urged that the answer to the plaintiffs' first point should, at least, have been qualified, that it refers only to quantity and ignores quality, and every other essential element in the cause. We have already said that the record failed to disclose any serious contention in regard to the quality of the oil. Under the facts of the case we do not regard either the point or the answer objectionable. The defendants' first point which was refused raised the question of the right of the plaintiffs to maintain replevin where the oil had been mixed without the act of the defendants. In the recent case of Hutchison *v.* The Commonwealth (1 Norris, 472), the question of the effect of commingling oils in tanks and pipe lines was discussed at some length. It is not necessary to go over the ground again. It is well settled as a general principle that in Pennsylvania replevin lies wherever one man claims goods in the possession of another, and this, whether the claimant has ever had possession or not, and whether his property in the goods be absolute or qualified, provided he had the right of possession. (Harlan *v.* Harlan, 3 Harris, 507, and cases there cited.) In this case both the plaintiffs and defendants had large oil tanks situated near each other. Johnson & Co. had a refinery near said tanks, and had also the right of storage in each of them to the extent of two thousand barrels. The tank of the defendants was connected with the refinery by means of a pipe, and was used by Johnson & Co. as a supply tank. They drew out oil for the refinery and replaced it in whole or in part, from time to time. Finally, they connected the two tanks by a pipe, and, the plaintiffs' tank being higher than the defendants', the oil would flow from the former to the latter. When Johnson & Co. drew oil from the defendants' tank for their refinery they replaced it on several occasions by drawing from the plaintiffs' tank. They acquired no title to the oil thus unlawfully abstracted, nor did the defendants acquire any title by having it run into their tank by Johnson & Co. to replace the oil taken out by them.

The plaintiffs had a clear right to follow and reclaim their oil by a writ of replevin unless prevented by the fact of its mixture with other oil of the defendants. A given number of barrels of plaintiffs' oil having been unlawfully drawn out of their tank, and placed in defendants' tank, they were entitled to have the same number of barrels of oil put back again. Had the character of the oil been so essentially changed by the mixture that one barrel would not be the equivalent for another barrel, the case would have presented a different question, one that we are not now required to pass upon.

We are not prepared to say that the defendants are wholly without responsibility for the mixture. They allowed Johnson & Co. to use their tank as a supply or feeder for their refinery to draw out oil at will and replace it. This necessarily involved a mixture of the oil. The right of the owner of oil in tanks or pipe lines to take out his aliquot part was distinctly recognized in Hutchison *v.* The Comm. *supra*. As bearing upon the same principle we may refer to Wood *v.* Fales (12 Harris, 246); Tripp *v.* Riley (15 Barbour, 333); Fobes *v.* Shattuck (22 Id. 568); Kimberly *v.* Patchin (19 N. Y. 330).

The judgment is affirmed.

Opinion by PAXSON, J.

Oct. & Nov. '77, 138. Oct. 19, 1877.

Dorsey v. Abrams et al.

Banks and banking—Principal and agent—Power of agent to bind principal—Extent of the authority of the cashier of a bank—Ratification—Ultra vires.

The cashier of a bank has no authority to certify a check which upon its face shows it to be more than a mere order for the payment of money; and any subsequent acts of ratification by him will not be valid as against the bank.

A check containing the words, "To hold as collateral for 1000 P. T. Oil," etc., is not within the ordinary course of banking business, and a certificate by the cashier of the bank, "Good when properly indorsed," will not bind the bank.

Error to the Common Pleas of Clarion County.

Assumpsit, by Patrick Dorsey against Abrams

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and others, trading as "The Citizens' Savings Bank of East Brady, Penna." on the following check:—

EAST BRADY, PA., Dec. 30, 1875.

Citizens' Savings Bank of East Brady, Pa.
Pay to P. Dorsey, or order, two thousand dollars.
$2000. A. W. McCULLOUGH.
To hold as collateral for 1000 P. T. oil pipage paid to Jan. 4, 1876.

[Certified on the face] Good when properly indorsed.
J. Y. FOSTER, Cashier.

[Indorsed on the back] P. DORSEY.

Plea, non assumpsit.

On the trial (before JENKS, P. J.) the signatures of the maker and indorser were proved. There was much testimony tending to prove that the signature of Foster to the check, as well as two telegrams which were subsequently received by the plaintiff, purporting to come from him, were forgeries. On the 10th of January, 1876, demand was made for the payment of the check, which was refused. Testimony was also adduced, on the part of the plaintiff, of acts and declarations by Foster tending to ratify his indorsement of the check, and the telegrams bearing his signature. It was also shown that Foster had on other occasions certified checks, but it was not established that these checks were otherwise than in the usual form.

It was conceded that the check in suit was collateral security for oil, which had been borrowed from the plaintiff by McCullough, the drawer of the check, who had no funds in bank.

Plaintiff's counsel requested the Court to charge in substance (3) that if Foster ratified the indorsement of the check, "such act would amount to an acceptance of the check and plaintiff is entitled to recover;" and (4) "That if the jury find that the managers of the bank had knowledge that Foster was in the habit of certifying checks for their customers, to give them credit in the oil market, and did not promptly repudiate such act, they would be bound by such certificate whether the act was within the scope of the cashier's authority or not." These points the Court refused.

The defendants' counsel requested the Court to charge, *inter alia*, (2) That as there is no sufficient evidence that the cashier of the bank had authority to accept a draft as security for oil to be delivered, the plaintiff cannot recover; (7) Under all the evidence in this case the plaintiff cannot recover.

These points were answered in the general charge, which was as follows: The certification of a check written out would contain a statement that the drawer had funds sufficient to meet it in the bank, applicable to its payment, and an agreement on behalf of the bank that these funds should be retained and paid upon the check whenever it was presented. The cashier has a right, by virtue of his office, to make this certificate when the drawer has funds. (Cook *v.* Blank, 52 N. Y. Repts. 96.) [Even if the drawer had no funds we apprehend that the certificate of the cashier would hold the bank when the transaction was within the range of its legitimate business, but the acts of the cashier, or other officer of the bank, only bind the stockholders when such acts are within the regular and just sphere of banking transactions. (Lloyd *v.* West Branch Bank, 3 Harris, 172.) We do not think this transaction within such sphere. The certificate of the cashier upon the paper upon which suit has been brought would not, therefore, bind the stockholders, without proof that they authorized him to make such certificate, or without proof of such usage and practice on the part of the cashier as would justify third persons in believing that such usage was authorized. Plaintiff having failed in proving such authority or usage, we answer defendants' second point in the affirmative. We also answer defendants' seventh point in the affirmative. As this disposes of the case, further answer to points of either plaintiff or defendants is unnecessary.]

Verdict and judgment for defendants. Plaintiff took this writ, assigning as error (1) The portion of the charge inclosed in brackets; and (5) The refusal of the plaintiff's fourth point.

Knox & Maffett (with whom were *Corbett & Clark*), for plaintiff in error.

The holder of a certified check stands in the same position as the original depositor.

Girard Bank *v.* Bank of Penn Township, 3 Wr. 98.

If the cashier subsequently ratified the transaction after it was done, without his authority, it will have the same effect as if done by his authority.

Parsons on Notes and Bills, 101.
Rayborg *v.* Pergton, 2 Wharton, 386.

There was sufficient evidence of ratification by Foster to have allowed the case to go to the jury.

Rees *v.* Jackson, 14 Sm. 486.

Wilson & Jenks (with whom was *James Campbell*), for defendant in error.

The bank cannot be bound by the forged acceptance of its cashier; and, if the act was beyond the scope of his authority, it cannot be pretended that any subsequent act would ratify it. McCullough having no funds in bank, Foster's certificate is simply an undertaking to pay the debt of another, which is clearly beyond his power as cashier.

Park *v.* Smith, 4 W. & S. 289.
Sutton *v.* Irwin, 12 S. & R. 13.

Nov. 19, 1877. THE COURT. This was a suit brought against the defendants, an unincorporated banking association, to recover the

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amount of a check held by the plaintiffs, a copy of which is here given [*ut supra*].

The J. Y. Foster who certified the check is the cashier of the defendants' bank. It was alleged upon the trial, and there is evidence tending to prove, that the certificate of Mr. Foster was a forgery. Mr. Foster has recognized it and confirmed it by his subsequent acts and declarations.

We do not regard the question of the alleged forgery as an important element in the discussion of this case. It was conceded that at the time McCollough drew the check upon the bank he had no funds there, and no right to draw. It is also apparent that the check was entirely out of the usual course of banking business. This is plain from the face of the instrument. Instead of being a mere order upon a bank to pay a certain sum of money to a person therein designated, or to bearer, it has the significant indorsement in one corner, "to hold as collateral for 1000 P. T. oil," etc. This indicates plainly that the check was given merely as collateral security for the delivery of the oil. If any doubt could exist upon this point, it is put at rest by the testimony of Dorsey (the plaintiff) himself. He says: "The first check was given for borrowed oil; if the oil was not returned, the check was to be paid; that check was carried for thirty days; supposed it was all right and not forged. The second check was taken when oil was advancing, and I would not extend the check without he would give me a check which would secure me for the return of the oil." If the certificate of Foster that the check was "good when properly indorsed" is to bind the bank, then the cashier has made the bank security for the delivery of 1000 barrels of oil. This he could not do without authority. It is an act entirely outside of any of the ordinary recognized duties of the cashier of a bank. There is not a word in the evidence to show that the defendants, or any of them, knew of this transaction, much less sanctioned it. An attempt was made to show a similar course of dealing by the bank as to prior transactions; that is to say, to certify checks drawn without funds, to be held as collateral for oil. It was not successful, however. The checks certified were what the witnesses call "straight checks," by which we understand commercial checks for the payment of money, free from clog or condition. As to such checks, it is not outside the line of a cashier's duties to certify them when requested, if the drawer has funds in the bank. It has been decided that he has a right to make such a certificate by virtue of his office. (Cook *v.* The Bank, 52 N. Y. 96.) The effect of such a certificate we need not discuss, as the question is not before us. Nor need we consider at length the proposition that the plaintiff was a *bona fide* holder for value. The face of the check was notice that it was not drawn in the usual course of business; that it was not a commercial check. The plaintiff's own testimony shows, as we have seen, that he was only to hold it as a security for the oil. He had no right to draw the money upon the check until default in the delivery of the oil. There was ample to put him upon inquiry as to the authority of the cashier.

We are of the opinion that the learned Judge of the Court below was entirely accurate in his rulings embraced in the first assignment. This practically disposes of the case. We may say, however, in regard to the fifth assignment, that the point referred to was not based upon any evidence in the case. There was no error, therefore, in declining to answer it. Judgment affirmed.

Opinion by PAXSON, J. SHARSWOOD, J., absent.

Common Pleas—Law.

C. P. No. 4. Dec. 19, 1877.

Girard Life Ins. Co. v. Frederick P. Addicks.

Mortgage—Personal liability of vendee of land "under and subject" to a mortgage—May be avoided by an agreement between vendor and vendee that vendee shall not assume personal liability—Evidence—Parol evidence of such agreement, to contradict mistake in deed to vendee containing the "under and subject" clause, is admissible in a suit by assignee of the mortgage against vendee of the land.

Rule for a new trial.

Assumpsit. The following facts appeared:—

In February, 1872, William Pettibone, being the owner of certain real estate, executed a mortgage therefor to J. Edward Addicks (a brother of the defendant) to secure his bond for $8000. Pettibone subsequently conveyed the premises to Walton, and Walton by indenture dated July 3, 1872, recorded September 17, 1872, conveyed the premises to Frederick P. Addicks (the defendant), "under and subject to the said mortgage."

The mortgage, by several assignments, became vested in The Girard Life Insurance, Annuity

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and Trust Company (the plaintiffs). Default being made in the payment of interest, the mortgage was sued out by *scire facias* issued against the original mortgagor, and the mortgaged premises were sold at sheriff's sale for less than the amount of the mortgage debt.

The plaintiffs then brought this action of assumpsit to recover the balance from the defendant, on his alleged personal liability arising by implication of law under the deed conveying the premises to him "under and subject to the mortgage."

On the trial (before BRIGGS, J.), the defendant offered parol evidence to show that it was expressly agreed and understood between his grantor, Walton, and himself, at the time of the said conveyance to him, that he, the defendant, should assume no personal liability for the said mortgage debt; and that the "under and subject" clause in the deed to him of July 3, 1872, was inserted by the conveyancer who drew the deed by mistake, and without the knowledge or direction of either party to said deed. He also offered an agreement in writing, under seal, between said Walton and himself, dated June 3, 1876 (after the recovery of judgment in the *scire facias* against the mortgagor, but before the sheriff's sale), reciting that said deed of June 3, 1872, from Walton to the defendant, was by mistake erroneously drawn, in making said conveyance under and subject to the said mortgage; and agreeing that said deed should be reformed and corrected by striking out the said under and subject clause, "and, further, that there is not, nor shall be, any liability on the part of said Addicks to said Walton or any other person or persons for or on account of said mortgage debt, or any part thereof."

The above evidence was admitted, under objection, and BRIGGS, J. directed a verdict for the defendant.

Ridgway, for the rule.

It has been uniformly held in Pennsylvania that one who purchases land "under and subject to a mortgage" makes the debt his own, and is personally liable therefor to the mortgagee, or his assignee.

Campbell *v.* Shrum, 3 Watts, 60.
Kearney *v.* Tanner, 17 S. & R. 94.
Burke *v.* Gummey, 13 Wr. 518.
Taylor *v.* Preston, 29 Sm. 436.
Peyton *v.* Samuel, 4 WEEKLY NOTES, 105.

This liability is founded not merely upon a contract to indemnify the grantor against liability for the mortgage debt, but is a personal assumption to pay the debt, or so much thereof as the mortgage may be insufficient to secure, absolutely and at all events. The vendee obtains the land for so much less, and the assumption being thus founded on a valuable consideration enures to the benefit of the mortgagee or his assignees, who have a right to rely on the vendee's liability, and this liability is enforceable by assumpsit.

Hoff's Appeal, 12 Har. 200.
Blank *v.* German, 5 W. & S. 36.
Walker *v.* Physick, 5 Barr, 194.
Lennig's Estate, 2 Sm. 139.
Ross *v.* Hanna, 2 WEEKLY NOTES, 222.

The evidence of an agreement between the defendant and Walton, his immediate grantor, that the defendant should assume no personal liability for the mortgage debt, might have been admissible in an action between Walton and the defendant, but it was clearly inadmissible in this action. The present plaintiffs were not in privity as to that agreement. Their rights had vested, on the purchase of the mortgage, long before such agreement was drawn up. The record showed a deed to the defendant, "under and subject" to the mortgage, and it was not until four years afterwards that the alleged mistake in the deed was sought to be remedied by the sealed agreement of June 3, 1876. As to third parties whose rights had intervened, the liability of the defendant was fixed; it was entirely independent of any covenant between his immediate grantor and himself. If there has been a mistake, the defendant should seek redress from his grantor, or from the conveyancer, but he cannot charge the loss on innocent third parties whose rights were acquired without notice of any such mistake.

Crawford, contra.

The principle of liability of the vendee of land under and subject to the payment of a mortgage debt in a suit directly by the mortgagee or his assignee, who is a stranger to the contract, is that a creditor has the right to securities acquired for the debt subsequently to his assignment of the debt. (See analysis of cases in Thomas on Mortgages, chap. "Assumption of Mortgages.")

The mistake could of course be corrected as against the vendor, and therefore can be corrected against the assignee of the mortgage, whose rights can rise no higher; and the vendor may agree to release the vendee from liability as against the mortgagee or his assignee.

Hartley *v.* Harrison, 24 N. Y. 170.
Stephens *v.* Casbacker, 8 Hun. 116.

In Hoff's Appeal, cited by the plaintiff, the question of the assumption of the mortgage debt did not arise from a clause in the deed.

C. A. V.

Jan. 5, 1878. THE COURT (after stating the facts). The plaintiff's counsel earnestly contends that it is now the fixed adjudication of the Courts of this State, that the grantee of mortgaged premises subject to a mortgage becomes personally liable for the payment of the mortgage, and cites in support of his view the following cases: Kearney *v.* Tanner, 17 S. & R. 94; Campbell *v.* Shrum, 3 Watts, 60; Blank *v.* German, 5 W. &

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S. 36; Hoff's Appeal, 12 H. 200; Burke *v.* Gummey, 13 Wright, 518; Woodward's Appeal, 2 Ib. 322; Lennig's Est., 2 Sm. 135; Metzgar's Appeal, 21 Ib. 330; Taylor *v.* Preston, 29 Ib. 436; Peyton *v.* Samuel, 4 WEEKLY NOTES, 105, 34 Leg. Int. 126.

The language of those cases in its abstract sense seems to support the plaintiff's view; yet if we restrict its meaning to the points actually decided, it means nothing more than that a grantee who purchases subject to an incumbrance, and assumes to pay the incumbrance as a part of the purchase money, thereby makes the incumbrance his own debt, and if he do not pay it an action against him may be maintained by the party holding the incumbrance. Indeed, the reasoning of the Court in every one of those cases is put upon that ground, though the language employed, abstractly considered, at times takes a wider range.

To precisely the same effect is the principle enunciated in the following cases: Clymer *v.* De Young, 4 P. F. Smith, 118; Stoudt *v.* Hine, 9 Wright, 30; Jack *v.* Morrison, 12 Ib. 117; Fleming *v.* Alter, 7 S. & R. 296; Commercial Bank *v.* Wood, 7 W. & S. 93; Torrens *v.* Campbell, 24 P. F. Smith, 470; Townsend *v.* Long, 27 Ib. 143; Beers *v.* Robinson, 9 Barr, 229; Hind *v.* Holdship, 2 Watts, 105.

The difference between these two classes of cases is in the character of proof only—the latter resting exclusively on oral testimony, the former evidenced by the written assumption to be found in the "under and subject" clause in the deed. The principle running through them all, however, is, that where a debtor and creditor relation exists, and a third party intervenes, who receives from the debtor a valuable consideration for the use of the creditor, the intervening party thereby becomes liable to the creditor.

Now, is there anything in the case before us to put the defendant in such relation with the plaintiff? He not only received nothing for the plaintiff's use, but expressly stipulated that he was not to be held personally liable when he purchased the mortgaged premises. In making such agreement, the contracting parties did not in the remotest degree affect the securities which the plaintiff then held, or its remedy upon them. The plaintiff still held the land pledged by the mortgage and the bond of the mortgagor; and the plaintiff being a stranger both to the contract and the consideration, it is none of its concern what bargain the contracting parties made. That they possessed this power is affirmed in Metzgar's Appeal (21 P. F. Smith, 332). After affirming the doctrine that one who purchases subject to an incumbrance, without restrictive words, may make the incumbrance his own debt, Judge SHARSWOOD says: "Undoubtedly it might be shown that such was not the agreement of the parties; in other words, that the insertion of those words was a mistake of the scrivener."

In Lennig's Est. (2 P. F. Smith, 138), the testator having purchased property already incumbered, the Court, per Judge AGNEW, said: "An heir, devisee, or purchaser, taking land already charged with a mortgage, does not *ipso facto* make the debt his own, or subject his personalty in equity to its payment."

In Blank *v.* German (5 W. & S. 42), though the conveyance was subject to the payment of the mortgage, it appeared from all the evidence that the grantees did not intend to assume the mortgage, and it was held they were not liable, and in doing so the Court puts this forcible inquiry: "But what deduction or reservation of purchase money was there in contemplation of the parties before us? There was no express promise to pay a farthing, either to the plaintiff or the mortgagees; nor is there anything in the nature of the circumstances of the transaction from which a promise can be implied."

In Kearney *v.* Tanner (17 S. & R. 97), the Court expresses itself in this way: "It has been erroneously supposed that it was adjudged by the late Judge MCKEAN that a purchaser of mortgaged premises made himself personally liable to the mortgagee for the amount of the mortgage. If such has been the decision, it was well calculated to create alarm, as the assertion by high authority of a principle not heretofore so understood by the profession, and most extensive in its operation. I was pleased to find, on careful examination, that it does not appear to have been his opinion. The charge of the Court admits of this construction—and when fairly considered no other meaning can be collected from it—that when there was an agreement that the vendee should pay the mortgage money, and afterwards the vendor had been compelled to pay the amount due on the mortgage, he could sustain an action for money paid, laid out, and expended, against the purchaser."

Mr. Thomas, in his book on Mortgages, thus writes on the same subject (page 173): "In all cases it is quite material to show that the grantee has really assumed the mortgage, and promised to pay it. The mere fact that a conveyance is made subject to an outstanding mortgage creates no personal liability on the part of the purchaser to pay it: Hamill *v.* Gillespie (48 N. Y. 556). The law does not raise such an obligation where none is in terms expressed; but, on the other hand, no precise and formal words are necessary, and any language in the deed which imports a promise on the part of the grantee to pay the debt will be sufficient to hold him. As in all other cases of contract the inquiry is, 'What was the intention of the parties?'" And on page 194 he proceeds: "The assumption

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clause contained in a conveyance is evidence of an agreement, but it is no more conclusive than other contracts which are in writing, and executed by the parties under their seals. It may, therefore, be set aside for fraud, or corrected because of mistake, and because it does not express the real intention of the parties."

Is it not then clear from all the authorities that a vendee of premises, subject to a mortgage already on the land, is not bound personally for the mortgage debt if it be agreed at the time of purchase that he shall not be so liable? Such having been the agreement in the case before us, according to the defendant's allegation, surely it was proper to receive the evidence offered to sustain the allegation. The paper to reform the deed was evidence to the same point, and was hence properly admitted. This evidence, being uncontradicted, conclusively rebutted the supposed assumption of the mortgaged debt in the deed; the Court could not do otherwise than direct a verdict for the defendant. That such evidence may be admitted to correct a mistake, and show the true nature of the transaction, though it even contradict the deed, it is now too late to question. (Lippincott *v.* Whitman, 2 Norris, 244; Greenawalt *v.* Kohne, 4 WEEKLY NOTES, 497.)

This case is clearly distinguishable from that of Peyton *v.* Samuel (4 WEEKLY NOTES, 105, 34 Leg. Int. 126) in this: There the allegation was that Kressler, the real purchaser of land, in order to relieve himself of personal liability for the bonds and mortgages to be given to the vendor for advances, solicited Pierce, a man of no means, to take the title, give the bonds and mortgages, and then convey the premises thus charged to Kressler.

However efficacious such an arrangement may have appeared to the parties to it, in legal effect it was but a piece of circuity, landing Kressler just where he would have been had he given the mortgages direct. Taking the arrangement as set forth in the plea, it was clearly insufficient in law to establish the conclusion claimed for it. (American Academy of Music *v.* Smith, 4 P. F. S. 130.) But in our case the agreement that the defendant should not be personally liable was straight-forward, direct, and in good faith, and is to be sanctioned and ratified just as the parties to it intended it should be.

Rule discharged.

Opinion by BRIGGS, J.

[See Lippincott's Estate, 4 WEEKLY NOTES, 103; Stokes *v.* Williams, Id. 370.]

Orphans' Court.

Jan. 22, 1878.

Anders's Estate.

Decedent's contract—Unexecuted contract to convey real estate—Jurisdiction of Orphans' Court to decree specific performance—When vendee not bound to accept title—Building restrictions—When unreasonable, or affecting the enjoyment and value of the property, specific performance will not be decreed against vendee.

Sur petition for a decree for specific performance.

The petition of Joseph Ryan and I. P. O'Neil, executors of Sarah Anders, alleged that prior to her death the decedent entered into a contract with one Michael McGarry, by which the latter was to erect for her a back building to a house then owned and occupied by her, for which she agreed to convey to the said McGarry certain lots of ground, valued at $1000, and to pay the rest of the consideration in cash; that McGarry carried out his part of the agreement and completed the work. The said agreement was in writing, but signed only by McGarry.

The executors further averred in their petition that they were ready and willing to perform the part of the decedent in this agreement by making a conveyance of the aforesaid lots, and prayed for a citation to be issued to various parties in interest, devisees under the will of the testatrix, and to Michael McGarry, the respondent, to show cause why a specific performance of the contract by the executors should not be decreed.

A citation issued accordingly to the above parties returnable on the 27th of October, 1877, when the respondent filed an answer which in substance set forth: that at the time of making the agreement the respondent bargained with the decedent for an absolute and unqualified ownership in the real estate to be conveyed in consideration of the alterations and repairs done to the decedent's house, but that the respondent afterwards found that the real estate was burdened with the following building restrictions as appeared by the deed to Sarah Anders:—

"Not to erect any dwelling house of a less width than seventeen feet, nor any glue factory, bone boiling, lamp-black and printers' ink factory, varnish, turpentine, camphene, or burning-fluid factory, etc., or open any street, lane, alley, court, or avenue of a less width than fifty feet except such private alley as may be necessary as a passage way or watercourse."

The answer further alleged, that, were the respondent "compelled to accept the title to the aforesaid real estate, the above restrictions would interfere with his enjoyment and work greatly to

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his injury, and that an absolute and unqualified ownership and nothing else is, he is advised and believes, the only title to the real estate which he should be compelled to take."

J. Duross O'Bryan, for the petitioners.
Thomas E. Merchant, for the respondent.

Feb. 9, 1878. THE COURT. This is a petition in the nature of a bill for the specific performance of a decedent's contract. The contract was not that ordinarily entered into by parties for the sale and conveyance of land, but was an agreement by decedent to pay the respondent for the improvement of her dwelling house, by conveying to him certain unimproved lots of ground. The agreement was in writing, signed by the respondent alone, but was accepted by the decedent. The respondent performed his part of the contract, but decedent died without having conveyed the lots of ground, or making any provision for their conveyance. Her executors now aver their readiness to execute a conveyance to the respondent, and complete the contract. But while admitting the making of the contract, and his part of its performance, the respondent refuses to accept a deed of conveyance of the lots of ground, for the reason that they are subject to certain building restrictions, which would interfere with his enjoyment and use of the land, and work greatly to his injury. These restrictions, and those of a like character, are frequently imposed upon vendees of land within this city, and are intended to prevent the depreciation in value of adjacent and neighboring lands of the vendors, by prohibiting the erection of buildings for noisome or dangerous occupations, the opening of narrow courts or alleys, or building dwelling houses of less than a prescribed width in front.

By the Act of 1834 (Purd. Dig. 276), under whose provisions this proceeding has been instituted, the Orphans' Court is authorized, "if the facts of the case be sufficient in equity, and no sufficient cause be shown to the contrary, to decree the specific performance of such contract." But in all cases the same principles govern as in a Court of Equity. (Brady's Appeal, 66 Penn. 277.) And wherever, therefore, a chancellor would direct a conveyance to be made in discharge of a decedent's undertaking, the proper Orphans' Court is bound to interpose its statutory authority with like effect. (Brightly's Equity, 218, and cases cited.) But if there be anything inequitable in the transaction, specific performance will not be decreed; it is of grace, and not of right. (Pennock *v.* Freeman, 1 Watts, 401.) And the nature and terms of the contract sought to be enforced, must be clear and capable of ascertainment from the instrument itself, without the aid of parol testimony. (Hammer *v.* McEldowney, 10 Wright, 334.) In that case a bill for the specific performance of a contract for the sale of "houses on Smithfield Street" was dismissed.

In the present case the contract was to pay for work done and materials furnished by the conveyance of "Lots at 51st and Spruce Streets," and is equally objectionable by reason of indefiniteness and uncertainty. But the vendee is entitled, not only to a good and marketable title, but also to an ownership unfettered by conditions which interfere with the use and enjoyment of the land. In Lesley *v.* Morris (9 Phila. Rep. 110), an action of covenant by vendor against vendee upon articles for the sale of land, the defendant declined to take the land, for the reason, *inter alia*, that it was subject to restrictions not to build any frame or wooden buildings, and if any piazza should at any time be erected, the same should be erected fronting to the south. THAYER, J., held that the first restriction was reasonable, and could not be maintained as a serious objection against the plaintiff's right to recover, but the second had "a tendency, not only to diminish the enjoyment of the estate, but also to affect its marketable value to a considerable degree."

Here the restriction not to erect or suffer to be erected any glue factory, bone boiling, lampblack, varnish or turpentine factory, or chemical laboratory, slaughter-house, tallow chandlery or distillery, cannot be considered as unreasonable or prejudicial to the full and absolute enjoyment of the land; but on the other hand, the covenant not to erect or suffer to be erected any dwelling house of a less width in front than seventeen feet, nor lay out or open any street, lane, alley, court, or avenue of a less width than fifty feet, or suffer to be erected any dwelling house upon any such street, court, or avenue, is of a far different character. These restrictions not only limit and diminish the use and enjoyment of the estate, but being perpetually and inseparably incident to the title, might considerably affect its value. It also appears that the respondent had no notice of these restrictions until so informed by counsel. For the reasons stated, and as it would be inequitable to compel the respondent to accept a conveyance hampered with restrictions and covenants, of which he was ignorant at the time the contract was made, we must refuse the decree for a specific performance.

Petition dismissed.

Opinion by HANNA, J.

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U. S. Circuit Court—Equity.

Jan. 6, 1878.

McComb v. The Credit Mobilier of America et al.

Corporations—Subscriptions to stock—Laches in making payment—Abandonment of contract—Authority of officer of a corporation to receive subscriptions to stock—Limitations thereof.

To entitle a subscriber to stock to demand shares from the company, where no payment has been made, and a considerable time has elapsed before suit, the plaintiff must show that the officer of the company had authority to make a contract on an indefinite credit.

Otherwise no contract exists on which he can claim title.

Hearing on bill, answer, and proofs.

The bill, filed Oct. 26, 1868, set forth that in March, 1866, the complainant McComb agreed with Crane, the treasurer of the Credit Mobilier, to take 250 shares of the capital stock of the corporation, and drew for that amount on Fant, for whom the shares were taken. Fant declined paying the draft, and taking the stock. McComb then agreed to take up the draft, and Fant transferred his right to the stock to him. McComb tendered $25,000, the agreed price of the shares, in May, 1866, but refused to allow Crane to have the money, unless he would then issue him a certificate. Crane offered a receipt and promised a certificate on the return of the president, who was then in Omaha. McComb refused to pay on these terms. In June, 1866, the entry of the receipt of the $25,000 for the stock by the draft on Fant was cancelled by a cross entry.

The bill prayed that the stock should be issued to McComb with all dividends paid in the interval.

There was no evidence that Crane had authority to make any contract for the shares, except upon the terms of the charter, and there was nothing special in those terms. The plaintiff endeavored to prove that his right was recognized by the company until February, 1867, and then first denied. The value of the stock had greatly increased in the mean time.

The defendants endeavored to prove that the contract or claim had been abandoned, and that McComb's conduct in 1866–7 showed he did not claim the stock, nor pretend to be bound to pay for it.

Under the ruling of the Court, the only material point on the present hearing was, whether an ownership of shares by contract was shown.

J. E. Gowen and *Jeremiah S. Black*, for complainant.

The contract passed the title. The books showed that the draft on Fant was accepted as payment. While the stock was below par the plaintiff was given no reason to suppose his right would be denied, and the remedy of the company was to sue on the draft.

McMurtrie, contra. The contract was for cash, the draft being taken as cash. When that was returned unpaid—no shares having been issued—the situation of the parties was precisely that of a seller for cash who receives a check on a bank where there are no funds, and the goods have not been delivered. The purchaser cannot keep the seller forever in the position of one who retains goods as security for the price. The act of the company in cancelling the credit by the cross entry in June, 1866, showed they had abandoned the contract. After that the position of McComb was that of any other buyer for cash, where nothing had been paid and no delivery made. No title ever passed. It was merely contractual, and that ended by the neglect to pay within a reasonable time.

Jan. 14, 1878. THE COURT (McKENNAN and CADWALADER, JJ.). The Credit Mobilier of America is a corporation established by the laws of the State of Pennsylvania, and its officers, who represented it in the transaction upon which the complainant founds his title to relief, appear to have been authorized to receive subscriptions to its capital stock, and to issue such stock to subscribers on payment of its par value in cash, and they may have had incidental authority to allow a reasonable time for such payment. But they had no power to give an indefinite extension of credit, and the complainant could not by any arrangement or combination with them obtain it.

Dealing with the ministerial officers of a corporation touching a subject over which they had only such control as was clearly conceded to them, it was his duty to inquire into the source and extent of their authority, and he is, therefore, chargeable with knowledge of its limitations, and of the necessary conditions under which they could bind their constituent.

Upon the admitted facts in the case, there was no payment or authorized waiver of payment for the stock for which the complainant seeks to make the defendants accountable. He did not, therefore, acquire any title to the stock.

This view of the case renders it unnecessary to consider whether the complainant's inaction, or imputed acts of disclaimer on his part, or his alleged assent to other dispositions of the stock, may have induced or sanctioned the issue of the stock of the whole capital to other persons, so that it would be against equity to sustain his present contention.

Irrespective of these considerations, the Court is of opinion that he is not entitled to relief, and his bill is, therefore,

Dismissed with costs.

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WEEKLY NOTES OF CASES.

VOL. V.] *THURSDAY, FEB.* 28, 1878. [No. 5.

Supreme Court.

RULE V. CONCERNING BAIL IN ERROR.

Adopted February 18, 1878.

The existing Rule V. relating to BAIL IN ERROR is rescinded, and the following adopted as Rule V., in lieu thereof:—

Rule V. The defendant in error or appellee may, within twenty days after notice of the taking of bail in error, except to the sufficiency thereof, when the plaintiff in error or appellant must either put in new bail, or the old bail must justify within ten days after exception taken; in default whereof the writ of error shall not be a supersedeas of the execution. New bail may be put in or the old justified, within the ten days, before the Prothonotary of the Court in the proper district, or before the Prothonotary of the Court of Common Pleas of the county to which the writ of error shall have been issued, or from which the appeal shall have come; and in the latter case the new recognizance, or the affidavit of justification, shall be returned to the Prothonotary of this Court within the ten days allowed, not counting the day when the exception to bail was taken. Of the time and place of giving new bail or justifying the old, at least three days' written notice shall be given to the opposite party or his attorney of record. For the purpose of this rule the Prothonotaries of the several Courts of Common Pleas are appointed Commissioners of bail.

Adopted by the Supreme Court at Philadelphia, the 18th day of February, A. D. 1878.

PER CURIAM. AGNEW, C. J.

July, '77, 29. Oct. 1, 1877.

Kehoe v. Commonwealth.

Criminal law—Murder in the first degree—Evidence—Sufficiency of, to support verdict—Question of intent—Conduct and declarations of prisoner and companions, about the time of the murder—Res gestæ—Dying declarations—Competency of witnesses—Co-defendants, who are awarded a separate trial, cannot testify for each other—A co-defendant convicted, but not sentenced, not a competent witness—Jurisdiction—Felonious beating in one county and death in another—Practice—Assignment of error at bar.

Where it appears that an assault, which resulted in a homicide, was brought about by concerted action on the part of several persons with whom the prisoner was associated, evidence is admissible relative to the conduct of the prisoner immediately prior to the assault, and what was said in his presence by others with whom it was alleged he was acting in pursuit of their common purpose to attack the deceased, and what occurred after the attack.

In a trial for homicide it was shown that deceased was beaten and rendered senseless about nine o'clock in the evening, and by his friends carried to a hotel; that next morning he started to walk to his home, about a mile distant, alone; that about half way he met an acquaintance, and said to him: "Bill, it is all up with me. I will never get over it," and proceeded to tell him about his injuries, and how they were inflicted. Two days later he died from the effects of these injuries:

Held, that what was then said by deceased was properly admitted in evidence as dying declarations.

One who has been tried and convicted of an infamous crime, but not sentenced, in whose case motions for arrest of judgment and a new trial are pending, is not a competent witness for one who was jointly indicted with him for the same offence, but granted a separate trial.

When several persons are jointly indicted, and separate trials are awarded, one who has not been tried is not a competent witness for one of the others on trial.

Per STERRETT, J. When the essential ingredients of murder at common law, or murder of the second degree under our code, are shown to exist, the burden of raising the grade to murder of the first degree devolves on the Commonwealth.

Error to the Court of Oyer and Terminer of Schuylkill County.

John Campbell, Neal Dougherty, John Kehoe, Michael McGee, Columbus McGee, and John Chapman, were jointly indicted for the murder of Frank W. S. Langdon. A separate trial was awarded each of the defendants. Campbell and Dougherty were tried and convicted of murder in the second degree, and on the 9th of January, 1877, the case against John Kehoe was brought to trial, before PERSHING, P. J. The following facts appeared:—

On Saturday, June 14, 1862, about nine o'clock in the evening, Frank W. S. Langdon, when returning home from a meeting of citizens, held at Williams's Hotel, in Audenreid, Carbon County, to make arrangements for a proper celebration of the coming Fourth of July, was knocked down by one John Campbell, who immediately passed on leaving him insensible on the street. While there, prostrate, and seemingly lifeless, Langdon was again attacked by a party of men, who hurled large stones at him, some weighing two and a half pounds. He struggled to his feet and endeavored to escape, and was pursued, it is alleged, by Neal Dougherty and John Kehoe, and was again twice knocked down. He was found

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soon afterwards by the roadside, unconscious, his head one mass of cuts and bruises, his ear in shreds and almost severed from his head, his nose and lips cut through, and some of his teeth knocked out. Three days later he died, at his home in Schuylkill County, from the effects of these injuries. Soon after Campbell and others were arrested for the murder, but the Grand Jury of Carbon County ignored the bill. In 1876 the matter was brought before the Grand Jury of Schuylkill County, who found a true bill as above stated.

Langdon had been a "ticket boss" at a coal breaker, and appeared to have incurred the hostility of a number of workmen, who, it was alleged, formed a scheme to kill him. Kehoe, it was claimed, was associated in this scheme and took part in the beating which resulted in Langdon's death. In proof of this, at the trial the Commonwealth's counsel made offers of evidence relating to the conduct and declarations of Kehoe immediately prior to the beating, and what was said in his presence by others with whom it was alleged he was acting in the pursuit of their common purpose to attack Langdon, and what occurred after the latter was attacked. Objected to; objection overruled and evidence admitted; exception.

This evidence showed that three weeks before the murder, Kehoe had used threats against Langdon, saying: "You son of a bitch, I will kill you before long, because you are robbing me and robbing the men by your docking." At the meeting at Williams's Hotel, above referred to, and which Langdon had been largely instrumental in getting up, Kehoe came to the hotel seemingly desirous of making trouble. During the procession, preceding the meeting, he took a flag from Langdon's hands and, making a wrap of it, struck the latter in the face. Afterwards he spit upon the flag hanging from the porch of the hotel, and, being remonstrated with, replied he would do worse than that before he went home. There were with Kehoe at that time Campbell, Dougherty, McGee, Chapman, and others, who formed a group in front of the hotel. Some of them threw pebbles and sand up on the porch where the band was playing. Langdon having appeared on the porch, one of them said: "If they got that son of a bitch off that porch they would kill him." The meeting soon afterwards dispersed, and Langdon started home. A few minutes later a man was heard to cry "don't, don't, for God's sake don't. I have had enough," accompanied by the sound of stones thrown against a fence. A number of witnesses were attracted by the fray, who testified there were some six assailants, and that Langdon was the man attacked. Several witnesses identified Kehoe, and testified that the crowd was substantially the same which had made the disturbance at the hotel, and had been seen together several times that evening. Soon afterwards, Kehoe and Dougherty went into a saloon and said they had been just twenty minutes coming from Beaver Meadow, a distance of four miles; this was about fifteen or twenty minutes after they had been seen at the hotel making the disturbance. The next morning Kehoe said to one witness, "They killed Langdon last night. The boys gave him a hell of a beating."

The admission of this evidence constituted the first five, together with the eighth and ninth assignments of error.

Langdon, after he was found by his friends, was carried to the hotel. The next morning he started alone from the hotel to walk to his home, a mile distant. About half way there he met an acquaintance, one Canvin, and said to him: "Bill, it is all up with me. I will never get over it." Further conversation followed on the subject of his injuries and how they were inflicted, which the Commonwealth offered in evidence. Objected to as not sufficiently shown to be dying declarations; objection overruled; exception. (Sixth and seventh assignments of error.)

The defence offered Neal Dougherty and Columbus McGee to contradict the testimony on behalf of the Commonwealth as to these three and others having been in company on the night of the murder. Dougherty had been tried and convicted of the same homicide, but was not yet sentenced, a motion being pending in his case for arrest of judgment and a new trial. The Commonwealth's counsel objected to Dougherty as incompetent because convicted of an infamous crime, charged in the indictment pending against him and still undetermined. McGee was objected to on the ground that he was a co-defendant in the indictment against the prisoner at bar, that he elected to be tried separately and had not yet been tried. The objections to both these proposed witnesses were sustained. (Ninth and tenth assignments of error.)

Defendant's counsel presented, *inter alia*, the following points:—

(4) If the jury believe the evidence of James Shearer and John Cook, that the defendant, Kehoe, was with them in front of the hotel at the time Langdon was beaten and stoned, and that Kehoe was not present at the beating and did not participate therein, the verdict of the jury should be for the defendant. *Answer:* To this we say yes, with the qualification, that if the jury find from the evidence that the defendant, as claimed by the Commonwealth, entered into a combination or conspiracy with the other defendants to procure the killing of Langdon; if he counselled the act or procured it to be done, he would be guilty as an accessory before the fact, although absent at the time of the commission of the

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crime. If present aiding and abetting, although he did not strike the blow, he would be equally guilty in the eye of the law with those who actually did the beating.

(5) If the jury believe that a prosecution against John Campbell and others was commenced in Carbon County shortly after Langdon was beaten, and that Young, Horne, and others who now identify Campbell as the person who struck a blow and felled Langdon to the ground, were present before the grand jury and gave their evidence as they then remembered the circumstances, and that the prosecution failed, the jury may take into consideration such facts in connection with the fact, that from the long time (fifteen years), which has elapsed since the injuries were done to Langdon, that there is a strong probability that witnesses may have forgotten the order of events, the particular time of their occurrence, and the persons who participated therein, as well as the identity of those whom they supposed they saw. *Answer:* The facts in connection with the legal proceedings in Carbon County have been stated by the witnesses, and are for the consideration of the jury. In affirming that, we may observe, as the matter has been incidentally discussed, although it is no necessary part of our instruction to the jury, that at one time when a party was beaten in one county and died in another it was held that the perpetrators of the crime could not be tried in either county, because in neither was the offence complete. It appearing that Langdon was beaten in Carbon County and that he died in Schuylkill County, the existing statute gives jurisdiction of the case to this Court.

The jury found the prisoner guilty of murder in the first degree, and sentence of death was subquently pronounced upon him. Defendant took this writ, assigning for error, *inter alia*, the admission of the testimony as to the conduct, declarations, etc., of the prisoner and his companions about the time of the murder; the admission of the declarations of Langdon after the beating; the rejection of Dougherty and McGee as witnesses, and the answers to the points given above.

John W. Ryan (with him *A. Campbell* and *S. A. Garrett*), for plaintiff in error.

It is not denied that when a party has committed a crime, preparations looking towards it, or opportunities sought to accomplish it, may be given in evidence to strengthen the probability of his guilt, but a reasonable doubt about the bearing of any fact offered in a case of this character requires the rejection of the offer. Here detached circumstances having no apparent or probable connection with the offence charged, were introduced in the case for the purpose of procuring a verdict of murder in the first degree against this prisoner after two verdicts of murder in the second degree against other parties, charged with participating in the same crime.

Dying declarations are not admissible unless made under a sense of impending dissolution and a consciousness of the awful occasion. Langdon on this occasion thought himself well enough to walk home, a mile in distance, alone. He met a friend accidentally about half way, who walked with him while he made these declarations. He dismissed his friend as he approached his home, lest his wife, seeing him attended, should think him worse than he was. He lived for two days afterward. Declarations under such circumstances should have been rejected.

It is not sufficient ground for the exclusion of a witness that he is a party to the record.

Worrell *v.* Jones, 7 Bing. 395.
Mart *v.* Mainwaring, 8 Taun. 139.
Pipe *v.* Steele, 2 Q. B. 733.
Whitehead *v.* Bank of Pittsburgh, 2 W. & S. 172
Mevey *v.* Matthews *et al.*, 9 Barr, 112.
Paine *v.* Tilden, 20 Vermont, 554.
Moddewell *v.* Keever, 8 W. & S. 65.
Johnston *v.* Blackman, 11 Com. 342.
Woodruff *v.* Westcott, 12 Com. 134.
Bowen *v.* Burk, 1 Harris, 146.
Kennedy *v.* Philipy, 1 Harris, 408.

It is the judgment of the Court, not the conviction, which operates to incapacitate a witness from giving evidence. When the cause is at an end as against one of the parties, so that his liability is no longer dependent on the final event as to the rest, he may be called as a witness on either side.

Greenleaf on Evidence, vol. 1, pp. 470, 473.
Van Deusen *v.* Van Slyck, 15 John. 223.
Moon *v.* Eldred, 3 Hill, 104.
Wildmarth *v.* Montford, 4 W. C. C. R. 79.

Where two persons have been jointly indicted and one pleads guilty, he has been held a competent witness before sentence, on the trial of the other.

Commonwealth *v.* Smith, 12 Metcalf, 238.
Rex *v.* George, C. & Marsh, 111.
Rex *v.* Fletcher, 1 Stra. 633.
Rex *v.* Hinks, 2 C. & Kir. 462.
Commonwealth *v.* Marsh, 10 Pick. 57.
People *v.* Bill, 10 Johnston, 95.
Regina *v.* Hinks, 1 Dennison, 84.
People *v.* Donnelly, 2 Park. 182.
Shay *v.* Commonwealth, 12 Casey, 305.

The tenor of the evidence does not support a verdict of murder in the first degree.

[AGNEW, C. J. You have not assigned that for error.]

Not specially.

[AGNEW, C. J. You must assign it for error and argue it.]

(On the suggestion of the CHIEF JUSTICE and with permission of the COURT, counsel for plaintiff in error thereupon filed an additional assignment of error to the effect, that the verdict of

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the jury of murder in the first degree was against the weight of evidence in the case.)

There was not any testimony showing a deliberate intent to take life. There was no evidence that any weapons, except stones, were used. If the threat was to be used in evidence as to his intent to kill, they should have shown evidence of premeditation and preparation of weapons.

George R. Kaercher and *Charles Albright* (with them *Guy E. Farquar* and *F. W. Hughes*), contra.

The admission of the dying declarations in evidence was a question for the determination of the Court below under all the evidence before it, and its judgment upon the facts should not be reversed, unless it plainly appear that error has been committed.

Fife *et al. v.* Commonwealth, 5 Casey, 437.
Phillips on Evidence, vol. 1, pp. 3, 5, and 7.
McCorkle *v.* Binns, 5 Binney, 340.
Hemphill *v.* McClimans, 12 H. 370.

Magee being an untried joint defendant, could not be a witness.

Shay *v.* Commonwealth, 12 Casey, 305.
Stup *v.* Commonwealth, 24 Sm. 462.

The authorities quoted by plaintiff in error only go to show that a co-defendant may in certain cases be a witness when the case as to him is at an end. With a motion for arrest of judgment and a new trial pending, the case of Dougherty was not at an end, and he therefore was not a competent witness.

Greenleaf on Evidence, vol. 1, sect. 363.
State *v.* Young, 39 N. H. 283.

A party to the record cannot be a witness.

Kirk *v.* Ewing, 2 Barr, 455.
Given *v.* Albert, 5 Watts & Sergt. 333.
Wolf *v* Finks, 1 Barr, 439.
Cambria Iron Co. *v.* Tomb, 12 Wr. 394.
Parke *v.* Bird, 3 Barr, 360.
Irwin *v.* Shuemaker, 4 Barr, 177.
Lies *v.* Stub, 6 Watts, 48.
Stub *v.* Leis, 7 Watts, 43.
Marshall *v.* Bank, 1 Casey, 386.
Noble's Administrators *v.* Laley, 14 Wr. 284.
Swanzey *v.* Parker, 14 Wr. 454.

The evidence was sufficient to support the verdict of the jury; the evidence of intent was the threats.

[AGNEW, C. J. These threats being confined to Kehoe, there arises the necessity of showing that the one who threatened death caused the death.]

There was no *post-mortem* examination, no evidence as to which was the mortal wound. It was the persistent attempts and repeated blows that killed. Kehoe was present, and all the evidence showed a concerted effort to kill the man.

[AGNEW, C. J. There may have been malice, there may have been an intention to beat and beat badly; but was there any evidence of an intent to take life?]

The intent whether to kill or beat was a controverted point before the jury; and they, by their verdict, found that there was an intent to take life.

Jan. 7, 1878. THE COURT. The plaintiff in error was indicted jointly with five others for the murder of Frank W. S. Langdon, charged to have been committed at Audenried on the 14th day of June, 1862. The defendants each demanded a separate trial, which was granted. The assignments of error relate exclusively to the trial of John Kehoe, and we are not called upon to consider the legal status of any of the other defendants, except in so far as it may have affected their competency as witnesses, or otherwise have a legitimate bearing on the present case.

The testimony before the jury was of such a character as to leave no reasonable doubt in their minds that an atrocious murder was committed upon the person of Langdon, and it was equally clear that several persons were concerned in its commission. A great deal of testimony, direct as well as circumstantial, was introduced for the purpose of showing that John Kehoe participated in the homicide, and it thus became a question of fact exclusively for the jury. By their verdict, the felony charged in the indictment, as well as his guilty participation therein, has been conclusively established. It is very clear to our minds that the testimony was quite sufficient to warrant a verdict of guilty; but it is claimed that it did not justify the jury in finding the higher grade of murder. This would be so if there was no testimony from which the jury might fairly and reasonably find that the killing was wilful, deliberate, and premeditated, as well as malicious and without justification or excuse.

When the essential ingredients of murder at common law, or murder of the second degree under our code, were shown to exist, the burthen of raising the grade to murder of the first degree devolved on the Commonwealth.

The previous threats of the prisoner, the manner and circumstances of the attack on the deceased, and the atrocious severity of the injuries inflicted on his person, were mainly relied on for the purpose of proving the intent to kill. It was shown that Langdon was "ticket boss" at the colliery, and as such it was his duty to see that the coal, as it came out of the mine, was clean; and, if not, to dock the delinquent diggers; that complaints were made of his docking, and about three weeks before he was murdered Kehoe threatened to kill him because he was robbing him and others there by his docking. It may be said that Kehoe was somewhat intoxicated at the time, and that his threats were mere idle bravado intended to intimidate Langdon. It is true the witness says he was "in liquor;" but it by no means follows that he did not mean what he said. When

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men are under the influence of liquor, they are perhaps more unguarded and outspoken than when duly sober. The testimony tends to show that Langdon had become obnoxious, especially to Kehoe, on account of the manner in which he discharged his duties as "ticket boss," and that in making the threats he was actuated by feelings of hatred and revenge. These, however, were matters of fact to be determined by the jury.

In endeavoring to discover the motive and intention of the prisoner, they would naturally and properly consider, among other things, the inhuman manner in which Langdon was assaulted and beaten without provocation, the fiendish cruelty with which his assailants persevered in their wicked purpose, even after he had begged them to desist and spare his life.

When these and all the attendant circumstances are taken into consideration, in connection with the previous threats to kill him, there was quite sufficient before the jury to warrant the conclusion that they intended to carry the threat into execution. Dr. Dimmick and other witnesses who speak of the condition in which Langdon was found describe his head as "almost a complete mass of wounds and bruises."

They say "in fact his whole head was a mass of wounds, more particularly about the posterior part;" one of his ears was lacerated, and almost severed from his head; his nose and lip were cut through, and some of his teeth knocked out. It was satisfactorily shown that death resulted from the injuries in less than three days; and, if he had not been a man of vigorous constitution, he could not have survived so long. If it may be presumed that men intend the natural and ordinary consequences of their acts, it required no strained inference to reach the conclusion that they intended to beat him to death. But the jury had no occasion to rely exclusively upon any such presumption. The previous threats and subsequent conduct of the prisoner tended strongly to the same conclusion.

When he met the witness, William King, early next morning, he said, "I was up at Pottsville last night, and they killed Langdon." How came he to use this expression if the idea of killing Langdon had not been previously entertained? And scattered throughout the testimony there are a number of facts and circumstances which tend to connect the prisoner with the murder, and at the same time justify the jury in determining the degree as they did. It is unnecessary to refer to them in detail or at greater length than has been done. They all appear to be consistent with the theory upon which the verdict must have been based, and at the same time irreconcilable with any reasonable hypothesis of the prisoner's innocence. The body of the offence was clearly established. There could be no doubt that Langdon was murdered, and the evidence was amply sufficient to justify the jury on finding that the prisoner was one of the guilty parties, and that the grade of his offence was murder of the first degree. A careful review of the evidence satisfies us that "all the ingredients necessary to constitute murder of the first degree were proved to exist."

The supplemental error assigned at bar during the argument is therefore not sustained.

The first five together with the eighth and ninth assignments of error relate to the conduct and declarations of Kehoe immediately prior to the beating of Langdon, and what was said in his presence by others with whom it was alleged he was acting in the pursuit of their common purpose to attack Langdon, and what occurred after he was attacked.

As has been already remarked, it was very evident that in the assault on Langdon there was what at least appeared to be concerted action on the part of several persons with whom Kehoe was associated, and it would have been impossible for the jury to have had an intelligent understanding of the case without being informed as to the facts and circumstances, leading to and connected with the main transaction. Many of the matters embraced in these assignments fall properly under the head of *res gestæ;* and while some of them may have had but little, if any, bearing on the case, we are unable to see that the prisoner could have been in any way unduly prejudiced by any of the testimony to which objection was made. As a general rule everything that pertains to the proper surroundings of the crime charged is admissible. We cannot say that the rule was violated in this case. The length of time that has elapsed, nearly fifteen years, between the commission of the offence and the date of trial, made it more difficult to develop the facts of the case without the introduction of some unimportant circumstances the relevancy of which may not have been quite clear. We have been unable to discover any material error in the matters complained of in either of the foregoing assignments.

The sixth and seventh assignments relate to the alleged dying declarations. The testimony on which they were admitted appears to show, and no doubt satisfied the Court that they were made by the deceased under a sense of impending dissolution. In determining the state of his mind, at the time, the nature and character of the injuries from which he was then suffering were to be considered in connection with what he said in regard to their fatal effect, and if he really believed that death was impending, as the speedy result of those injuries, his declarations were properly admitted.

It was a question for the Court, and while in

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some respects it may be considered a close one, we think it was rightly determined.

The tenth and eleventh assignments relate to the rejection of Columbus McGee and Neal Dougherty, as witnesses offered on the part of the prisoner on the ground that they with others were indicted jointly with him for the same homicide, and that Dougherty had been tried and convicted, but not sentenced.

In the case of McGee the question presented is, whether, when several persons are jointly indicted and separate trials are awarded, one who has not been tried is a competent witness for one of the others on trial.

This was one of the questions in Shay *v.* Commonwealth (12 Casey, 305) in which it was held that he was incompetent. This case was followed by Staup *v.* Commonwealth (24 P. F. Smith, 458) in which the present Chief Justice, delivering the opinion of the Court, says: "Defendants jointly indicted for murder, though severing in their defence, cannot testify for each other. The love of life is too strong to be placed in the balance against truth, and the result might often be that both defendants would be acquitted when both were guilty."

A different rule has sometimes been recognized, but the decided weight of authority accords with our own case.

The case of the other witness, Neal Dougherty, differs only in this, that he had been tried and convicted, but not sentenced, and motions in arrest of judgment and for a new trial were pending at the time he was offered. Was he thereby rendered competent? We think not. It is clear that when the prosecution, as to one of several defendants is fully ended, either by acquittal, entry of a *nolle prosequi*, or by a verdict of guilty and judgment thereon, he is a competent witness, unless disqualified by the judgment as in case of sentence for crime of an infamous nature. In such case it is the judgment that renders the convict infamous, and the disqualification continues until it is removed by pardon or otherwise. In Rex *v.* Fletcher (1 Strange, 633) two persons were jointly indicted, one of whom plead guilty and paid his fine; it was held by Lord Chief Justice RAYMOND that he was a competent witness for the other for the obvious reason that the matter was at an end, as to him. He was no longer, in any just sense, a party to the record. His testimony could have no possible effect on his own punishment, for that had been inflicted and satisfied; nor upon any subsequent proceedings against him, for, as to him, all proceedings had terminated. But the case is very different when the prosecution has not been ended: when a verdict of guilty has been rendered, and efforts are being put forth to arrest judgment or secure a new trial. At no period in the progress of a case perhaps is the defendant more interested in furnishing exculpatory evidence in behalf of his co-defendants, who after being liberated by his testimony would become competent witnesses for him in the event of a new trial.

In the State *v.* Young (39 N. H. 283) a defendant who plead *nolo contendere*, but against whom no judgment had been pronounced, was held to be incompetent, as a witness for his co-defendant. In delivering the opinion of the Court Mr. Justice FOWLER says, "It seems, notwithstanding cases to the contrary, that a defendant cannot properly be admitted as a witness for his co-defendant in a criminal case, until he has ceased to be a party to the proceeding. No plea, merely, unless followed by judgment in accordance with it, can operate to remove the disqualification. So long as he remains a party to the proceeding, so long as anything remains to be done against him which may, by possibility be affected by his own testimony, he is incompetent."

In some cases confusion of thought has apparently arisen from speaking of the conviction of a defendant as the end of the case. When conviction by judgment of the Court is meant this is correct, but when a plea admitting guilt, or a verdict of guilty not followed by judgment, is regarded as a conviction which ends the case, it is erroneous.

We are satisfied that both reason and weight of authority concur in the conclusion that neither of the witnesses offered was competent, and therefore no error was committed in rejecting them.

The remaining assignments of error are not sustained, and there appears to be nothing connected with either of them that requires special notice. The defendant's fourth point was affirmed with an explanation and qualification which the circumstances of the case appear to have justified. The fifth point was substantially affirmed, and the suggestions therein contained were properly referred to the jury for their consideration. What was said by the Court in the same connection, relative to its jurisdiction of the case was correct in itself, and in no way calculated to prejudice the defendant.

The learned President of the Oyer and Terminer appears to have conducted the trial with great care and due regard to the rights of the plaintiff in error; the principles of law involved were fully and clearly explained to the jury, and the testimony was so received and submitted, as to leave them entirely free in the discharge of their duties as judges of the facts.

Guided in their deliberations by correct and appropriate instructions, and acting under the solemnity of their oaths they found the defendant guilty of murder in the first degree.

The record discloses nothing that would justify us in disturbing the judgment.

The judgment of the Court of Oyer and Ter-

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miner is affirmed, and it is ordered that the record be remitted for the purpose of carrying the sentence into execution.

Opinion by STERRETT, J.

Jan. '77, 75. Jan. 14, 1878.

The Girard Life Insurance, etc., Co. v. Stewart.

Mortgage—Personal liability of vendee of land "under and subject" to a mortgage—Parol evidence to vary effect of deed—Vendee, who is a mere naked trustee, not personally liable to assignee of mortgage.

The defendant, as grantee of property "under and subject" to a mortgage, was sued in assumpsit by the assignee of the mortgage for a balance due thereon after sheriff's sale of the mortgaged premises. The defendant offered parol evidence to show that he was not the real purchaser, but a dry trustee; and that he entered into no agreement to pay the mortgage:

Held, that such evidence was admissible.

Held, further, that the defendant, under such circumstances, was not personally liable for the mortgage debt.

Semble, that the criterion of personal liability on the part of a purchaser of land for an encumbrance to which the property is subjected is the contract or consent of the purchaser to become bound for it, where the debt forms a part of the consideration he is to pay for the encumbered property.

The undertaking to pay the encumbrance is a contract with the vendor.

Where the property is cast upon the party by act of law, or by the agency of others who are the beneficiaries, there is no reason for assuming that he intended to bind himself.

Error to Common Pleas No. 4, of Philadelphia County.

Assumpsit, by the Girard Life Insurance, Annuity and Trust Company, assignee of a mortgage, against Stewart, the vendee of the premises upon which said mortgage was secured.

The mortgage in question, for $1200, was executed April 3, 1873, by John H. Haas to Thomas C. Price who assigned it Nov. 29, 1873, to Charles S. Potter, who, on the same day, assigned it to the Girard Life Insurance, Annuity and Trust Company, plaintiffs.

On May 22, 1875, the premises in question were conveyed by one Durant, the then owner, to the defendant, the deed being made "under and subject" to the payment of the said mortgage debt of $1200. The consideration mentioned in the deed was $7800. The defendant received the rents, and paid the first semi-annual interest upon the mortgage falling due during his ownership. He declined to pay the following interest, in consequence of which the mortgage was sued out, by *scire facias* against the mortgagor, and the property sold at sheriff's sale for $950. For a balance due on the mortgage of $511.15, with interest, the plaintiff then brought this action of assumpsit, on the ground of the defendant's personal liability arising from the "under and subject" clause in the said deed.

At the trial (before ELCOCK, J.), the defendant offered to show by parol evidence "that he was a mere naked trustee, without knowledge or personal interest; that he was not the real purchaser, the real purchaser being John Jennings; that he took title to oblige Jennings, without consideration, and paying nothing for the property; that he never dealt as purchaser with Durant, the grantor, directly or indirectly; that the conveyance was made to him merely in pursuance of his desire to oblige, and in trust; that at the time of the conveyance all these facts were known to Durant, the grantor, and that the defendant never knew anything of the terms of the deed until after its execution, and until it was brought to him by Durant and Jennings, duly executed."

Objected to; admitted; exception.

The defendant then offered in evidence an agreement dated May 22, 1875, the same date as the conveyance to him, between Durant, Jamison, and Jennings which provided, *inter alia*, that certain lots, including the premises in question, should be conveyed by Durant *et al.* to said Jennings, "or to whom he may direct."

Objected to; admitted; exception.

Further, that the deed to defendant was made in his name as grantee, without his knowledge until after its execution, and that he did not enter into any covenant, promise, or agreement with the grantor to pay the mortgagee.

Objected to; admitted; exception.

The Court charged the jury, *inter alia*: "You are to find only one question, Was Stewart the real owner or purchaser, or merely a dry trustee? If you find that he was simply a dry trustee, and that he made no other promise or undertaking, then your verdict should be for the defendant."

Verdict and judgment for the defendant. The plaintiff took this writ, assigning for error the admission of the evidence objected to and that portion of the charge quoted above.

John J. Ridgway, Jr. (*E. S. Harlan* with him), for plaintiff in error.

The effect of the evidence admitted was to contradict the deed.

Whoever takes property "under and subject to a mortgage," makes the debt his own, and is personally liable for it.

Campbell *v.* Shrum, 3 W. 60.
Blank *v.* German, 5 W. & S. 36.
Walker *v.* Physick, 5 B. 194.
Hoft's Appeal, 12 H. 200.
Burke *v.* Gummey, 13 Wr. 519.
Lennig's Estate, 2 Sm. 139.
Ross *v.* Hanna, 2 WEEKLY NOTES, 222.
Peyton *v.* Samuel, 4 Ibid. 195.

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New York decisions are to the same effect, but ven more emphatic.

Thomas on Mortgages, 185–195,
Lawrence *v.* Fox, 20 N. S. 268.
Burr *v.* Beers, 24 Ibid. 178.
Garnsey *v.* Rogers, 47 Ibid. 233.
Thorp *v.* Keokuk Co., 48 Ibid. 253.

The right to recover does not rest upon the grantor's equity, but upon the grantee's making himself liable to his grantor and the mortgagee.

This case is distinctly ruled by—

Woodward's Appeal, 2 Wr. 322.

George W. Biddle and *George Bull*, for defendant in error.

In Hoff's Appeal (*supra*), there was no mention of any mortgage debt in the deed, but Hoff rendered himself liable by an indorsement that the balance of the purchase money, consisting of the mortgage debt, was "to be paid by the said John Hoff." Woodward's Appeal (*supra*) was a mere question of distribution of the funds between the guardian and the administrator of the estate of the deceased ward. The Supreme Court held that it was an obligation properly chargeable upon the ward's estate, and made a decree to protect the guardian. So was Lennig's Estate (*supra*) a question of distribution.

In this case Durant had knowledge that Stewart was but a dry trustee, and having therefore no right of action against him, the mortgagee, whose rights are no higher, can have none.

A review of all the cases in Pennsylvania shows, that, in order to render the grantee personally liable in such cases it must appear (1) That the grantee named in the deed was a *bona fide* purchaser, and not a representative of the real purchaser; (2) Either from the deed, or by evidence *aliunde*, that the assumption of encumbrances by the purchaser was agreed upon and understood between the parties, and formed a part of the consideration for the conveyance; and this should be made to appear affirmatively.

Kearney *v.* Tanner, 17 S. & R. 94.
Trevor *v.* Perkins, 5 Wh. 244.
Lippincott's Assigned estate, 4 WEEKLY NOTES, 103.

Even if this were otherwise there was no privity of contract, in this case, between the defendant as grantee of the land, and the plaintiffs as assignees of the mortgage. The Common Pleas case of Ross *v.* Hanna, cited on the other side, is the only instance in which a mortgagee ever recovered in a suit directly against the grantee, skipping over the mortgagor and the grantor. That case was brought to this Court on writ of error, but was not prosecuted. We submit that the principle is unsound, and contrary to the well-settled law of this State.

Jan. 21, 1878. THE COURT. In this case there was no agreement or consent of the defendant to pay the mortgage debt or to make it his own, and no consideration moving to him for its payment. He was merely a dry trustee to whom the property came by the acts of others, and not his own. He is clearly not liable for the mortgage debt under such circumstances. The property was bound for it, but not himself personally. The criterion for personal liability for an encumbrance to which property is subjected, appears to be the contract or consent of the purchaser to become bound for it where the debt forms a part of the price or consideration he is to pay for the encumbered property. His undertaking to pay the encumbrance is a contract with his vendor. But where the property is cast upon the party by the act of the law, or by the agency of others who are the beneficiaries, there is no reason for assuming that he intended to bind himself and thereby to add a new security for the payment. (Lennig's Estate, 2 Sm. 135.)

PER CURIAM. Judgment affirmed.

[See Girard L. Ins. Co. *v.* Addicks, *ante*, p. 75.]

Jan. '77, 137 Jan. 15, 1878.

Bentley v. Kaufman.

Will—Bequests of personalty—Gift of income, when not equivalent to gift of corpus—Gift to A. for life, and if he should "die without issue" over, when not an absolute gift to A.—Testamentary intent.

A bequest of income will not carry an absolute estate in the principal, where the plain intent appears to sever the product from its source.

A testatrix directed her executors to sell her real estate, to invest the proceeds in interest-bearing securities, and to pay the income to her son during his life. She provided as follows: "If my son should *die without issue*, it is my desire that the whole amount of my investment be given to the Children's Orphan Asylum":

Held, that there being a clear intent to give the son an estate in the personalty for life only, no implication would make his interest absolute.

Error to the Common Pleas No. 4, of Philadelphia County.

In the Court below, Bentley, having obtained a judgment against Leon Kaufman, issued an attachment execution against funds held by the Pennsylvania Company for Insurance on Lives, as executors under the will of Hannah Ann Kaufman, deceased. The plaintiff and the garnishees agreed upon a case stated, from which the following facts appeared:—

Hannah Ann Kaufman died September 19, 1873, leaving a will, of which the following is a copy:—

"*Imprimis.* It is my desire immediately after my decease, that all my personal property shall be sold at public sale and my funeral expenses paid, and the balance of funds

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to be invested and placed to the credit of my son Leon Kaufman, which shall be explained hereafter.

"One year after my decease, I desire my executors to sell my real estate situate in Wood Street, north side, west of Second Street, at public sale, to the highest bidder, for current funds, the proceeds to be invested in the best securities bearing interest, the interest of my estate to be paid to my son Leon Kaufman during his natural life, in half yearly payments, for his sole benefit. If my son Leon Kaufman should die without issue, it is my desire that the whole amount of my investment be given to the Children's Orphan Asylum.

"As to all the rest, residue, and remainder of my estate, real, personal, or mixed, of whatsoever nature or kind, or wheresoever situate at the time of my decease, I do hereby give, devise, and bequeath the interest of my estate to my son Leon Kaufman during his natural life, to be paid to him half yearly. If my son Leon Kaufman should die without issue, then the whole of the investment be given to the Children's Orphan Asylum of this city as a gratuity."

The testatrix lastly appointed the Pennsylvania Company for Insurance on Lives, etc. (the garnishees), her executors.

The following question was submitted to the Court:—

Does the defendant Leon Kaufman take an absolute or a life interest under the will of his mother? If the former, then judgment to be entered for the plaintiff for the amount of his claim to the extent of the assets in the hands of the garnishees; if the latter, then judgment to be entered for the plaintiff, but only one of income accrued in the hands of the garnishees.

The Court held that the defendant took nothing but a life estate.* It subsequently appearing that the accrued income was exhausted by a prior lien, the Court below finally entered judgment for the garnishees, whereupon the plaintiff took this writ of error.

Isaac D. Yocum and *Henry Wharton*, for the plaintiff in error.

When there is a gift over on a mere general failure of issue without qualifying words, there is no difference between real and personal estate.

Train *v.* Fisher, 15 S. & R. 145.
Gray *v.* Shawm, 1 Edw. Ch. 153.
Crook *v.* Devandes, 9 Vesey, 197.
Amelia Smith's Appeal, 11 H. 9.
Biddle's Appeal, 19 Sm. 190.

When there is a gift to A., and on his death without issue to B., we cannot attribute to the testator the intention that if A. does have issue, they shall get nothing, either directly or indirectly; we must infer an absolute gift to the ancestor, which, as here, must defeat the gift over which is within the rule against perpetuities, or, a gift to the issue in remainder. The former alternative has long been adopted in this country and in England, and it certainly makes no difference whether the gift is direct, or to the trustees to pay over the income. The latter alternative has not been adopted. Wynch's Trusts (5 DeG. M. & G. 188; 17 Jur. 588), Sheets's Estate (2 Sm. 257), Keene's Appeal (14 Sm. 268), which were relied on by the Court below, were cases in which there was an express gift to issue; where there is no such express gift the only implication is that the first taker takes absolutely.

Hawkins on Wills, pp. *201, *206.
Theobald on Wills (London, 1876), pp. 240, 242.

John G. Johnson, contra.

In Train *v.* Fisher, relied on by plaintiff in error, the gift was of income to be paid to H. N., "her heirs and assigns," forever, and in default of issue, the principal over. The plain intent was to give all to H. N. The cases cited, together with Train *v.* Fisher, contain gifts over after bequests, not for life, but generally.

The distinction between cases where there are, and where there are not express gifts to issue, is unreasonable. It defeats the primary intent for the benefit of the issue, substituting a secondary intent, ostensibly for their benefit, but less effectual.

The word "issue" quâ personalty is not now a word of limitation, and its interpretation is no longer affected by feudal laws.

Sheets's Estate, *supra*.
Hawkins on Wills, 147.
Greenway *v.* Greenway, 2 De G. F. & J. 128.
Herrick *v.* Franklin, L. R. 6 Eq. 593.

The intention of the testatrix is unmistakable. It was to give, primarily, a life estate to Leon Kaufman; inferentially on his death leaving issue to such issue in fee; failing such issue to give the estate to the Orphan Asylum.

January 28, 1878. THE COURT. Did Leon Kaufman take an estate for life or absolutely in the personalty bequeathed to him by his mother, Hannah Ann Kaufman?

We think it was a bequest of the interest or income for life only. That a bequest of income or profits will carry an absolute estate in the principal or *corpus* of the estate in some cases is well settled; but the ground of the conclusion in such instances is that no contrary intent of the testator appears to sever the product from its source, and the fruits therefore carry with them that which bears them.

In the interpretation of a will, however, in order to gather the testator's intention, the words *income* and *interest* as contradistinguished from

* For a more full statement of the facts set forth in the case stated, and the opinion of THAYER, P. J., in full, see the report of the case in the Court below, 3 WEEKLY NOTES, 352. Since the decision in the Court below, and prior to the argument of this case in the Supreme Court, the questions arising under the will of Joel C. Hilsee (contained in the case stated, and referred to in the report in 3 WEEKLY NOTES, 352) were finally determined by the Supreme Court upon the Appeal of the Pennsylvania Company for Insurance on Lives, etc., reported 4 WEEKLY NOTES, 32. Those questions were, therefore, eliminated from the present case, and any further reference thereto in this report is rendered unnecessary.

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the *corpus* or principal, and the enjoyment for *life only*, have an important bearing. (Earp's Appeal, 25 P. F. Smith, 119; Ogden's Appeal, 20 P. F. Smith, 501.) Hence where the intent clearly appears to carry the corpus or principal over to others, the words of the will must be permitted to have their proper force. Here the bequest of the interest only for life, connected with the provision immediately following, is inconsistent with an intent to confer the principal absolutely upon him. The provision is: "If my son Leon Kaufman should die *without issue* it is my desire that the *whole* amount of my *investment* be given to the Orphan's Asylum." Thus we have the testatrix clearly distinguishing, by apt expressions, between the limited usufruct given to Leon, and the entirety of the investment to go to his children (for issue here clearly means children or grandchildren), or in their default to a favorite charity. To hold otherwise is simply to disappoint the manifest intent of the testatrix in a case governed by no feudal reasons or by a fixed rule of property. While in regard to titles to real estate we have borrowed much from feudal rules, because of the permanency of such property, and the necessity of certainty in its title, we must remember that in a free State such rules are not to become unbending laws of property under an allodial system, so as to disappoint the intentions of testators, where the rule is unnecessary to a proper policy of the State.

Such is the undoubted current of Pennsylvania decisions, since the doctrines of trusts and dispositions by will have become pretty well settled on reasonable grounds. Personal estate, therefore, stands on a foundation of testatorial intention, which ought not now to be doubted or shaken. The intention of the testatrix being clear to give only the usufruct of the investments to Leon for life, and the investments themselves to his children at his death, there is no rule which will permit the estate in Leon to be converted into an absolute right of property, carry it to his creditors, and disappoint the expectations of the issue if any, or the Orphan's Asylum if none.

The following cases may be consulted as the evidence of the current of decision, and the proper distinction to be taken in this State, instead of being thrown upon the laws and usages of another country differing in the genius and spirit of its institutions, and the rules of property adopted to secure different rights of property. Myer's Appeal (13 Wright, 111); Sheet's Estate (2 P. F. Smith, 257); Keene's Appeal (14 P. F. Smith, 268). When the testatorial intent is not clear, and when the words "without issue" would carry a fee-tail in realty, a different rule prevails and an absolute estate in *personalty* will be presumed. The following cases state this rule. Amelia Smith's Appeal (11 Harris, 9); Mengel's Appeal (11 P. F. Smith, 248); Ogden's Appeal (20 P. F. Smith, 501); Biddle's Appeal (19 P. F. Smith, 190).

Judgment affirmed.

Opinion by AGNEW, C. J.

July, '77 97. Jan. 22, 1878.

Justice v. Tallman.

Statute of frauds—Parol promise to answer for the debt of another, when not within the statute —Promise to pay out of funds transferred by the debtor for the purpose.

Where one makes a parol promise to pay the debt of another, out of funds transferred to the promissor for the purpose, such promise is not within the statute of frauds.

The creditor to be benefited, though not present at the time of the promise, becomes the owner of the fund thus impressed with a trust for him, and as such can sue for it.

Error to the Common Pleas No. 2, of Philadelphia County.

Assumpsit, by Stones & Tallman, trading as E. G. Stones & Co., against Justice, on an alleged promise of the defendant to answer for the debt of one Wilson to the plaintiffs. Pleas, non-assumpsit, set-off, payment with leave, etc.

The death of the plaintiff, E. G. Stones, was suggested on the record, and the cause proceeded as to Tallman, surviving partner of E. G. Stones & Co., plaintiff.

At the trial Wilson testified for the plaintiff that in April, 1867, he was indebted to Stones & Co., the plaintiffs, in the sum of $1662.33, and that he also owed Justice, the defendant, a large amount. That Stones & Co. having pressed him for payment, he then disposed of all his available property, and transferred the proceeds of this sale, representing $16,817.48, to Justice, stating his indebtedness to Stones & Co. That "he understood" that these assets were placed in the hands of Justice for the purpose of paying Stones & Co., and that "he understood" Justice to say he would pay Stones & Co.'s debt out of the fund.

The defendant, Justice, testified that Wilson having for a long time previous to April, 1867, owed him about $23,000, he in that month applied to Wilson for payment; that, in accordance with this request, Wilson made the transfer of property mentioned above, on account of Justice's claim, and without any agreement on the part of Justice to pay the money owed by Wilson to Stones & Co.

It was undisputed that Stones & Co. were not present at the time of the alleged promise, and that a month afterward they demanded and re-

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ceived of Wilson promissory notes for the amount of their claim.

The defendant presented, *inter alia*, points substantially as follows: (1) The alleged promise was not in writing, and therefore, even if the jury believe that such a promise was made, it is within the Act of April 20, 1855, and the plaintiff cannot recover. *Refused.* (2) The alleged contract between Wilson and the defendant is void as to Wilson's creditors unless the said creditors under the arrangement gave up their claims against Wilson and accepted the new contract with the defendant in their stead; and as the evidence in this case is that the plaintiffs not only did not surrender their claim against Wilson, but nearly a month after the alleged promise accepted notes from Wilson for the said claim, the alleged promise is void as to them, and they cannot recover. *Refused.*

Verdict and judgment for the plaintiff.

The defendant took this writ, assigning for error the refusal of the Court below to charge as requested.

Letchworth (*R. P. White* with him), for the plaintiff in error.

The alleged promise is clearly within the statute of frauds. This case is governed by Shoemaker *v.* King (4 Wr. 107), which is not so strong as this case, for in that case the funds transferred exceeded the total indebtedness of the debtor. Here there was no consideration for the alleged promise.

Wilson remained liable to Stones & Co., as is evidenced by his giving notes to the latter afterwards. Where the parol promise is collateral to a continued liability of the original debtor, it is within the statute.

Maule *v.* Bucknell, 14 Wr. 39.
Townsend *v.* Long, 27 Sm. 143.

T. J. Diehl, contra.

The jury established the fact of Justice's promise. Was it within the statute? The forbearance of the promissee is a sufficient consideration. The consideration need not move from the promissee.

Jack *v.* Morrison, 12 Wr. 113.
Maule *v.* Bucknell, 14 Wr. 52.
Jepherson *v.* Hunt, 2 Allen, 423.

The fund was furnished to Justice for the very purpose of paying Stones & Co. Such an arrangement or undertaking has been held to be not a contract of suretyship, so as to come within the statute of frauds, but a direct engagement as an agent or trustee to apply in a particular direction the funds which came into his hands; in other words, it is the means adopted by a debtor to pay his own debts—an administration of his own estate by the hands of another. Therefore the case is excepted from the statute.

Taylor *v.* Preston, 29 Sm. 436.
Clymer *v.* De Young, 4 Id. 118.
Stoudt *v.* Hine, 9 Wr. 30.
Arnold *v.* Stedman, 9 Wr. 186, 188.
Malone *v.* Keener, 8 Wr. 107.
Jack *v.* Morrison, 12 Wr. 113, 117.
Browne on Stat. of Frauds (3d ed.), § 187, and p. 219, note.
Birkmyr *v.* Darnell, 1 Sm. L. C. 490, note (7th Amer. ed.).

January 28, 1878. THE COURT. No question was raised in the Court below upon the sufficiency of the evidence to establish the promise relied on to pay the plaintiff out of the funds lodged by his debtor in the hands of the defendant.

The jury having found the promise or undertaking of Mr. Justice to Philip Wilson to pay E. G. Stones & Co. their debt out of the funds then placed by Wilson in the hands of Justice, the case falls within the class known as the exceptions to the statute of frauds, and the promise is not simply to pay the debt of another, but to hand over funds appropriated by the debtor himself to the creditor for whose use he deposits them.

In such case the creditor, though not present, is the party to be benefited, and becomes the owner of the fund, thus impressed with a trust for him, and can sue for it. (Townsend *v.* Long, 27 P. F. Smith, 143.)

Judgment affirmed.

PER CURIAM.

Jan. '77, 216. Jan. 19, 1878.

Phila. and Reading R. R. Co. v. Heil.

Railroad company—Injury to child standing near track—Negligence—When question of, to be submitted to the jury—Court and jury, respective functions of.

In an action against a railroad company, by one not a passenger, for alleged negligence, the plaintiff must overcome by proof the presumption that the defendant has exercised due care, and in the absence of evidence tending to such proof, it is error to submit the question of the defendant's negligence to the jury.

The mere fact that the plaintiff has been injured is no evidence that the defendant was negligent.

The plaintiff's child, while standing upon the curbstone in a narrow city street, was struck by an axle of the defendant's car. There being no direct evidence of any negligence on the part of the defendant:

Held, that it was error for the Court below to submit the question of the defendant's negligence to the jury.

Per TRUNKEY, J. The true value of the trial by jury is best conserved by maintaining intact the respective functions of the Judge and Jury. The Judge must say whether any facts have been established by evidence from which

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negligence may reasonably be inferred. If so, he shall submit the evidence to the jury to say if it ought to be inferred—he never can withhold the case because in his opinion it ought not. If there be no evidence of such facts there should be no submission, for no jury have a right arbitrarily and without evidence to infer there was negligence.

Error to the Common Pleas No. 2, of Philadelphia County.

Case, by Valentine Heil and wife against the Philadelphia and Reading Railroad Company, for negligently causing the death of the plaintiffs' minor child. Plea, not guilty.

Upon the trial (before HARE, P. J.) the following facts appeared: The corporation defendant, by virtue of a power contained in their charter, operate a double line of railway on Willow Street in the city of Philadelphia. This street, at the point in question, is thirty feet wide, having footways six feet wide, which leave a cartway eighteen feet wide from curb to curb. The gauge of the railroad is four feet eight and one half inches, and the average distance between the tracks five feet nine inches, which is the least distance with which the double track could be operated. This leaves only a distance of one foot five inches between the outside rail and the curb. Some of the axle-boxes of the defendants' cars projected one foot six inches beyond the outside of the rail and therefore necessarily extended a short distance over and beyond the curb-line. At the place of the accident, the curb had fallen towards the middle of the street some two inches, so that the axle boxes extended three inches over the line of the curb.

On June 22, 1875, a team of mules drawing three box freight cars was coming down Willow Street at a slow walk. The driver was sitting on the front platform of the front car, his usual place. As the driver passed Garden Street four children, one of whom was the plaintiffs' son, four years of age, were on the pavement. The only witness called by the plaintiff who saw the accident testified he saw the children coming up Willow Street in the opposite direction to the cars; as the cars got opposite to them he saw a child pitched down as if knocked over. Before he could get to the child's assistance two cars had passed over his legs; in consequence of these injuries the child died. There was evidence given on behalf of the defendants that the driver had called to the children to keep out of the way.

Defendants' counsel presented the following point: That there is not sufficient evidence in this case of negligence on the part of the driver of the team in question to find a verdict against the defendant. *Refused.*

The Judge charged *inter alia* as follows: "If you find the parents of the child did not by their negligence contribute to the accident, the other question is, was there negligence upon the part of the railroad company—was there such care used in handling this car upon this occasion as it was the duty of the defendant to use in that regard."

Verdict and judgment for the plaintiffs for $1500. The defendants took this writ, assigning for error the submission of the case to the jury, the answer to their point, and the charge of the Court as above quoted.

Thos. Hart, Jr., for the plaintiffs in error.

The plaintiffs' theory was that the child was struck by one of the axle boxes projecting over the pavement. It was necessary for them to prove two things: first, that the accident did so happen; and, second, if it did, it occurred in consequence of some negligence on the part of the driver of the team.

On the first point there was no evidence, nothing but a conjecture. A scintilla of evidence should not be submitted to the jury. But granting the cause of the accident, there was still no evidence of negligence. The driver was not bound to stop whenever children were on the pavement.

Penna. R. R. Co. *v.* Morgan, 1 Norris, 134.
Railway Co. *v.* Carey, 7 Pitts. Leg. Jour. N. S. 199.

If he were not bound to stop, it is difficult to imagine what he omitted to do, which he should have done. Unless some fact be alleged from which negligence might be legally inferred, and unless there was some evidence which would have alone justified an inference of such a fact, it was error to submit the case to the jury.

James H. Shakespeare and *J. H. Heverin*, contra.

If a child of tender years be guilty of some negligence, yet if the defendants could by ordinary care have avoided the injury, they are liable.

Smith *v.* O'Connor, 12 Wr. 218.
R. R. Co. *v.* Spearen, 11 Id. 304.

The question to be submitted to the jury was whether the defendants' negligence contributed to the injury.

Penna. Railroad Co. *v.* Ogier, 11 Casey, 60.
McKee *v.* Bidwell, 24 Sm. 218.
P. & R. R. R. Co. *v.* Long, 25 Sm. 265.
McCully *v.* Clarke, 4 Wr. 399.
Kay *v.* R. R. Co. 15 Sm. 269.

Jan. 28, 1878. THE COURT. This action was brought by Heil and wife to recover damages against the railroad company for causing the death of their son, a child between four and five years of age, on June 22, 1875. The company were lawfully running a train of cars over their track on Willow Street in Philadelphia, when the child was seen to pitch, as if knocked over, under the car wheels and was injured so that he died.

The child, with three others, was walking along the pavement in a direction opposite that in which

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the train was moving. The only witness who saw the accident was on the opposite side of the street, and saw, under the cars, the legs of children moving toward Garden Street; one pitched as if knocked into the gutter. The driver was sitting on the front car, and could not see what took place after the children passed. The witness did not hear him speak to the children; nor did he see what was the cause of the child's falling; another witness shortly before the accident, heard the cars coming, and went out and told the children to stand back next to the fence, and they did. The street was so narrow that the grease boxes of the cars extended over the curbstone as far as the bricks. The pavement on the south side is five feet ten inches wide, and on the north side five feet seven inches. The train was drawn by a mule team. Nothing in evidence shows that the cars were unfit and not such as the company had a right to run then and there, or that the train was running at too great speed, or that it was not kept under control, or that it was not stopped soon as it should have been upon the alarm, or that the driver and breakman were not at their proper places and attending to their respective duties. Thus stood the case when the plaintiffs rested, and surely it was not made better by the testimony given on the part of the railroad company.

The sole inquiry now is: Was it error in the learned Judge, upon such evidence, to submit to the jury to determine whether the railroad company was guilty of negligence?

The locality of the accident is one where the highest degree of care should be used in moving cars, especially in reference to children incapable of contributory fault. The presumption is that such care was exercised, and that presumption must be overcome by proof on the part of him who asserts it was not.

What was committed or omitted by the employés of the company, from which negligence can be inferred, was not pointed out by the able counsel who so earnestly urged that it "is always a question for the jury under the evidence." It has not been claimed that the company were bound to employ watchmen to guard children off the pavements; but it seemed to be urged that proof of injury was enough to require submission to the jury to determine if there was negligence. In passing it may be remarked that expressions of eminent Judges, apparently to that effect, were made in cases when there was evidence to warrant its finding.

But in a case of undoubted evidence of negligence it is the duty of the Court to pronounce it such as a matter of law. If there is is no doubt as to the acts committed, yet substantial doubts as to the inferences to be drawn from these facts, they should be submitted to the jury. McKee *v.* Bidwell (24 P. F. Smith, 218). In that case MERCUR, J., said: "What is and what is not negligence in a particular case, is generally a question for the jury and not for the Court. This arises from the fact that the question of ordinary and reasonable care is generally involved. The degree of care required is changed by the circumstances of the case. Some circumstances require a higher and some a lesser degree of care. Hence generally negligence is a mixed question of law and fact."

This is a concise and clear expression of the general rule settled by numerous cases. It is equally well settled that a plaintiff who avers that he received an injury in consequence of the defendant's negligence must adduce proof; and if no such proof be adduced, the presumption of innocence remains, and it is error to submit to the jury the question whether there was negligence. (Railroad Company *v.* Hummell, 8 Wright, 375.) "The doctrine that wherever there is a scintilla of evidence of a material fact, the question must be submitted to the jury has not stood the test of experience, and it has accordingly been exploded in England. The more reasonable statement of the rule is, that where there is any evidence which alone would justify an inference of the disputed fact, it must go to the jury, no matter how strong or persuasive may be the countervailing proof." "But in a case in which a Court ought to say there is no evidence sufficient to authorize the inference, then the verdict would be without evidence, not contrary to the weight of it. Wherever this is so they have the right and it is their duty to withhold it from the jury." Per SHARSWOOD, J., Howard Ex. Co. *v.* Wile (14 P. F. Smith, 201). In a later case for damages caused by alleged negligence of the defendant upon the undisputed facts, the Court below charged the jury as a matter of law that the plaintiff could not recover, which was affirmed by this Court. (Hoag *v.* L. S. & M. S. Railroad Co., 34 Leg. Int. 429; 4 WEEKLY NOTES, 561.)

I repeat that the rule as understood does not impair the true value of trial by jury. The surest way to conserve this right is to maintain intact the respective functions of the Judge and jury. The Judge must say whether any facts have been established by evidence from which negligence may reasonably be inferred. If so he shall submit the evidence to the jury to say if it ought to be inferred—he never can withhold the case because in his opinion it ought not. If there be no evidence of such facts there should be no submission, for no jury have a right arbitrarily and without evidence to infer there was negligence.

Finding no evidence of any negligence of the

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defendants which caused an injury to the plaintiffs, we think the jury should have been so instructed, and the defendants' point affirmed.

Judgment reversed.

Opinion by TRUNKEY, J.

[See Penna. R. R. Co. *v.* Morgan, 3 WEEKLY NOTES, 137.]

July, '76, 53. Jan. 7, 1878.

Whitaker v. Houghton.

Trover—Deterioration of the property after conversion—Tender unaccepted—Measure of damages.

In trover, after demand and refusal to deliver, the plaintiff is not bound to accept tender of the property deteriorated since conversion.

Per PAXSON, J. Where goods have been unconditionally received by the plaintiff after suit has been brought, the measure of damages is the difference in value at the time of conversion and that of delivery.

Error to the Common Pleas No. 2, of Philadelphia County.

Trover, brought Jan. 4th, 1876, by Thomas Houghton against Robert Whitaker, for damages for the conversion of a lot of glass moulds, and other tools and materials for the manufacture of glassware. Plea, the general issue.

From the evidence the following facts appeared:

In 1870 Philip Keen occupied certain premises in the city of Philadelphia as a glass manufactory under a lease from Robert Whitaker, the defendant. The plaintiff, who was working with Keen under an agreement to make glassware, had stored in the factory certain glass moulds and other materials for manufacturing glassware which were not in use and were nailed up. Keen becoming embarrassed in business, the lease and his goods on the premises were taken in execution under a judgment against him held by one Darlington, and sold on August 30th, 1870, to Darlington's brother. The plaintiff's goods, which were stored away, upon notice were not sold but set aside by the sheriff.

Shortly after the sale the plaintiff made a demand for his goods from the defendant, who declared he knew nothing about them. Afterwards upon a second demand for his goods, he was told by the defendant that no property could be removed from the premises. About three weeks after the sale, the defendant sent a notice to the plaintiff to remove the moulds and any goods he had on the premises. After receipt of this notice and some four or five weeks after the sale, the plaintiff, as soon after recovery from sickness as he could, went to the factory, where he found another tenant in possession, his goods honey-combed, thrown out in the yard, rusted and worthless. There was no evidence that the plaintiff had accepted an offer of delivery of his goods.

On the trial (before HARE, P. J.) the defendant presented the following point: If the jury believe the defendant requested the plaintiff to take his goods in question, even if they believe the defendant before refused to let him take them, the plaintiff can recover only such damages as occurred to the goods, if any, between the time of the demand and the request, and for their detention that interval, and not the value of the goods. *Refused.*

The Judge, in the general charge, instructed the jury, *inter alia*, as follows: "A demand and refusal are not a conversion, but evidence from which a conversion may be inferred. A clearly expressed demand on one who has the goods of another in his possession followed by an unequivocal refusal to surrender them to the owner, are *prima facie* evidence of a conversion, and may be conclusive if it thereby appears that the plaintiff was deprived of his property. Where one demands his chattels, and there is such a withholding of them as amounts to a conversion, a right of action accrues which will not be divested by a subsequent offer to return the goods or a notice to the plaintiff to come and take them away. But such a notice may be taken into consideration by the jury in determining whether the previous refusal was absolute and amounted to a conversion."

Verdict and judgment for the plaintiff, for $1400.

The defendant took this writ of error, assigning for error the refusal of the Court to affirm his point, and that part of the charge of the Court quoted.

George L. Crawford, for the plaintiff in error.

Though refusal to deliver goods on demand is evidence of conversion, if the defendant afterwards before the issuing of the writ, makes a tender, the effect of the previous refusal is done away with and the subsequent tender is a bar to the action.

1 Addison on Torts, p. 500.

2 Hilliard on Torts, 3d ed., § 13 c., p. 121.

Where there is a delivery before the suit, recovery of nominal damages only can be had; and if special damage is claimed, between the conversion and tender, it must be averred in the declaration.

Sedgwick on Damages, 614.

Where trover is brought for a specific chattel, and there is no averment of damages beyond the real value, proceedings will be staid upon delivery and payment of costs.

Moon *v.* Raphael, 2 Bing. N. C. 310.

Rutland & Washington R. R. Co. *v.* Bank of Middlebury, 32 Vt. 639.

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The measure of damages after the suit is brought, is the difference in value at the time of conversion and that of delivery.

Rank *v.* Rank, 5 Barr, 211.

Although there is complete conversion, and although the measure of damages is the value of the goods at the time of conversion, a repossession of the goods before trial goes in mitigation of damages; for the law aims at compensation.

McInroy *v.* Dyer, 11 Wr. 118.
Greenfield Bank *v.* Leavitt, 17 Pick. 1.
Hunt *v.* Haskell, 24 Me. 339.
Cook *v.* Hartle, 8 Carr & Payne, 568.

E. C. Mitchell (with whom was *John F. Young*), contra.

The question in this case is, what is the effect of an unaccepted offer to restore the goods after a demand and refusal to deliver? It is well settled that such an offer need not be accepted, and cannot be received in mitigation of damages.

Higgins *v.* Whitney, 24 Wendell, 379.
Hanmer *v.* Wilsey, 17 Id. 91.
Gibson *v.* Humphrey, 1 Crompt. & Mees. 544.

Where the value of the goods is not ascertained, a motion by the defendant to stay proceedings upon delivery of goods and payment of costs will not be entertained.

Tucker *v.* Wright, 3 Bing. 601.

In Moore *v.* Raphael (cited by the other side) the goods were accepted unconditionally and nominal damages were allowed, because there was no averment of special damage in the declaration. But that case is not law here, for in Rank *v.* Rank (5 Barr, 211) it was expressly held that special damage might be recovered, though not formally averred. The plaintiff is not bound to accept a tender if the goods have been damaged, and that distinguishes this case from that of Rutland & Washington R. R. Co. *v.* Bank of Middlebury (32 Vt. 639); and this rule is recognized in—

Stickney *v.* Allen, 10 Gray, 352.
Munson *v.* Munson, 24 Conn. 115.
Edmondson *v.* Nuttall, 34 L. J. C. P. 102.
Finch *v.* Blount, 7 C. & P. 478.
Alsager *v.* Close, 10 M. & W. 577.

Jan. 21, 1878. THE COURT. There was some evidence in the case that the goods in controversy had been injured prior to the offer to return them to the plaintiff. Houghton (plaintiff) says in his cross-examination: "After receiving the notice from Mr. Whitaker, not immediately, but on account of sickness as soon as I could, I went to the factory and found my goods honey-combed, thrown out in the yard, rusted, and worthless. This was some four or five weeks after the sale." In view of such evidence, it was not error to decline the defendant's point. Had the plaintiff accepted the tender or offer of the goods, the measure of damages indicated by the point would not have been inaccurate. Thus in Rank *v.* Rank (5 Barr, 211), where the goods had been unconditionally received by the plaintiff after suit brought, the measure of damages was held to be the difference in value at the time of the conversion and that of the delivery. And it may be stated generally that in an action of trover, where the goods have been accepted or regained by the plaintiff, such fact goes in mitigation of damages. He cannot accept a return of his goods and yet recover their full value. We need not refer at length to the authorities cited in support of the proposition that in trover a plaintiff is bound to accept a tender or offer to return the property. In nearly all of them there was no deterioration of it after conversion. This was so in Rutland & W. R. R. Co. *v.* The Bank (32 Vermont, 639), where the property consisted of the bonds of the plaintiff, for which they were liable in full, and which, therefore, could not have suffered any deterioration as to them. It was held that plaintiffs were bound to accept them when tendered, but it was distinctly said that such a rule would not apply where the goods had deteriorated in value. This principle runs through most of the cases. Whether a plaintiff in trover is bound under all circumstances to accept a return of the goods, is a question not necessary to a decision of this case. It is sufficient to say that under the evidence the plaintiff was not bound to accept the offer, and that the measure of damages based upon the affirmation of this proposition was not the correct one. Hence it was not error for the learned President of the Court below to say: "Where one demands his chattels, and there is such a withholding of them as amounts to a conversion, a right of action accrues which will not be divested by a subsequent offer to return the goods, or a notice to the plaintiff to come and take them away." This is entirely accurate, whether we view it as an abstract proposition or an instruction upon the evidence in the case. At most, a tender could only affect the measure of damages; it does not go to the right of action.

However it may be in the case of an offer to return an article that has sustained no injury, it is clear, both upon reason and authority, that an offer to return property that has been damaged while in the possession of the wrong-doer, imposes no obligation upon the injured party to accept it.

Judgment affirmed.

Opinion by PAXSON, J.

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Common Pleas—Law.

C. P. No. 2. Feb. 9, 1878.

Central Fire Ins. Co., to use of A. Wilson Norris, receiver, v. Thurlow.

Affidavit of defence law—Charter of a corporation not part of the record when a copy is not filed—Simulated stock subscription—Set-off—Ultra vires—Compromise by receiver.

Rule for judgment for want of a sufficient affidavit of defence.

Debt, brought by the receiver of the Central Fire Insurance Company, to recover, in cash, an alleged unpaid balance of the subscription of defendant to nine hundred shares of the stock of the said company.

The articles of agreement upon which suit was brought, after referring to the charter, obtained March 2, 1874, contained the following covenant as to subscription to the stock:—

"Now therefore, we the said subscribers hereby do severally promise, covenant, and agree, and are held and firmly bound unto the Central Fire Insurance Company of Philadelphia, in the amount of shares set opposite our respective names at the par value thereof, viz., fifty dollars per share, to be paid to the said company, in the certain instalments herein after named, to which payment well and truly to be made and done, we do bind ourselves, our and each of our heirs, executors, administrators, and assigns, firmly by these presents. Sealed with our seals, and dated at the respective dates, as will hereafter appear. The said each and every payment shall be respectively made as follows, viz.: fifty per cent. of the amount subscribed shall be paid at the time of the subscription in money, at which time the treasurer of said company to whom the said money is payable, shall give the receipt of the said company to each subscriber for said payments, and the remaining fifty per cent. shall be paid whenever thereafter required, and in the manner specifically provided by the Board of Directors, in accordance with the provisions and by-laws of said company."

In the list of subscribers under this agreement, defendant put his name down for 900 shares, of the par value of $45,000.

The plaintiff filed, with the copy of said agreement, an averment that the fifty per cent. of defendant's subscription, viz., $27,500, had been duly required of the defendant, and remained due and unpaid.

The defendant filed an affidavit of defence that he "took the 900 shares, paid for them in full to the proper officers of the company before its failure, and received from the company its full paid certificates for the same, and is not indebted upon account thereof to the amount of one cent." This affidavit having been adjudged by the Court to be insufficient (because it merely set forth evidence and conclusions of law instead of facts), the defendant filed a supplemental affidavit, that in March, 1874, the Central Fire Insurance Company, through its president, agreed with deponent to give him nine hundred full paid shares of its capital stock and five thousand dollars in cash for a piece of land owned by deponent, in the twenty-fifth ward of the city of Philadelphia; that deponent signed the subscription list for the 900 shares sued upon, with the distinct understanding and agreement that such signature had reference to the shares simultaneously issued to him in payment for the said land, and for no other purpose whatever; that in pursuance of the said agreement the said certificates for 900 shares full paid were given to deponent, together with $750 in cash and notes of the company for $4250, which deponent accepted as cash, and thereupon he duly conveyed the said land by request of the company to one F. C. Nell; that said Nell by direction of the company conveyed the land to one Wallace who executed as consideration therefor certain mortgages amounting to $60,000; that subsequently the said mortgages were assigned to the plaintiff Norris as receiver of said company, and he has entered satisfaction upon the same; that plaintiff Norris as receiver sold the said land at public sale under an agreement with deponent that if deponent would bid the same up to $6000, deponent would be relieved of all claims upon the subscription paper now sued on, and that deponent did bid up and purchase the said land at the price of $6000, and paid the said purchase money in cash to said receiver. Defendant therefore submitted that a full settlement had been made, and further, that the notes of plaintiff company for $4250 accepted as cash were still unpaid, and it would be against conscience to permit the plaintiff to retain deponent's land or the proceeds thereof, and at the same time compel him to pay in money for a subscription the only consideration of which was the said land.

Samuel Gustine Thompson, for the rule.

The charter of this company provides that the subscriptions to stock should be paid in cash. It is no defence that it has been paid in land.

Upton *v.* Trebilcock, 1 Otto, 45.

If it is contended that the conveyance of the land is a simulated subscription, this is a fraud on the stockholders, and defendant is liable.

Graeff *v.* R. R. Co., 7 Cas. 358.

Robinson *v.* R. R. Co., 8 Cas. 338.

Defendant, having subscribed to the stock and having received the certificates, can only escape liability by showing payment for the same in money.

Upton *v.* Tribilcock, 1 Otto, 45.

Sanger *v.* Upton, Id. 56.

Webster *v.* Upton, Id. 65.

If the affidavit is held to set forth a purchase of land by the company, such purchase was *ultra vires*. The charter only authorized the company to hold real estate for business purposes.

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R. P. White, contra.

The charter is not part of the record in this case.

If the company received land in payment for stock, they must account for the value of the land before they bring suit for the cash subscription.

C. A. V.

Feb. 16, 1878. THE COURT. No copy of the charter having been filed, we cannot consider it as before us upon this rule. Counsel for plaintiff argued very forcibly that as the subscription paper filed recites an incorporation of the plaintiff company by the Court of Common Pleas, we must take judicial notice that it must have been under the Acts of April 2, 1856 (Purdon, 791, pl. 3), and March 26, 1867 (Purdon, 283 note *e*), and therefore that a subscription to stock is payable only in money and any agreement to pay in land is void.

But even if we should assent to this proposition the plaintiff would still have the most important part of the affidavit to meet—the alleged settlement or compromise between the defendant and the receiver. It may be that this as well as the agreement for land was *ultra vires*, and therefore void as against the receiver representing creditors, but we can hardly say so without having the facts fully developed; and, as this is a case specially proper for a full investigation of all the facts in order to reach the real merits, we must send it to a jury.

Rule discharged.

Oral opinion by MITCHELL, J.

C. P. No. 2. Feb. 16, 1878.

Smith v. Citizens Gas and Gaseous Fuel Co.

Sale of goods to be manufactured by vendor—Latent defects.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit on a book account for gas pipe. The affidavit of defence alleged that the goods charged were delivered to defendants in pursuance of an order previously given by them and accepted by plaintiff for the pipe to be manufactured by plaintiff *himself*, of the best material and workmanship; that in violation of the agreement plaintiff delivered pipe purchased by him from another manufacturer, of inferior quality both in workmanship and materials, being full of flaws and hollow spaces between the inner and outer surfaces; that the defect could not be ascertained by inspection, and was not discovered by defendants until a large quantity of the pipe had been put in the ground and connections made with the service pipes of customers, and that then the pipe had to be taken up and replaced at great expense to defendants, and they claimed to set off said expense against the plaintiff's claim.

Paul, for the rule

White, contra.

Rule discharged.

C. P. No. 3. Feb. 2, 1878.

King v. Embrey.

Practice—Process—Capias served on defendant decoyed within jurisdiction—Too late to set aside service after giving common bail.

Rule to set aside service of capias and quash writ.

The depositions showed that the defendant had been decoyed into the jurisdiction of the Court for the purpose of being served with a capias; upon which writ he was arrested, and in default of bail, committed.

A rule taken by his counsel to have him released on common bail was made absolute. The present rule was then taken to set aside the service and quash the writ.

H. L. Carson (with him *McGeorge*), for the rule.

The defendant having been decoyed into the jurisdiction, the Court should set aside the service. To do otherwise would be allowing the plaintiff to take advantage of his own wrong.

Hevener *v.* Heist, 9 Phila. 274.
Sugar Refining Co. *v.* Matthiesson, 2 Cliff. C. C. R. 304.
Wells *v.* Gurney, 8 Barn. & Cress. 769.
Williams *v.* Reed, 5 Dutcher, N. J. R. 385.
Spence *v.* Stuart, 3 East. 89.
Snelling *v.* Watrous, 2 Paige's Chan. 314.
Carpenter *v.* Spooner, 2 Sanford, 717.

G. H. McCabe, contra.

By entering common bail, the defendant has perfected his appearance in Court, and has precluded himself from making any defence as to the defect in service.

C. A. V.

Feb. 9, 1878. THE COURT. It is now too late to set aside the service. Rule discharged.

C. P. No. 3. Dec. 11, 1877.

Kressler v. Williams.

Practice—Duties of an examiner—When his functions cease.

Motion to restrain examiner from taking further testimony.

In this case an examiner was appointed to take testimony, and after hearing witnesses both for the plaintiff and defendant, he prepared his report and filed it in Court. Subsequently the plaintiff notified the defendant of his intention to re-examine some of the same witnesses who had previously testified before the examiner.

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This motion was made to prohibit such re-examination.

Thorn, for the motion.

Fisher, contra.

THE COURT. The report is in Court and in order that it be referred back to the examiner, a motion to that effect must be made, founded upon some good reason which must be set forth in an affidavit. Motion granted.

Oral opinion by LUDLOW, P. J.

C. P. No. 3. Dec. 15, 1877.

Bancroft v. Freeman.

Practice—More specific bill of particulars—Bond given by liquidating partner conditioned for faithful appropriation of the assets and an account—Suit against surety.

Rule for more specific bill of particulars.

Debt on a bond. The writ issued in 1862. The narr. set forth that the defendant, Freeman, and one Haines, jointly executed a bond for $5000 on the 19th March, 1859, conditioned that "the said Haines shall well and truly appropriate and account for all the assets of the late firm of Bancroft, Haines & Co., now in his hands or hereafter to come into his hands as liquidating partner, etc. . . . . and shall well and truly pay over and settle the same." The plaintiff averred that Haines had not from the execution of the said bond complied with its conditions. The narr. did not contain the common counts.

After the general issue had been pleaded, the defendants demanded a bill of particulars from the plaintiffs, and were informed that the amount sued for was the penalty on the bond. The defendants then pleaded specially that the said bond was made in consideration of an agreement that the obligees, the Bancrofts, should operate with Haines in adjusting the affairs of Bancroft, Haines & Co., and that the Bancrofts would not impede or harass said Haines, etc., but that in fact they did not co-operate, etc., but did harass him, etc. Replication *de injuria*. This rule was then taken.

George Biddle and *George W. Biddle*, for the rule.

This is a case where the defendants are clearly entitled to a bill of particulars, for this is not a money bond but simply a bond to enforce the performance of a collateral condition, and the only damages that the obligees could recover would be the amount of money which Haines actually received as liquidating partner and failed to pay over. The penalty cannot be recovered.

Barrington *v.* The Bank, 14 S. & R. 421.
Robeson *v.* Whitesides, 16 S. & R. 320.
Burr *v.* Todd, 5 Wr. 206.
Bigony *v.* Tyson, 25 Sm. 157.

The plaintiff does not aver what sums Haines received as liquidating partner, what sums he failed to pay over, or for what sums they propose at the trial to charge him.

Titus *v.* Baird, 1 WEEKLY NOTES, 81.
Winpenny *v.* Winpenny, Id. 90.
Patterson *v.* Jones, Id. 153.
Cummings *v.* Thomas, Id. 311.
Williams *v.* Huidekoper, Id. 376.
Graham *v.* Graham, Id. 416.

The defendant may demand a bill of particulars, even where the declaration contains special counts.

Hunter *v.* Burnham, 1 WEEKLY NOTES, 74.
Norris *v.* Hanson, Id. 507.
Livingston *v.* Enochs, 2 Id. 244.
Borda *v.* P. & R. R. R. Co., Id. 314 and 3 Id. 351.

The Court may grant a rule for a bill of particulars at any time, even after plea pleaded.

McClain *v.* Henry, 1 Tr. & H. Pr. 425.

Samuel W. Pennypacker (with whom was *Lewis Stover*), contra.

The purpose of a bill of particulars is to inform defendant of the nature of the claim against him, and is only required under common counts, or when the special count is so general as not to give this information.

1 Tr. & H. Pr. 422.
Norris *v.* Hanson, 1 WEEKLY NOTES, 507.
Gilpin *v.* Howell, 5 Barr, 41.

The bond is set forth in the narr., and there are no common counts. The failure to account is in itself a breach of the condition. To require the plaintiff by a bill of particulars to state items for which he claims, would be to impose on him the duty of accounting instead of on the defendant who had the assets.

Where the facts, as in this case, are peculiarly within the knowledge of the defendant, the plaintiff is not required to go into details in his pleading.

Stephen on Pleading, 370.
Gale *v.* Reed, 8 East, 80.

The defendant is unreasonably late in his demand. The case has been at issue on general pleas for ten years, and has been many times on the trial list. The special pleas have also been filed.

C. A. V.

Rule absolute.

C. P. No. 4. Jan. 26, 1878.

Hughes v. Calvert.

Practice—Sheriff's sale—Lumping sale, when not set aside.

Rules to set aside sheriff's sale.

In this case fifteen separate houses and lots had been sold together under a *vend. ex.* The description as contained in the sheriff's hand-bill was as follows:—

"Buildings and lot N. side Mercy St., 68 ft. E. 8th St. 217 ft. 1¼ in. front, 48 ft. deep to a 4 ft. wide alley. Fifteen three-story brick houses are on this lot each subject to a mortgage $1300 with interest."

The properties were sold in a lump and purchased by the plaintiff in the execution for $250.

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The rules to set the sale aside were on behalf of the defendant and of one Shaffer, a mechanic's lien creditor.

The depositions were conflicting with reference to the value of the premises, but showed that Schaffer, the lien creditor, was aware of the sale and the manner in which the properties were advertised: that he had attended the sale and bid $200 for the properties, and that no objection as to the manner of selling had been made to the sheriff by any one.

T. J. Diehl and *Jos. Mason*, for the rule.

A sale of this kind is against the policy of the law and will always be set aside without regard to the adequacy of the price.

Ryerson *v.* Nicholson, 2 Yeates, 517.
Rowley *v.* Brown, 1 Binney, 62.
Connell *v.* Hughes, 1 Phila. 225.
Tate *v.* Carberry, Id. 133.

Even if a lumping sale of fifteen houses would be allowed, it is only in a case where they are described separately, so that purchasers may know what is being sold.

E. O. Michener, contra.

This case constitutes an exception to the general rule which avoids a lumping sale. There may be exceptions to this general policy

Ryerson *v.* Nicholson, *supra*.

It is not to the interest of any one save the defendant that the sale should be set aside, and it is only to his interest in that he will have the benefit of a month's time to collect rents. It is not pretended that the properties if sold separately would bring more than the sheriff's costs.

The description is perfectly good and is in the same language as that sustained by the Court in Cadwallader *v.* Steinmetz (1 WEEKLY NOTES, 90).

The lien-creditor, Schaffer, has no standing here, as he appeared at the sale and bid on the properties. He is thereby estopped.

Ex parte Chartecis Coal Co., 1 Pitts. 87.
Perot *v.* Scott, 1 WEEKLY NOTES, 157.

Rule discharged.

C. P. No. 4. Jan. 5, 1878.

Vodges v. Ferree.

Paving—City ordinances—The ordinance of Dec. 31, 1862, is repealed by ordinance of Dec. 23, 1874.

Sur exceptions to report of auditor.

Before the auditor appointed to distribute a fund in Court arising from a sheriff's sale of certain real estate of the defendant, was presented a municipal claim to the use of one Shipps for the cost of laying a rubble pavement in front of the premises sold, which pavement was authorized by ordinance of Dec. 15, 1875 (C. O. 353), directing the chief commissioner of highways to contract with competent pavers for the paving, *inter alia*, of Sycamore Street, in the Twenty-fourth Ward, with rubble pavement under the usual conditions.

The claim was resisted by the defendant's counsel chiefly upon the ground that there had been no advertisement by the contractor of his intention to apply for the contract for this pavement, as required by the ordinance of Dec. 31, 1862 (C. O. 486).

The claimant admitted that he had not made such advertisement, and the auditor reported on his claim as follows: "that under the authority of Fell *v.* The City (31 Sm. 58), he is of opinion that the chief commissioner of highways was without authority to enter into the contract for paving Sycamore Street with Mr. Shipps, by reason of the non-compliance by Mr. Shipps with the ordinance of Dec. 31, 1862, etc. . . . . and that the claim of Mr. Shipps, though a meritorious one, cannot be sustained in point of law, and is, therefore, discharged. Shipps excepted.

W. W. Wiltbank, for the exceptant.

The ordinance of Dec. 31, 1862, is repealed by the ordinance of Dec. 23, 1874 (C. O. 431). Section 2 of the ordinance of 1874, commits to the chief commissioner of highways the supervision and management of the paving, grading, and curbing of all the streets in the city. The material portion of Section 10 provides that, after petition to councils by the property owners, it shall be the duty of the chief commissioner to award the contract for paving to competent pavers. It entrusts the power of engaging contractors entirely to him; his discretion is the ultimate resort; the repeal is, therefore, perfectly clear, and the contractor, having satisfactorily performed the contract awarded to him, should not have been shut out from the distribution.

M. Hampton Todd, contra.

The object of the ordinance of 1862 was to secure a good paver, by giving the property holders an opportunity to confer with the chief commissioner. There is certainly nothing in a compliance with it that would interfere with the performance of the duty imposed on the chief commissioner by the ordinance of 1874. Prior to the passage of this ordinance every paving ordinance required a direction from councils to award the contract; now, it is his duty to award the contract for the work as specified in the ordinance. This can be done as well whether there has or has not been an advertisement of intention to apply to him. Unless, therefore, there is positive repugnancy between the ordinances, which there is not, both must stand and their provisions be complied with by each party.

C. A. V.

Feb. 2, 1878. THE COURT. The fund for distribution by the auditor was raised from sale by the sheriff under our writ, of certain real property,

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situate on Sycamore Street, formerly called Silverton Avenue, West Philadelphia. A claim was presented before the auditor by the city of Philadelphia to the use of William A. Shipps against the defendant, amounting to $1194.57, for the cost of paving the highway with rubble pavement in front of the property sold.

The work was done under authority of an ordinance, approved December 15, 1875, which directs the Chief Commissioner of Highways to enter into a contract with a competent paver for the paving of, *inter alia*, said streets, but requires no preliminary act upon the part of the Chief Commissioner or any one else.

The auditor has refused to allow the claim, upon the ground that there was no preliminary advertisement before the awarding of the contract to said William A. Shipps, as required by the ordinance approved December 31, 1862, which is as follows:—

"Hereafter, before any contract for paving any street or streets shall be entered into by the Highway Department, the person or persons applying for such contract shall give notice of such application in two daily papers having the largest circulation, by three consecutive insertions, at least two weeks prior to the making of such application, such notice to set forth—

(1) The name of the contractor or contractors.

(2) The locality of the space or spaces intended to be paved, with the length of such space in lineal feet.

(3) The name and residence of each person signing for contractor, together with the number of feet owned or represented by each person so signing fronting on said street or streets.

(4) To such notice shall be added an invitation to the owners of property to meet at the Department of Highways, at a certain hour on a given day, to show cause, if any, why such contract should not be awarded to the applicant."

The important question now raised is, whether this ordinance was not repealed by the ordinance reorganizing the Highway Department, approved December 23, 1874.

By section 2 of that ordinance, "from and after January 1, 1875, the building and repairing of all bridges, culverts, sewers and inlets, the opening, grading, curbing, paving, repaving, and repairing of all streets, roads, lanes, alleys, and other highways of the city of Philadelphia, *shall be under the control, supervision, and management of the Chief Commissioner of Highways of said city.*"

By section 10 the owners of property desiring to have the streets which shall pass through their property paved, shall apply to Councils by petition, to which shall be attached a certificate of the District Surveyor, that the petitioners are a majority of the owners of property between the points named. After an ordinance shall be passed for the paving of any street, *it shall be the duty* of the Chief Commissioner to award the contract for the same to a practical paver or pavers, regularly engaged in such business, and known to be such: *Provided*, the security for the same shall be the same as is now regulated by Act of Assembly: *Provided*, that any contractor failing to perform his work in accordance with the terms of his contract, shall be deemed a defaulter, and no bid shall thereafter be received from, or contract awarded to, such defaulting contractor.

And by section 11, "all ordinances, or parts of ordinances inconsistent herewith, be, and the same are hereby repealed."

The object of the ordinance of 1862 was to secure a competent paver to do the work, instead of awarding it to some person who might bid low enough in price, but be utterly ignorant of the mode of performing the work or of the materials to be used in it.

The necessity for the advertising under the ordinance of 1862 is therefore done away with, when, under the ordinance of 1874, *it is made the duty* of the Chief Commissioner to award the contract to a practical paver or pavers, regularly engaged in such business, and known to be such. And further, the alleged important facts stated in the ordinance of 1862 (much of it repealed by an ordinance of March 24, 1871), and made necessary to be advertised, are by the ordinance of 1874, directed to be set forth in the certificate of the District Surveyor, which shall be attached to the petition to be presented to councils.

The ordinance of 1874 therefore takes away from the property owners any choice in the selection of a contractor, and vests all power in the Chief Commissioner, who may enter into a contract immediately after the approval of the ordinance. Then why advertise under the form directed in the ordinance of 1862? It creates a new system of awarding contracts; directs by whom they shall be awarded, to whom as a particular class they shall be awarded, and the facts which petitioners for paving streets must lay before Councils where Councils do not act of their own motion. It accomplishes the same object as the ordinance of 1862 by a different method.

The inconsistency and repugnancy of the ordinance of 1862 to that of 1874 may be instanced where a contract had been awarded by the Chief Commissioner, since January, 1875, to some competent paver, who immediately sets to work under his contract, and perhaps completes it in ten days. The contract having been awarded him, it would be an extraordinary rule of law to require him to advertise in the form of the ordinance of 1862, to notify property owners to assemble and show cause, within two weeks from the approval of the ordinance, why his contract *should not* be awarded him. It can hardly be supposed that after the contract *had* been awarded any one else would be so frenzied in the support of any two newspapers as to invest money in any such advertisement; whilst the meeting of property owners, without aim or power, would be without cause to show.

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We think there cannot be a clearer repeal of a precedent affirmative statute. There is such clear legislative intention shown in the words of the later ordinance to repeal the former that it comes within the rule of interpretation of statutes as "clearly repugnant and inconsistent."

The case of City *v.* Fell (31 Smith, 58), has been strongly relied upon by the learned auditor, but, under the present views we take of the ordinance of 1862, it can have little application, as that case was tried before the passage of the ordinance of 1874, and the work performed in 1870; besides, the work was performed under a special ordinance, the non-compliance with the terms of which destroyed the claim for the work done.

To maintain the doctrine ruled against this claim would produce intense hardship, for every contract awarded for paving of streets in Philadelphia since January, 1875, has been awarded in the view of the repeal of the ordinance of 1862; and to at one blow destroy every lien and annul every contract thus entered into, notwithstanding the work was honestly done, would be paving the way to a repudiation most immoral and terrible in extent. *Salus populi suprema lex.*

The exceptions are sustained and the report is referred back to the auditor for redistribution in accordance with this decision.

Opinion by ELCOCK, J.

Orphans' Court.

Jan. 23, 1878.

Hurley's Estate.

Decedents' estates—Widow's claim—When allowed—Acceptance under husband's will no bar—Must be presented within a reasonable time—Delay of one year in presentation of such claim where the rights of creditors are not affected does not constitute laches—Household goods—Perishable property.

Sur exceptions to widow's claim for allowance of $300.

Aaron A. Hurley died in September, 1876, leaving a will, by which he bequeathed unto his wife for life all his household goods, furniture, and pictures of every description. The widow was also authorized to live in the family dwelling house, rent free, for one year after testator's death.

At the appraisement of the personal property, two items—a mirror, value $100, and a lot of coal, value $100—were omitted from the inventory.

About a year after the death of the testator, the widow made her claim for $300 from funds in bank, and filed the inventory and appraisement.

To the allowance of this claim, the children and legatees of the testator excepted.

J. C. Longstreth, for exceptants.

The widow retained the two items omitted from the inventory, valued at $200, and remained in the house of testator one month over the year allowed her. The rent of the house is $100 a month. The taking of these items without remark is a waiver of her claim to $300.

She was present at the appraisement, and made no claim then to $300; it is now too late.

The claim must be made in a reasonable time, at or before the appraisement.

Heller's Est., 2 WEEKLY NOTES, 338.
Baskin's App., 2 Wright, 65.
Bryan's Est., 4 Phila. 228.
Lyman *v.* Byam, 2 Wright, 475.
Seller's Est., 1 Norris, 156.

The cash has all been expended in payment of debts of the estate, and she claims now out of a fund which has no existence.

Joseph Parrish, contra.

The Act of 1851 provides no time within which the widow's claim must be made. Laches depend on circumstances, and not on lapse of time.

Kirkpatrick's Est., 5 Phila. 98.

As to retaining the items mentioned, she had a right to do so under the will which gave her a life estate in all personal property. If she remained one month over her year in the house, the accountant should be surcharged for allowing her to do so.

Feb. 9, 1878. THE COURT. If the rights of creditors, or of the residuary legatees were affected by the allowance to the widow of her claim under the Act of 1851, and its supplements, we should be disposed to hold, that by her delay of more than one year since the death of testator, she had waived her right to the exemption. But as there are no creditors, and the interests of the legatees are not prejudiced, we think the claim has been presented in time, and should be allowed. (Kirkpatrick's Estate, 5 Phila. Rep. 98.) Testator bequeathed unto his wife for life all his "household goods and furniture, and pictures, of every description." A short time prior to his death, he purchased a number of tons of coal for domestic purposes, but only a small portion of which had been consumed at the date of his death. The remainder was not included in the inventory and appraisement, but was used by the widow, who, under the will, was entitled to occupy the family residence, free of rent, for one year. We think the coal remaining unconsumed at the testator's death passed to the widow for life, and was included among the "household

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goods," etc., bequeathed to her. Being perishable, its use involving its consumption, it follows that the coal belonged absolutely to the widow. (Brightly's Digest, 1609; see cases cited.) A plate glass mirror was also omitted from the inventory taken by the executors, and retained by the widow as her separate property. The legatees claim that she should be also charged with its value as against her allowance under the Act of Assembly. But from the testimony it appears that the widow asserted her ownership at the time of the appraisement, in the presence of the executors and one of the residuary legatees, who made no objection thereto; and from the declarations of the testator it may safely be concluded that he made a valid gift of the mirror to his wife at the time of its purchase. And in the absence of creditors she can retain the same as against the legatees.

The exceptions are therefore dismissed, and the petition for allowance granted.

Opinion by HANNA, J.

[See Farrell's Estate, 4 WEEKLY NOTES, 383.]

Dec. 1877.

Samuel Moseley's Estate.

Orphans' Court—Jurisdiction—Decedents' estates—Gift inter vivos—Heirlooms—Bequest of family pictures "to remain in custody of A. until demanded by heirs of B."—Testator's executors will not be required to deliver possession to B.'s administrator in a proceeding in which B.'s heirs are not parties.

Sur exceptions to Master's report.

The following facts appeared:—

Samuel Moseley, M.D., died June 9th, 1873, leaving a will, by which he appointed James J. Barclay, Esq., and C. O. Groome his executors.

In the year 1860 Burwell B. Moseley, a cousin of the decedent, domiciled in Virginia, sent to him four portraits of the ancestors of the said Burwell B. Moseley, and wrote to him on December 13th, 1860, as follows:—

"I have sent you the pictures, as promised, by Adams Express as per receipt inclosed, which I wish safe to hand. I hope when I am no more, and you and yours have no use for them, they may fall into the hands of some of my children, as they would prize them very much as the portraits of their ancestors."

On the next day he wrote again as follows:—

"I wrote you yesterday inclosing a receipt for the pictures, and I am fearful you may not put the construction I intended when I said 'I hope when I am no more, and you and yours have no use for them they may fall into the hands of some of my children.' The above might be construed that I expected it, which is by no means the case. We cannot dive into futurity, and it is useless to attempt it. I would not desire the control of it."

The said Burwell B. Moseley died in February, 1868.

Samuel Moseley in his will provided as to the portraits as follows:—

"I will and direct that the four portraits, by Vandyke, in the parlor of my residence, No. 1715 Walnut Street, in the city of Philadelphia, shall remain in the custody of my residuary legatee until they shall be demanded by the heirs of my cousin B. B. Moseley, deceased, when they are to be delivered to said heirs or their legal representatives."

By the same will the decedent made Helen Virginia the wife of C. O. Groome, one of his executors, his residuary legatee. Upon the testator's death, in 1873, the pictures were delivered to Mrs. Groome, in whose possession they remained until her death, in 1875, since which time they have been in the possession of her husband, the said C. O. Groome.

On October 12th, 1876, Bloomfield H. Moore obtained letters of administration *c. t. a.* on B. B. Moseley's estate from the Register of Philadelphia County, and presented his petition to this Court on October 14th, 1876, setting forth the above-recited facts, and praying that a citation should issue to James J. Barclay and C. O. Groome, the executors of S. Moseley, deceased, "to show cause why they should not account for and deliver to the petitioner the said personal estate of the said testator."

The executors filed separate answers, that of James J. Barclay admitting the facts in the petition, and disclaiming all interest in the matter in controversy, and further stating that the pictures were never inventoried, "as they were not believed to constitute any part of the estate of Samuel Moseley."

The answer of C. O. Groome admitted the possession of the four portraits, and referred to the two letters from Burwell, above quoted. The answer further averred that the wife of the respondent died on March 15th, 1875, intestate, and he is the administrator of her estate; that Dr. Samuel Moseley did not claim the ownership of the portraits in his lifetime, "nor do I claim to own them now, and I am ready at any time to surrender them to the heirs of B. B. Moseley, deceased, when properly demanded by them."

The case was referred to a Master and Examiner (Thompson Westcott), who communicated with five children of B. B. Moseley, residents of Virginia, informing them of the nature of the proceedings before him, and received from two of them replies objecting to the petitioner obtaining possession of the portraits, and from three others answers favorable to the petitioner's claim.

The Master reported that the prayer of the petition should be refused, and the application dismissed.

To this report the petitioner filed exceptions.

Wm. Henry Rawle, for the exceptant.

The doctrine relating to heirlooms is not favored in this country. Even in England it is

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only allowed by special custom, and not favored by the common law.

Coke Litt. 186.

The facts to bring a case within the doctrine must be strictly proved, and the burden of proof rests on the party claiming the affirmative.

2 Black. Com. 427, Chitty's notes.

M. Arnold, contra.

C. A. V.

February 23, 1878. THE COURT (after reciting the facts). The averments contained in the answers, not having been denied or disproved, must be taken to be true. (Hengst's Appeal, 12 Harris, 413.) It is immaterial, so far as respects the rights of third parties, that the executors did not consider these portraits as property of their testator, and, therefore, omitted to include them in the inventory and appraisement. It is evident that he claimed and exercised the right of ownership, by bequeathing the portraits to his residuary legatee until they should be demanded by the heirs of his cousin B. B. Moseley. And their respective rights cannot be determined in a controversy to which they are not parties. Being of opinion that the Master is correct in his conclusion, and that the petitioner has failed to show that the said portraits form part of the personal estate of said B. B. Moseley, deceased, or any right to call upon the executors of said Samuel Moseley, deceased, to account for the same, the exceptions are dismissed, and the report of the Master and Examiner confirmed.

Opinion by HANNA, J.

Jan. 22, 1877.

Smyth's Estate.

Decedents' estates—Direction by testator to executors and trustees to pay bequest—Insufficiency of personal estate—Whether Orphans' Court may require trustees to sell real estate to pay bequest where the will contains a sufficient power of sale—Executors' account of personal estate must first be settled.

Sur petition for order of sale of real estate.

James P. Smyth, the decedent, by his will, *inter alia*, devised and bequeathed to George H. Stuart and William Ray all the residue of his estate, real and personal, in trust for his wife and four daughters. The seventh clause of the will provides as follows:—

"I hereby direct, authorize, and empower the said George H. Stuart and William Ray, and their successors in said trust, in case any one or all of my said daughters shall marry, to pay over, on or after the day of her marriage, to any daughter so marrying, the sum of five thousand dollars, for and on account of such share of the estate as shall have been theretofore held in trust for the daughter so marrying."

The petition of Emma Heron Fulmer, a daughter of the decedent, set forth that on the eighth of February, 1876, she, being of age, married one William Fulmer; that no part of the said sum of $5000 had been paid to the petitioner, but the same remained due and unpaid, and that the share of the decedent's estate held in trust for the petitioner exceeded in value the sum of $5000. There was also a statement of the real estate held by the trustees. The prayer of the petition was for an order and decree that the said trustees should sell or mortgage so much of the said real estate constituting the share of the petitioner therein, as might be necessary for the payment to her of $5000, with interest from the day of her marriage.

The answer of the trustees, after quoting the fifth clause of the will of the decedent, by which he directed his executors and trustees to apply moneys realized from life insurance, and other personal property not otherwise disposed of, to the extinguishment of encumbrances on real estate at the time of his death, averred as follows: "We have not paid the said legacy to the petitioner only because we have no fund out of which the said legacy could properly be paid. We have been advised by counsel that, under the fifth clause of the testator's will, it is our duty to appropriate the balance of cash in our hands from insurances on the decedent's life, and the collection of other personal property, to the payment and extinguishment of the encumbrances with which the decedent's real estate is still charged. . . . . We further respectfully suggest that, upon the construction of the decedent's will, it may very properly be held that he did not contemplate the sale of any of his real estate for the purpose of paying the marriage portion of any daughter, but it was the intention of the decedent that any such marriage portion should be paid out of the surplus assets, if any, remaining after the extinguishment of mortgage debts."

W. W. Wiltbank, for the petition, cited—

Haslam's Estate, 4 WEEKLY NOTES, 526.

Rhodes' Estate, Id. 527.

T. De Witt Cuyler and *C. Stuart Patterson*, for the respondent.

Feb. 9th, 1878. THE COURT. It would be irregular in the present proceeding to make an order upon the executors to mortgage or sell the real estate of testator for the purpose set forth in the petition. All that the Court can now do is to indicate their opinion respecting the duty of the executors. The testator by no uncertain language directs his executors to pay to any of his daughters, on or after the day of her marriage, "the sum of five thousand dollars, for and on account of such share of the estate as shall have been theretofore held in trust for the daughter so marrying." He evidently contemplated the settlement of his estate before the marriage of either

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of his daughters, as the payment directed to be made could not be ascertained until a settlement of the account of the executors and distribution of the personal estate. The executors, *qua* trustees, are to make the payment, and if they did not hold sufficient personal estate in trust for the daughter so marrying, they would necessarily be obliged to make up the deficiency out of the real estate. The directions to the executors are imperative, the intention of the testator is to provide a marriage portion for his daughters, and there seems to be no room for the exercise of any discretion by the executors. It is immaterial that they deem it prejudicial to the estate to sell any of the real estate at present, for *non constat* that delay will prove beneficial. The testator has directed otherwise, and the petitioner was long since entitled to the amount directed to be paid to her.

While, therefore, we are of the opinion that it is the duty of the executors to carry out the directions of testator, yet we may also say that they have a full power of sale under the will, and need no additional authority from the Court. But their account as executors should first be settled and confirmed. The order made upon this petition is, that upon a settlement of the personal estate of testator, if the share of petitioner amount to the sum of $5000 and over, that sum, with interest from the date of her marriage, be awarded to her; but if her share does not amount to said sum, then the deficiency be paid to her by the executors, by a sale or mortgage of sufficient real estate to pay the deficiency.

Thus far, the petition is granted.

Opinion by HANNA, J.

U. S. District Court—Admiralty.

Dec. 21, 1877.

Wright et al. v. The Owners of the Bark Francesca Curro.

Charter party—Two charter parties, executed simultaneously, for successive voyages—Validity of second dependent on performance of the first—Effect of a reference to the first on the margin of the second.

Libel for breach of charter-party.

The libellants had chartered the bark *Francesca Curro* then at Genoa to sail from Philadelphia to a port in Great Britain, it being expressly stipulated that she should sail from Genoa (for Philadelphia) during the month of December, 1876. Upon her arrival here in February, 1877, the libellants refused to receive her under the charter, alleging that she had not sailed during December. Freight having fallen, they re-chartered her for the same voyage on exactly the same terms except at a lower rate of freight, and an action brought to recover the difference was decided by this Court in favor of the vessel. (Reported 4 WEEKLY NOTES, 415.)

The decree was paid by the present libellants, and the voyage performed under the re-charter.

Upon the same day that the original charter had been made, a second one was also made, of the same vesssel by the same parties. This charter was headed "Second Voyage" and in the margin were written the following words:—

"It is agreed and understood that the vessel, being already chartered for a previous voyage, has after completion of same to return to Delaware Breakwater for orders without delay and in ballast, to enter upon this charter."

After the completion of the voyage under the re-charter, the vessel returned to Delaware Breakwater, and the Master telegraphed his arrival to his agents in Philadelphia, who notified the libellants, and asked for orders. The libellants thereupon ordered the Master to Philadelphia, and he came and laid up at a dock.

The libellants then ordered the vessel to Girard Point for loading, but the Master refused to go, alleging that the libellants, having broken the first charter, were not entitled to the benefits of the second. Freights having advanced, this action was brought upon the second charter to recover the difference.

Henry Galbraith Ward, for libellants.

The contracts made in this case were to be performed or paid for. The dependence of the second on the first was merely to secure two consecutive voyages which could only be secured by referring in the second charter to the first. The first voyage was really performed, though not under the original charter, and the respondents were bound therefore to perform the second, there being nothing but the rise in freights to prevent it.

Only so far as the conduct of one party prevented the performance of the contract will the other be excused.

Dubois *v.* Canal Co., 4 Wend. 285.

In this case the conduct of libellants did not prevent performance, and the ship reported to the libellants on her return from the first voyage for orders. In the first suit the ship complained only of the breach of the first charter, damages were only awarded for that, and those damages have been paid.

Henry Flanders, for respondents.

The contract was, in substance, a single one providing for two voyages. The first was never performed through the acts of libellants: therefore the second was impossible of performance.

THE COURT dismissed the libel with costs.

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WEEKLY NOTES OF CASES.

VOL. V.] *THURSDAY, MARCH 7*, 1878. [No. 6.

Supreme Court.

Oct. & Nov. '78, 14. Nov. 1, 1877.

Appeal of John F. Hartranft, Governor of the Commonwealth of Pennsylvania, et al.

Constitutional law—Relations of the co-ordinate branches of the government—Executive and judiciary—The Governor, and, in certain cases, other officials and officers of the militia, not liable to attachment for refusing to appear to testify—Privileged communications—Grand jury, duties and powers of—Subpœna, essentials of.

The Governor is the absolute judge of what official communications to himself or his department may or may not be revealed.

He is exempt from the process of the Courts whenever engaged in any duty pertaining to his office; and he is the sole judge, of not only what his official duties are, but also of the time when they should be performed.

The Governor, the Secretary of the Commonwealth, the Adjutant-General, and two officers of the militia, being subpœnaed to testify before the Grand Jury in the matter of an investigation into a certain riot, made answer, through the Attorney-General, that they had no knowledge of the matter except what they learned in their official capacities; that such matters as they could testify to were privileged communications; that an examination into their acts in connection with the riot would, in their judgment, be injurious to the interests of the Commonwealth; and that the official duties of the Governor and Adjutant-General required their presence elsewhere; whereupon the Court of Quarter Sessions directed attachments to issue against them for refusing to appear to testify. On appeal to the Supreme Court:—

Held (AGNEW, C. J., and STERRETT, J., dissenting), that attachments would not lie for such their refusal.

The duties and powers of Grand Juries, and the essentials of subpœnas *ad testificandum*, discussed.

Per AGNEW, C. J., dissenting: On no ground of the Constitution, law, public justice, State policy, or sound reason, can I discover any exemption of any officer in the State, high or low, from the common duty all citizens owe to the due administration of justice.

Certiorari sur appeal, to the Quarter Sessions of Allegheny County.

This was an appeal by J. F. Hartranft, Governor, and M. S. Quay, Secretary, of the Commonwealth of Pennsylvania, and Adjutant-general James M. Latta, Major-General R. M. Brinton, and Major A. Wilson Norris, officers of the National Guard of Pennsylvania, from an order of the Court of Quarter Sessions directing attachments to issue against them for refusing to appear to testify before the Grand Jury in the matter of an investigation into the riot at Pittsburgh, on July 21 and 22, 1877.

The material facts of the case were as follows:

On July 19, 1877, a riotous strike began among some trainmen of the Pennsylvania Railroad Company at Pittsburgh, and the militia being called out, a collison occurred on the evening of July 21, between them and the mob, in which some twenty persons were killed and many wounded. A disastrous riot followed, in which several persons were killed, and property valued at over $2,500,000 pillaged and burned.

At the opening of the next term of the Quarter Sessions, the Court (KIRKPATRICK, J.) charged the Grand Jury at length upon their duties in the premises, and particularly, as follows:

"Secondly, you are 'diligently to inquire and true presentment make, ... as well of those things which you know of your own knowledge.' By this is meant that if of your own knowledge as a grand jury or of the knowledge of either of you individually, or from the examination of witnesses in other cases, or if, from any source, offences and crimes are discovered by you, or any other matter by you deemed worthy of investigation, touching which no formal complaint has been made or indictment submitted to you, it is your duty to advise the Court thereof in writing, together with your wishes in the premises. This paper is called a *presentment*, and if upon its submission and consideration the Court should be of opinion that your wishes should be complied with, they will direct a bill of indictment to be prepared accordingly and submitted to you, and it will be disposed of by you as if it had come before you in the usual and ordinary way. In the submission of your presentment . . . it is sufficient if it indicate your wishes and the substantial grounds on which they are predicated."

Subsequently the Grand Jury presented the following paper:—

In the Court of Quarter Sessions, etc.

To the Honorable JOHN M. KIRKPATRICK, Judge of said Court:

The Grand Jury of Allegheny County respectfully represent that the citizens of said county are greatly concerned in having a careful investigation made of the late riots of July 21st and 22d, 1877, and all facts and particulars incident and relative thereto and connected therewith, and the Grand Jury do respectfully pray your Honor to give the said matter in charge to them, to inquire concerning, and to furnish them compulsory process to secure the attendance of such witnesses as they may consider necessary to examine.

JAMES P. BARR,
Foreman of the Grand Jury.

Attest:
SAMUEL E. REYNOLDS, *Clerk.*

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The Court received the paper and endorsed it: "The within presentment considered, approved, and ordered to be filed. *Per Curiam.*" Whereupon the Grand Jury began an investigation, and the appellants, *inter alios*, were subpœnaed as witnesses. The subpœna commanded them to appear "before our Grand Jury at Pittsburgh, at our Court of Oyer and Terminer and Quarter Sessions . . . . to testify all and singular, those things which you shall know touching a certain investigation now being had on formal presentment, by and before the said Grand Jury, relating to the late riots of July last, in our said county, in our said Court depending, and then and there to be tried between the Commonwealth and ——— defendant, on part of the ———."

The appellants not appearing, the Grand Jury applied to the Court for attachments against them, to compel their appearance. Whereupon the Attorney-General appeared and filed the following answer:—

"George Lear, Attorney-General of the Commonwealth of Pennsylvania, comes into Court, representing the said Commonwealth, and says that the Governor, as Commander-in-Chief of the army and navy of the State, M. S. Quay, Secretary of the Commonwealth, Adjutant-General Latta, General R. M. Brinton, and Major A. W. Norris . . . have no knowledge of the late riots in Allegheny County, except that which they learned in their military and official capacities, and which consists of privileged communications, and that he has learned this by an examination of their knowledge of the subject, made personally of each of them, on behalf of the Commonwealth; that, in their capacity of civil and military officers, they declare to him that, in the exercise of their official discretion, an examination into their acts in connection with said riots would be detrimental to the public service and injurious to the interests of the Commonwealth; that they disavow any disrespect to the Court or its process, and absent themselves on the ground that such matters as they could testify to are privileged communications, and not the subject of inquiry before a grand jury; that John F. Hartranft, Governor of the Commonwealth, and James W. Latta, Adjutant-General, are in constant correspondence with the army in the field in the disorderly and riotous regions of the State, and in daily expectation of being required at the front, and to be called to a distant county would endanger the interests of the public service.* . . .

* The Attorney-General also formally withdrew the application for attachments, on behalf of the Commonwealth; but, as the action of the Court below in disregarding this was not assigned for error, the Supreme Court declined to consider the question involved, to wit: Had he the power to withdraw the application?

After argument the Court directed the attachments to issue (no opinion filed), whereupon the appellants took this appeal, assigning for error the action of the Court, *inter alia* (1, 2, 3), in issuing a subpœna for witnesses to appear before the grand jury, in a matter not depending before the Court or legally given in charge to the grand jury; (4) in directing attachments to issue against the Governor and Secretary of the Commonwealth, the Adjutant General and other officers of the militia, and (5) in directing an attachment to issue against the Executive of the Commonwealth.

Before the argument, both parties, wishing the case to be heard upon its merits, waived any technical objections.

George Lear, Attorney-General, and *Lyman D. Gilbert*, deputy Attorney-General (with whom was *Thos. M. Marshall*), for appellants.

The proceedings of the grand jury were unauthorized and illegal, and hence even private citizens were not compellable to appear. Their petition was not a formal presentment. It does not state that they had any personal knowledge of the riot, nor does it contain any facts upon which an indictment might be framed. Nor does it appear that the matter was given them in charge. The Court merely marked their petition "considered, approved, and ordered to be filed." This was not such a "giving in charge" as authorized them to make an investigation. If it was intended to give them the matter in charge, the Court should have directed the investigation, the witnesses should have been subpœnaed to appear before the Court and not before the grand jury, and this only for the purpose of enabling the grand jury to present the offence and the offenders.

In the case of Lloyd and Carpenter, 3 Clark, 188.
In the matter of the Memorial of the Citizens' Association, 8 Phila. 478.
The Grand Jury *v.* The Public Press, 4 Brewster, 313.

But, aside from this, the answer of the appellants to the application for attachments was sufficient. Every department of the government has its secrets of State, or privileged communications, which it is not only the right of the official to refuse to disclose, but his duty to withhold.

"The official transactions between the *heads of the departments of State and their subordinate officers* are in general treated as privileged communications . . . . as, *e. g.*, communications between . . . . the Governor and a military officer under his authority. . . . . The President of the United States and the Governors of the several States are not bound to produce papers or disclose information communicated to them when, *in their own judgment, the disclosures would, on public considerations, be inexpedient.*"

1 Greenl. on Ev. §§ 250 and 251.
Gray *v.* Pentland, 2 S. & R. 23.
Yoter *v.* Sanno, 6 Watts, 164.

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The department is to judge what are its secrets, what its privileged communications, as well as whether their disclosure would be injurious to the public interests. These are questions not for the Courts, but for the officials themselves to determine.

1 Burr's Trial, 186.
Gray *v.* Pentland, *supra.*
Cooper's Case, 1 Whr. St. Tr. 662.
Beatson *v.* Skene, 5 H. & N. 838.

And in this case the officers, being the subordinates and agents of the Governor, are accountable to him alone.

Vanderheyden *v.* Young, 11 Johns. 150, 158.

The appellants were subpœnaed by their official titles, the subpœna disclosed the nature of the inquiry, and the presumption is that the testimony required is concerning their official action. Their answer states that they have no knowledge of the riot, except what they learned in their official capacities; that such matters as they could testify to are privileged communications; and that, in their official judgment, a disclosure of their acts (now) would jeopard the interests of the Commonwealth. This was a complete answer to the application for attachments.

Again, the Courts, recognizing the Governor as the representative of *a distinct and independent branch of the government*, will not interfere with him in the discharge of his official duties.

Mott *et al. v.* The Penna Railroad Co., 6 Casey, 33.
State of La. *ex rel. v.* Warmoth, Gov., *et al.*, 22 La. An. 1.
Mauran, Adjutant Gen., etc. *v.* Smith, Gov., etc., 8 Rhode Island, 192.
The People *ex rel. v.* Bissell, Gov., 19 Ill. 229.
The State *ex rel. v.* Towns, Gov., 8 Ga. 360.
Hawkins *v.* The Governor, 1 Ark. 570.

And particularly do they decline to require him to appear to testify.

Thompson *v.* The German Valley Railroad Co., 22 N. J. Eq. 111.
And see 2 Burr's Trial, 536.

Governor Hartranft has stated that his official duties required his presence elsewhere. This is a sufficient answer in itself; for otherwise, he may be delayed in, or prevented from, the performance of his official duties, and the independence of his department be destroyed.

We do not contend that a subpœna may not issue to the Governor in a proper case; and, if he refuse to appear in the case of a private party, the proper remedy is an action for damages, but in no case is he liable to attachment for such refusal.

The appellants defend their rights, not of person, but of office; and if this Court require it, they will willingly appear. Indeed there would have been no refusal, had it not been that, while the conclusions of the grand jury are liable to be erroneous, the testimony taken before them cannot be made public.

E. A. Montooth, District Attorney, *Morton Hunter*, Assistant District Attorney, and *Geo. Shiras, Jr.* (with whom was *S. A. McClung*), contra.*

Judge KIRKPATRICK, in his charge to the grand jury, gave them this matter in charge; but, if not, the riot was undoubtedly within their personal knowledge, and hence, under their oaths, they were bound to present it. This they did in accordance with the instructions of the Court, and asked for special power to investigate it. That the grand jury meant this as *their own official act*, and not merely that of individual citizens, is clearly shown by the beginning and conclusion of the presentment itself. They wished, *as a grand jury*, to obtain additional facts, for the purpose of presenting the offenders for indictment. Thus is this case clearly distinguished from that of the Memorial of the Citizens Association (8 Phila. 478), cited by the other side.

The endorsement of the Court upon their presentment, taken in connection with the other circumstances of this case, was certainly sufficient to empower the grand jury to make the investigations.

But this question is immaterial, for, as the subpœna was in the proper form and regularly issued under the seal of the Court, and as the appellants were duly served therewith, they cannot answer it by questioning the proceedings of the grand jury.†

Are the Governor and the other appellants subject to subpœna? Chief Justice MARSHALL says that "it is not known ever to be doubted, but that the Chief Magistrate of a State might be served with a subpœna *ad testificandum*."

1 Burr's Trial, 177, *et seq.*
2 Ibid. 535.

That the others are subject to subpœna will scarcely be doubted. It became their duty, therefore, when subpœnaed, to make a proper response; and, as the law makes no exception in their favor, they should have responded in person. Instead of this, however, the Attorney-General filed an answer in their behalf. If such answer be permissible in any case, it should, at least, be made by the person subpœnaed and verified by affidavit.

In this answer, and in the argument before this Court, it is assumed that the appellants were subpœnaed in their official character. This nowhere appears. The title follows the name, and may be regarded merely as *designatio personæ*. It is also assumed that it was intended to examine them *wholly* in regard to their official acts, and upon privileged matters. This assumption is likewise gratuitous; but even if it were true, the answer is still insufficient. It was due to the dignity of

* Owing to want of time, no paper-book was prepared on behalf of the appellees. The brief of argument here given has been condensed by the reporter from notes of the oral arguments made at the hearing.

† The sufficiency of the subpœna was not questioned at the argument.

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the judiciary that they appear in person, and if any such question had been asked them, they could have availed themselves of their privilege in the ordinary way.

But are official communications in regard to this riot privileged? The only ground upon which such matters can be privileged is that of public policy, and it seems scarcely reasonable to suppose that the public interest would be injuriously affected by their disclosure several months after the riot occurred.

If, then, the appellants have failed to make a proper response to the subpœna, the right to attach them would seem to follow; and even if the Governor should be excused on account of his official duties, the others should certainly be required to appear in person, and submit themselves fully to the process of the Court.

It is not intended to reflect upon the official conduct of the Governor or the other appellants, but if any question should be asked which might be made the basis of impeachment or prosecution, they could, of course, refuse to answer it.

On Nov. 12, 1877, the Chief Justice announced that it was the judgment of the majority of the Court that the order of the Court below, granting the attachments, should be reversed. Opinions to be filed thereafter.

Jan. 7, 1878. THE COURT. Grand juries have the power to make presentment, not only of such criminal offences as may be laid before them by the district attorney, in the form of bills of indictment, and of such as may come within the personal knowledge of individual members thereof, but, also, of all such matters as may be given them in charge by the Court. Neither is there any doubt about the power of the Court to direct that body to make inquiry concerning affairs which directly affect the public peace and security; among which affairs may be instanced great riots, such as those which recently disturbed the well-disposed citizens of Pittsburgh and its vicinity. Matters of this kind may properly be referred to the consideration of the grand inquest, in order that the instigators thereof, and the participants therein, may be brought to justice; and this is the more necessary, because, in times of public tumult and alarm, private prosecutors may be overawed through fear of personal violence.

Doubtless the proceedings, in the case before us, are very irregular, since there seems to be a total inversion of the proper order of things. It was the duty of the Court, not of the grand jury, first to move in the matter. In a subject of so much importance, and one requiring the exercise of so much care and discretion, the Court should have instructed this jury as to what it was to investigate and in what manner the investigation was to be conducted. Nothing of the kind, however, was done; but the Court, having approved its petition, suffered it to proceed to the adoption of its own subjects after its own methods, and, by this sufferance, it allowed an important public investigation to pass from its own control to that of a body of men, which, as it was governed by no regular instructions, resembled more a committee for the general investigation of public affairs than a lawful constituent of the Court of Quarter Sessions. This, however, is really of small importance to the matter in hand; neither can the appellants call in question the regularity of the proceedings as between the Court and its grand jury; for if they have been properly subpœnaed, and can present no lawful excuse for their want of obedience to the mandate of the Quarter Sessions, they must stand convicted of a contempt, and we cannot help them. The subpœna is the process of the Commonwealth, and there is no doubt about the Court's power to issue that process in proper cases.

Our inquiry, then, is limited to two propositions: Were the subpœnas regular—such as an ordinary citizen would be bound to obey? If so, were the appellants liable to attachment for disobedience to this process? The subpœna we have before us, like the other proceedings in this case, is very irregular. It is, indeed, but a general mandate of the Court ordering the appellants to appear "to testify, all and singular, those things which they may know touching a certain investigation being had, on formal presentment, by and before the grand jury, relating to the late riots of July last, in said county, in said Court depending." It sets forth no case, present or prospective, nor does it state for whom, or at whose instance, the defendants were to be subpœnaed. As this writ is a very arbitrary one, obliging the citizen to leave his home and abandon his business, however important it may be, and give his attendance at Court, wherever that may be sitting, it is very important to know what parties are entitled to it; for if it be issued at the suit of one having no right thereto, it is no contempt to disobey it. The Commonwealth may have this process, in any proceeding where its interest is apparent, whether as a suitor or a prosecutor, and so may parties in courts, whether civil or criminal; but we have yet to learn that any such right exists in a Court, in its mere character as a Court, separated from the case which it has in hand. So this, as well as every other compulsory process, must show upon it face that it was issued for some person or party having a right thereto, otherwise it is nugatory and void, and disobedience to its mandate involves no penalty whatever. In the case before us, there was the use of the writ of subpœna as a mere order of the Court, without statement of party or case, commanding the de-

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fendants to appear before the grand jury for the purpose of giving their testimony touching the late riots. If there is any law authorizing such process we have not been informed of it.

No doubt the Court might have directed a subpœna to have issued for the Commonwealth, in any case where the Commonwealth was a party, or where it was apparent it was in some way interested in some case or transaction then depending. So might it have directed a warrant to have issued for the arrest of some one guilty of a crime or misdemeanor; but, in such case, no one would contend that the mere blank warrant of the Court would, in itself, be sufficient to detain a citizen for one moment; the authority for such warrant must appear upon its face, or it is worthless. But the Court's subpœna is no more respectable than its warrant; if the subpœna exhibit no authority it may be disobeyed with impunity. Now, in the case before us, the Commonwealth was not a party in interest; or, if so, it is not now apparent. It seems, from the petition of the grand jury, that the citizens of the county of Allegheny "were greatly concerned in having a careful investigation of the late riots," but whether they were concerned in bringing the rioters to justice or not, is not stated, though this was the only matter in which the Commonwealth could be concerned. Moreover, as the grand jury was acting under no instruction, it was not possible, even for the Court, to know what that jury was doing or intended to do, but of this the Court should have been informed before it undertook to interfere with the personal liberty of the citizen by its summary process of attachment; for, as the matter now stands, it is apparent that the subpœna was issued for no tangible case or party, and for no properly defined legal purpose; hence, no one was bound to obey it.

For the purposes of this case, however, we may admit the regularity of this subpœna, and that, upon an ordinary citizen, it would have been binding and obligatory, for we regard the question of the liability of the appellants to attachment, in any event, as the prime one of this case. In order to resolve this, we must first understand who the persons are against whom the Court has directed its attachment, and for what purpose they have been subpœnaed. They are the Governor of Pennsylvania, the Secretary of the Commonwealth, the Adjutant General, chief officers of the executive department of the State government, and two officers of the National Guard; the latter subordinates acting under the orders of the former. The purpose, for which these officers are subpœnaed, is that the grand jury may be put into possession of any information they may be possessed of, or that may be within the power of their several departments, concerning the military or other means used by them in the suppression of the late riots in the city of Pittsburgh. It will be observed that these persons are subpœnaed for the purpose of compelling a revelation of such things as have come to their knowledge, in their official capacities, and which strictly belong to their several departments as officers of the Commonwealth. This is clearly set out in the answer, by the Attorney General, to the application for the attachment, and there has been no denial thereof upon the argument before us. In order to simplify matters, we may treat this case just as though the process, first and last, were against the Governor alone; for, if he is exempt from attachment, because of his privilege, his immunity protects his subordinates and agents. The general principle is, that whenever the law vests any person with the power to do an act, at the same time constituting him a judge of the evidence on which the act may be done, and contemplating the employment of agents through whom the act is to be accomplished, such person is clothed with discretionary powers, and is *quoad hoc* a judge. His mandates to his legal agents, on his declaring the event to have happened, will be a protection to those agents. (Vanderheyden *v.* Young, 11 Johns. R. 158. Per SPENCER, J.)

It follows, if the Governor, as supreme executive and as commander-in-chief of the army of the Commonwealth, is charged with the duty of suppressing domestic insurrections, he must be the judge of the necessity requiring the exercise of the powers with which he is clothed; and his subordinates, who are employed to render these powers efficient, and to produce the legitimate results of their exercise, can be accountable to none but him. In like manner, if he is constituted the judge of what things, knowledge, or information, coming into his department, through himself personally, or from his subordinates, may, or may not, be revealed, then such subordinates, without his permission, cannot be compelled to disclose in Court any such matters or information.

What, then, are the duties, powers, and privileges of the Governor? In the language of the Constitution, Art. IV., Sec. 2: "The supreme executive power shall be vested in the Governor, who shall take care that the laws be faithfully executed." Also, same article, section 7: "The Governor shall be commander-in-chief of the army and navy of the Commonwealth, and of the militia, except when they shall be called into the actual service of the United States." He is also invested with the appointing and pardoning powers, the power to convene the Legislature in cases of emergency, and to approve or veto bills submitted to him by the General Assembly. It is scarcely conceivable that a man could be more completely invested with the supreme power and dignity of a free people. Observe: the *supreme*

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executive power is vested in the Governor, and *he is charged with the faithful execution of the laws*, and for the accomplishment of this purpose, he is made commander-in-chief of the army, navy, and militia of the State. Who, then, shall assume the power of the people and call this magistrate to an account for that which he has done in the discharge of his constitutional duties? If he is not the judge of when and how these duties are to be performed, who is? Where does the Court of Quarter Sessions, or any other Court, get the power to call this man before it, and compel him to answer for the manner in which he has discharged his constitutional functions as executive of the laws and commander-in-chief of the militia of the Commonwealth? For it certainly is a logical sequence that, if the Governor can be compelled to reveal the means used to accomplish a given act, he can also be compelled to answer for the manner of accomplishing such act. If the Court of Quarter Sessions of Allegheny County can shut him up in prison for refusing to appear before it and reveal the methods and means used by him to execute the laws and suppress domestic violence, why may it not commit him for a breach of the peace, or for homicide, resulting from the discharge of his duties as commander-in-chief? And if the Courts can compel him to answer, why can they not compel him to act? All these things, we know, may be done in the case of a private individual; such an one may be compelled to answer, to account, and to act. In other words, if, from such analogy, we once begin to shift the supreme executive power from him upon whom the Constitution has conferred it, to the judiciary, we may as well do the work thoroughly and constitute the Courts the absolute guardians and directors of all governmental functions whatever. If, however, this cannot be done, we had better not take the first step in that direction.

We had better at the outstart recognize the fact, that the executive department is a co-ordinate branch of the government, with power to judge what should or should not be done, within its own department, and what of its own doings and communications should or should not be kept secret, and that with it, in the exercise of these constitutional powers, the Courts have no more right to interfere, than has the executive, under like conditions, to interfere with the Courts. In the case of Oliver *v.* Warmouth (22 La. An. 1), it was held (per TALIAFERO, J.) that, under the division of powers, as laid down in the federal and State constitutions, the judiciary department has no jurisdiction over or right to interfere with the independent action of the chief executive in the functions of his office, even though the act he is required to perform be purely ministerial. This is putting the matter on very high grounds, for, in such case, no other officer would be exempt from the mandatory power of the judiciary. No case could more forcibly exhibit the extreme reluctance of Courts to interfere with the functions of the supreme executive, for the hypothesis put is the refusal of the governor to perform a duty, cast upon him by law, of a character strictly ministerial. We think, however, that the ground upon which this decision stands is substantial; for, as the learned Justice well argues, the difficulty arises in the attempt to establish a distinction between ministerial and discretionary acts as applied to the governor, and then to conclude that the former may be enforced by judicial decree; it is objected, however, that the doctrine is unsound in this that it gives to the judiciary the large discretion of determining the character of all acts to be performed by the chief executive; that this would infringe his right to use his own discretion in determining the very same question; that he must, necessarily, have the unconditional power of deciding what acts his duties require him to perform, otherwise, his functions are trammelled and the executive branch of the government is made subject to the judiciary.

The principle enunciated in the above-stated case applies with greater force to that we now have under consideration; for if the governor's discretion may not be interfered with, in a matter purely ministerial, much more may that discretion not be interfered with in a case which pertains to his office and duties as commander-in-chief, in the discharge of which the Constitution makes that discretion his peculiar and absolute prerogative.

Again, the governor, having a proper regard for the dignity and welfare of the people of the Commonwealth, is not likely to submit himself to imprisonment on the decree of the Court of Quarter Sessions, or to permit his officers and coadjutors to be thus imprisoned. Were we, then, to permit the attempt to enforce this attachment, an unseemly conflict must result between the executive and judicial departments of the government. We need not say that prudence would dictate the avoidance of a catastrophe such as here indicated. On this point, the case of Thompson *v.* The German Valley Railroad Co. (22 N. J. Eq. R. 111) furnishes us with a precedent well worthy of our consideration. In that case a subpœna *duces tecum* had been served on the Governor of New Jersey, commanding him, by his individual name, to appear and testify before an examiner of the Court of Chancery, and bring with him an engrossed copy of a private statute which had been passed by the Legislature and had been sent to him, as governor, for his approval. He refused to obey the subpœna; informing the Court, at the same time, that he did

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not refuse out of any disrespect to the Court or the law, *but because he thought his duty required him not to appear or produce the paper required, or to submit his official acts, as governor, to the scrutiny of any Court.* It will be seen that the case thus presented is quite as strong as that under discussion, for the governor upon his own opinion of duty, which, as it will appear, did not accord with that of the Court, not only refused to appear or produce the required paper, but to submit any of his official acts to the scrutiny of the Court. An order was granted on the governor to show cause why he should not appear and testify. After argument, ZABRISKIE, chancellor, said: "The governor cannot be examined as to his reasons for not signing the bill, nor as to his action in any respect regarding it. But there is no reason why he should not be called upon to testify as to the time it was delivered to him; that is a bare fact that includes no action on his part. To this extent, at least, I am of opinion that he is bound to appear and testify. But I will make no order on him for that purpose. Such order ought not to be made against the executive of the State, because it might bring the executive into conflict with the judiciary. If the executive thinks he ought to testify, in compliance with the opinion of the Court, he will do so without order; if he thinks it to be his official duty, in protecting the rights and dignity of his office, not to testify, he will not comply, even if directed by an order. And, in his case, the Court would hardly entertain proceedings to compel him by adjudicating him in contempt. It will be presumed the chief magistrate intends no contempt, but that his action is in accordance with his official duty."

If we adopt this opinion as a sound exposition of the law, the case before us is determined; for the matter is left to rest solely on the opinion of the executive, although his opinion be clearly contrary to that of the Court. We are inclined to think the conclusion, thus reached, is wise and discreet; and it is supported by the best text-writers of our times. These state the law to be, that the President of the United States, the Governors of the several States, and their cabinet officers, are not bound to produce papers or disclose information committed to them, in a judicial inquiry, when, *in their own judgment*, the disclosure would, on public grounds, be inexpedient. (1 Greenl. Ev., sec. 251; 1 Wh. Law of Ev., sec. 604.) Thus, the question of the expediency or inexpediency of the production of the required evidence is referred, not to the judgment of the court before which the action is trying, but of the officer who has that evidence in his possession. The doctrine that the officer must appear and submit the required information or papers to the Court for its judgment as to whether they are, or are not, proper matters for revelation, is successfully met and settled in the case of Beatson *v.* Skene (5 Hurl. & Nor. 838, per POLLOCK, C. B.). It was there held, that if the production of a State paper would be injurious to the public interest, the public welfare must be preferred to that of the private suitor; the question then arose, how was this to be determined? It must be determined either by the Judge or by the responsible crown officer who has the paper. But the Judge could come to no conclusion without ascertaining what the document was, or why its publication would be injurious to the public service. Just here, however, occurred this difficulty, that, as judicial inquiry must always be public, the preliminary examination must give to the document that very publicity which it might be important to prevent. The conclusion reached was, that from necessity, if for no other reason, the question must be left to the judgment of the officer.

A like case is that of Gray *v.* Pentland (2 S. & R. 23). A subpœna had been issued from the Court below, and served upon Governor Snyder and Secretary Boileau, with a *duces tecum;* a rule was also entered for the purpose of taking their depositions in Harrisburg. They declined to appear in answer to the subpœna, or to permit their despositions to be taken under the rule, and refused to produce the paper or deliver it to the plaintiff. This paper was of very great importance, inasmuch as its production was necessary for the maintenance of the suit pending, the Supreme Court holding that, though it was beyond the plaintiff's power, parol evidence of its contents was not admissible. A motion was then made, on part of the plaintiff, for a special subpœna *duces tecum* to compel the production of the paper; but this was refused. On argument, in the Supreme Court, this action of the Court below in refusing compulsory process against the Governor and Secretary of the Commonwealth does not seem to have been questioned; on the other hand, it was approved in the opinions delivered by TILGHMAN, C. J., and BRACKENRIDGE, J. The latter was, as he said, inclined to think that the Governor could not be compelled to produce the paper transmitted to him; that it was within his own discretion to furnish or refuse it; and this on the ground of public policy. The Chief Justice observed, *inter alia*, that the Governor, who best knew the circumstances under which the charge had been exhibited to him, and could best judge the motives of the accuser, must exercise his own judgment with respect to the propriety of producing the writing. Thus the matter is treated as quite beyond the power of the Court, and the judgment of the executive is regarded as absolute and final.

We next refer to the celebrated trial of Aaron

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Burr. Here is the case of one charged with treason; one who, by the express terms of the Constitution, was entitled to compulsory process for obtaining witnesses in his favor. The Judge before whom the examination was conducted was JOHN MARSHALL, Chief Justice of the Supreme Court, a man renowned not only for his legal learning, but also for his judgment and sagacity as a statesman; and the President was THOMAS JEFFERSON, one not likely unduly to exalt executive prerogative, or to refuse to the Judiciary its just tribute of respect. We may, therefore, presume that whatever was done by the principal actors in the remarkable judicial drama, then in progress, was well done. At the request of the defence, a subpœna *duces tecum* was awarded and directed to the President, requiring him to appear, and bring with him a certain letter from General Wilkinson to himself. He refused either to appear or produce the paper required. On discussion of the question, not whether compulsory process should be awarded against the President—for that was not so much as proposed—but whether the attorney-general should permit the defence to have the examination of a copy of the required letter, which had been put into his possession, the Chief Justice said (as we find it set down in vol. 3, p. 37, Burr's Trial, as published by Westcott & Co., Washington City, 1807): "I suppose it will not be alleged, in such case, that the President ought to be considered as having offered a contempt to the Court, in consequence of his not having attended, notwithstanding the subpœna was awarded agreeably to the demand of the defendant; the Court would, indeed, not be asked to proceed as in the case of an ordinary individual." We find, also, in vol. 2, p. 536, of the same trial, as published by Hopkins & Earle, Philadelphia, 1808, the following, recorded as the utterance of the Chief Justice: "In no case of this kind would the Court be required to proceed against the President as against an ordinary individual. The objections to such a course are so strong and obvious that all must acknowledge them. . . . In this case, however, the President has assigned no reason whatever for withholding the paper called for. The propriety of withholding it must be decided by himself, not by another for him. Of the weight of the reasons, for and against producing it, he himself is the judge."

Influenced by this and the other precedents we have cited, as well as by reason and necessity, we are in like manner disposed to conclude that the propriety of withholding the information required by the grand jury must be determined by the Governor himself; and the weight of the reasons influencing him in the conclusion at which he has arrived is for himself, and not for the Court, to consider.

Furthermore, as the Governor is the chief executive of the Commonwealth, and, as such, embodies the power of the people for the conservation of the peace and the protection of the rights and property of the citizens of the State, as he is also part of the legislative branch of the government, it must be obvious to every one that there are times when he must be excused from the ordinary process of the courts. We presume it will not be contended that he would be obliged to obey the mandate of a subpœna during the sessions of the Legislature, when his presence at the capital is constantly required, or whilst engaged in the suppression of an insurrection. These, however, do not embrace all his duties as Governor; we must, therefore, go one step further, and concede that he is exempt from such process whenever engaged in any duty pertaining to his office. Granting that there may be times when he is not so engaged, and when he might be free to answer to a subpœna, who is to be the judge of his engagements or disengagements? May he be compelled to appear before a court, and submit himself to the judgment thereof as to whether his duties, just then, require him to be in his office at Harrisburg, or at the head of the army in the field, or whether he may not have a few days of leisure, during which he may await the will and pleasure of a grand jury? It will be conceded that, in all ordinary cases, he must himself judge as to what things he must do, and what things he must leave undone, and that this is a duty imposed upon him by the Constitution. But how, then, shall a court, at any time, step in and assume the power of judging for him? This cannot be done except by an unwarrantable assumption of executive prerogative.

The same reasoning which bring us to the conclusion that the Governor is the absolute judge of what official communications, to himself or his department, may or may not be revealed, in like manner leads us to conclude that he must be the sole judge, not only of what his official duties are, but also of the time when they should be attended to. The Governor, disavowing any disrespect to the Court or its process, has answered that, in consequence of his constant communication with the State forces, now in the field, in the disorderly and riotous districts, his time is fully occupied in the discharge of the duties of his office, and that to leave his post would endanger the interests of the public service. This brings us face to face with the question, whether the executive, or the Courts for him, are to determine the character of his official duties, and the order in which they may be performed. For instance, is obedience to a subpœna one of the duties, and, if so, shall he discharge that duty in preference to that which rests upon him as commander-in-chief? The answer to this question is easy, for

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if the Courts can, in any one instance or at any one time, control, or direct, the executive, in the performance of his duties, they may do so in every instance and at all times. We need not waste time in the attempt to prove that this proposition is not allowable; that the Governor cannot thus be placed under the guardianship and tutelage of the Courts. To the people, under the methods prescribed by law, not to the Courts, is he answerable for his doings or misdoings. It is his duty, from time to time, "to give to the General Assembly information of the state of the Commonwealth," but it is not his duty to render such an account to the grand jury of Allegheny or any other county.

Whilst, therefore, the motives of the Court of Quarter Sessions, in granting the process before us, are not to be lightly impugned, yet, we have no doubt, it exceeded its jurisdiction in attempting to interfere with the executive prerogative.

Let the attachment be set aside.

Opinion by GORDON, J. AGNEW, C. J., and STERRETT, J., dissent.

Dissenting opinion by AGNEW, C. J.

The question before us belongs to the enduring theme of civil liberty, and not to ephemeral interest, passion, or feeling. It falls within the emphatic words of the Declaration of Rights that "All power is inherent in the people, and all free governments are founded on their authority and instituted for their safety, peace, and happiness." (Sec. 2.) The question is, whether any citizen, private or official, is above the process of that law, which protects and enforces these essential rights of the people—rights "excepted out of the general powers of government" in order to "guard against trangressions of the high powers delegated" to the mere organs of government. (Sec. 26.)

It is therefore a misfortune that this question has been marred by false issues. The course of the railroad company, or its men; the behavior of the troops, near or remote; the action of the citizens of Pittsburgh, and the conduct of the Governor and his officers, have nothing to do with the question we must consider—a question belonging solely to the realm of law, and only obscured when false issues intervene. Like the glass of the astronomer, cleared of all distorting and prismatic rays, the judicial mind should be free from every divergent influence and discoloring bias.

The twenty-first and twenty-second of July last were days of great alarm in this city, and a series of fearful riots bore terror to the hearts of its inhabitants. In the midst of the tumultuous mass, an armed military appeared. Pistols and muskets were fired, many were wounded, and more than twenty lives of citizens and soldiers were taken. Two millions or more of property were destroyed. A hundred locomotives were ruined, the roundhouse and other railroad buildings, the great hotel, the grain elevator, and many hundred cars were burned. Vast amounts of merchandise of distant owners were consumed or stolen, and for nearly a mile the railroad tracks were covered with car wheels, bars, bolts, and iron machinery of every kind.

A monstrous crime was committed. Blood ran in streams. Was this murder, manslaughter, or excusable or justifiable homicide? Property was despoiled. Was this arson, robbery or theft? Whose was the crime? Wrongheaded men united to remedy grievances by conspiracy and violence. A military force intervened. Death and spoil ensued. Were they called thither by lawful authority; or did they come at private bidding? Did the military attack, or were they attacked? Did they fire at command or by individual will? These were the fearful questions to be answered by some competent lawful authority. The State and distant communities are involved in the answer. The laws of the State have been violated, the "peace" of the people broken and their "safety and happiness" endangered. To whom is inquiry given to obtain the facts, and present the guilty for trial and punishment? Not to the Legislature. It has no judicial power. Not to the Governor. His duty is to "take care that the laws shall be faithfully *executed*." He can neither try nor punish crime. Even a coroner's inquest, *super visum corporis*, is totally inadequate to determine the full scope, character and purpose of a riot of this immense magnitude, and the various parts played by all the actors. No individual pursuit can suffice, for private prosecutors have neither the interest, the inclination, nor the ability to reach the breadth and scope of such a scene of bloodshed and ruin.

To the judiciary alone belongs this power and duty; to it only is the means given to summon juries and witnesses for both inquiry and trial. Under the Constitution and laws of the land, it only can act. Hence the Act of 16th June, 1836, "relating to the jurisdiction and powers of the Courts," and embracing all Courts, commits to the Oyer and Terminer authority "to *inquire* by the oaths and affirmations of good and lawful men of the county of all crimes committed or triable in such county," and also "to hear, determine, and punish the same." (Sec. 14.) To the Court of Quarter Sessions is given "the jurisdiction and power" "to *inquire* by the oaths or affirmations of good and lawful men of the county, of all crimes, misdemeanors, *and offences whatever*, against the laws of this Commonwealth, which shall be triable in the respective county." (Sec. 16.) It is then empowered to certify into the Oyer and Terminer all offences cog-

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nizable there, and to try those over which it has jurisdiction. After the distribution of powers to the several Courts—Common Pleas, Quarter Sessions, Oyer and Terminer, and Orphans' Court—the Act then gives to all alike certain powers, viz., to levy and recover fines, forfeitures, etc. (Sec. 20.) To make rules of practice, etc. (Sec. 21.) The 23d section proceeds: "Each of said Courts is empowered to issue writs of subpœna under their official seal into *any county* of this Commonwealth, to summon and bring before the respective Court *any* person to give testimony in *any* cause or *matter* depending before them, under the penalties hitherto appointed and allowed, in any such case by the laws of this Commonwealth." The Act of 14th April, 1834, "relating to the organization of the Courts of justice," makes the grand as well as the petit jury a lawful part or arm of the Court, for the administration of justice. The power to compel witnesses to come before the grand jury is, therefore, precisely on the same footing, as to require them to appear before the petit. Both are derived from the same law, and stand on the same power, the Act being careful to command *any* person to appear to testify in *any matter* as well as *any cause*. And if the law had not been so precise, the power would necessarily flow from the "jurisdiction and power" conferred to "*inquire* by the oaths and affirmations of good and lawful men of the county of all crimes, misdemeanors, and offences whatever against the laws of this Commonwealth." There is common law authority also. Says Hawkins, in his Pleas of the Crown (vol. i. ch. 6, p. 65): "It is also a high crime to disobey the king's lawful command or prohibition, as for refusing to give evidence to a grand jury concerning a crime, for which the Court may impose an immediate fine." This was decided by Lord HOLT in The King *v.* Lord Preston, committed by the Court of Quarter Sessions for refusing to give evidence to the grand jury. (1 Salkeld, 27–8.) The same law is stated by Mr. Chitty (vol. i. C. L. 320). Another evidence that the source of this power arises in the jurisdiction of the Court acting by means of its grand jury arm, is the fact that the Court will, in delicate cases, direct the evidence to be heard in the Court, so that the grand jury may be better assisted in the performance of their duties. (1 Chitty C. L. 312, 313.)

An immense riot, involving high crimes, and a multitude of persons whose identity, names, participation, and guilt or innocence must be ascertained, in order to proceed to trial and punishment, can be brought to legal knowledge only by a grand jury charged with this duty. A riot is one of those great public offences which is conceded by the authorities to be the special subject of inquiry in this mode. If, then, the Court can charge the grand jury as its legally appointed means, expressly given by the Act of Assembly to make inquiry, it follows, as a necessary logical consequence, that the inquiry must be made *per testes* brought before them by due process of law; for the scope, and all parties to such a riot, cannot be a matter of personal knowledge.

This much said upon the grand jury as a constituent in the administration of criminal jurisprudence ought to be sufficient. But its powers have been denied, rendering something more necessary. It is one of the boasted bulwarks of English liberty handed down to us, and protected by the Declaration of Rights. No man can be tried for a crime except upon a bill of indictment duly found by a grand jury. Hence the accused may challenge the array, or individual jurors. (Brown *v.* Commonwealth, 23 P. F. Smith, 321; Id. 26 P. F. S. 319; Lynch *v.* Commonwealth, 27 P. F. S. 205.) "Our laws (says a well-known writer) have therefore wisely and mercifully placed the strong twofold barrier of a presentment and a trial by jury between the liberties of the people and the prerogative of the crown." (2 Tomlin's Law Dict. 307.) Therefore the Constitution declares: "The trial by jury shall be as heretofore, and the right thereof remain inviolate." (Sec. 6.) "Heretofore" means according to the course of the common law. (Van Swartow *v.* Commonwealth, 12 Harris, 131.) The oath of the grand jury is: "diligently to inquire, and a true presentment make, as well of all such matters as shall be *given them in charge*, as of those things which they *may* know of their own knowledge." "Grand juries (says Judge ADDISON) inquire only into crimes, but they inquire of *all* crimes." "No criminal charge can be brought into a Court of justice in this State unless it have acquired the sanction of a grand jury." (App. 36.) "To the grand jury (he says) is committed the preservation of the peace of the county, the care of bringing to light for examination, trial, and punishment, all violence, outrage, indecency, and terror, everything that may occasion danger, disturbance, or dismay to the citizens. Grand jurors are watchmen stationed by the laws to survey the conduct of their fellow-citizens, and inquire where and by whom public authority has been violated, or our Constitution and laws infringed." (App. 47–8.) Speaking of the judicial branch of the government, he says: "This branch consists of two superior parts, a Court and jury." . . . "Juries selected from the people by an officer of their own election are so numerous and so frequently changed, that they may well be considered as the people themselves exercising this branch of the administration." (App. 55.)

A *charge* to a grand jury to inquire of a matter, is either oral by the Court, or in writing by the

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district attorney in the form of a bill. The oral charge is where criminal Courts (says Judge KING) "of their own motion call the attention of grand jurors to, and direct the investigation of matters of general import, which from their nature and operation in the entire community justify such intervention." "Such (he says) as great riots that shake the social fabric, carrying terror and dismay among the citizens." (1 Whart. C. L., sec, 458, *note*.)

Thus the constitutional power of the grand jury to inquire into the riots of July 21st and 22d being fully established, the inquiry implies evidence, evidence implies witnesses, and witnesses the process to bring them. Here I must notice two technical objections, one that the subpœna commands attendance before the grand jury itself. This is wholly unsubstantial. According to ancient practice, the grand jury having no power to administer oaths, the witnesses came into open Court, were sworn there, and then orally commanded to go before the grand jury. (1 Chit. C. L. 312, 313.) This is noticed in the note to 7th Smith's Laws, 686, and the practice of other States recommended to be adopted, of sending the witnesses at once before the grand jury, and saving the time of the Court. Accordingly, long ago a law was passed (now incorporated into the Criminal Procedure Act of 1860) authorizing the foreman to administer the oath. The witnesses are now sent immediately up. The subpœna, therefore, under the seal of the Court, tested by the Judge and signed by the clerk, was strictly correct in commanding the witnesses to appear before the grand jury. It is the written, instead of oral, order of the Court.

Another objection is that it states no parties. This is made without adverting to the fact that it is process awarded upon an inquiry, and before parties are known. The very purpose of the inquiry is to ascertain the parties to be presented for indictment. It is strictly proper and fully to the purpose, viz: "To testify all and singular those things you shall know touching a certain investigation now being had on formal presentment by and before the said grand jury, relating to the late riot in July last in our said county." This is sufficient for the purpose of inquiry. The remainder of the printed form used by the clerk was necessarily left a blank, there being no parties to be named in it. It was necessarily on the part of the Commonwealth, for a defendant cannot appear with witnesses before the grand jury. It was asserted in argument that the grand jury had no special charge to ground the inquiry. This is wholly incorrect. I have read the able charge of Judge KIRKPATRICK, and find it direct and pointed upon these very riots, and very full of instruction upon the entire subject of riots, routs, and unlawful assemblies. But if it were not so clear and pointed, it was followed by a special written request of the grand jury, "to give the said matters (these riots) in charge to them, and to furnish them compulsory process to secure the attendance of such witnesses as they may consider necessary to examine." This paper was indorsed by the Judge himself, "considered, *approved*, and ordered to be filed." Here then was a direct committal to the grand jury, and the process was issued accordingly.

Much space has been devoted to a vindication of the jurisdiction of the Court and the province of a grand jury. But the lustre of this great common law heritage for the protection and security of the people, and the light it has borrowed from our own legislation, have been so dimmed by denial and obscured by doubt, it has seemed to be necessary. The labor, moreover, is not vain, for all this bears directly on the great question to be considered, to wit: the constitutional power of the Court to require the governor of the State to appear for examination before this arm of its jurisdiction.

We come now to this immediate question, and the first point to be noticed is the argument that he is exempt from a *subpœna* because he is a *co-ordinate* branch of the State government. What is co-ordination or *equality of rank*, under the Constitution? It is not the absolute independence of each. If it were, the end would be disorder, conflict, and finally disorganization. It is not absolute superiority each over the others, for then they would not coexist in unity, as essential parts of the same common whole. The Constitution is the written will of the people, in its entirety, and all its parts must necessarily cohere without jarring, in order to effectuate that will. Equality of rank implies no superiority, except in the exercise of the particular function confided to that rank. Co-ordination is merely the vesting of the separate functions of making, determining, and executing laws, in different persons, that thereby the union of all in one person or body may not work injury to the public welfare. The assembly cannot try causes or execute process, the governor cannot legislate or decide judicial controversies, and the judge cannot make and execute laws. This is the general distribution of the powers of government, yet the Constitution itself does not strictly adhere to it. Thus the Legislature may make certain inquiries, and try certain cases, *e.g.*, the election and qualification of members, contempts, expulsions. The governor approves or vetoes bills, and the Courts superintend and enforce the execution of process. But from the very nature of co-ordination in one and the same government, and the distribution to each branch of its appropriate functions, each is necessarily supreme in its own department, for neither can freely exercise its proper functions if it can be

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obstructed by the other. For example, the judiciary cannot control or interfere with the discretion of the governor in the exercise of an executive function. And for the same reason the legislative and executive branches cannot control the appropriate functions of the judicial. If the legislative or executive can oppose or obstruct the exercise of an appropriate judicial power, the purpose of separation is defeated; a practical union takes place in them, and the surrender by the judiciary is effected. One of the appropriate and exclusive functions of the judiciary is the detection, trial, and punishment of offenders against the law. On the true principles of constitutional co-ordination, therefore, the governor cannot obstruct this function, and must yield obedience to the judicial branch in this respect as the appropriate and superior repositary of the power conferred by the people themselves. When arguments are properly drawn from the distribution of the powers of government among co-ordinate branches, their force must be conceded. But when their use is inconsistent with the rights of the people who have made this distribution for their own benefit, the argument is fallacious. Then it flies in the face of the Declaration of Rights (Sec. 2, already quoted), "That all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, and happiness." This right being reserved by the 26th section out of the powers conferred in the Constitution, it follows no use can be made of the distribution of powers prejudicial to their "peace, safety, and happiness." The appropriate function of the judiciary being the detection, trial, and punishment of offenders, and the inquiry for this purpose by witnesses being the constitutional and legal mode of procedure, it is equally clear the governor, just as any other citizen, being subordinate to the judicial power *in this respect*, must yield his obedience to the process necessary for the exercise of this judicial function. Good government and the welfare of the people demand this.

This superior function of the judiciary is to be seen in another aspect. There never was a time when it has not been engaged in passing upon the Acts of both the other branches, in resolving the constitutionality and interpretation of laws, and the regularity of executive acts. This needs no citation of authority. "It is idle" (says C. J. GIBSON) "to say the authority of each branch is defined and limited in the Constitution, if there be not an independent power able and willing to enforce its limitations." "From its very position it is apparent that the conservative power is lodged with the judiciary, which, in the exercise of its undoubted right, is bound to meet every emergency." "It has become" (he adds) "the duty of the Court to temporize no longer, but to resist, temperately, though firmly, any invasion of its province, whether great or small." (De Chastellux *v.* Fairchild, 3 Harris, 18.) How futile would be the judicial power to punish crime, or vindicate innocence, if the Governor, having exclusive knowledge of facts bearing upon either, could defy the process of the law at pleasure. To argue that his official character is a ground of denial of obedience, is to rob the people, whose servant he is, of their undeniable right to the due administration of justice, through that department of the government to which they have committed the right of judgment. To say he may be liable in an action for damages, is no response. If not bound to appear, no right of action can exist, for he is under no duty to the party. If it be a criminal prosecution, there is no party to whom he could respond. So impeachment cannot reach him, for that is no impeachable offence which is no violation of duty. An obligation to answer the subpœna is the postulate in either case. To say he must appear upon an indictment, and need not upon a legal inquiry, is equally unsound. For the inquiry of a grand jury is, as we have seen, the constitutional exercise of the power of the Court, in order to try and punish offenders. To discriminate between inquiry and trial, as a question of power, is to emasculate judicial rights, and dethrone those of the people.

And now we may crave aid from other sections of the Declaration of Rights. "In all criminal prosecutions, the accused hath a right (*inter alia*) to have compulsory process for obtaining witnesses in his favor, and in prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage." (Sec. 9.) "All Courts shall be open, and every man for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law, and right and justice administered without sale, denial, or delay." (Sec. 11.) These may be taken in connection with the 6th section: "That trial by jury shall be as heretofore, and the right thereof remain inviolate." Trial as *heretofore*, we have seen, implies inquiry and indictment. Now, the private rights of individuals, as thus enforced, are manifestly not superior to the administration of public justice for the welfare of the people as set forth in the second section already quoted. Indeed, public rights are in many respects superior to individual rights, and the enforcement of the private right of a speedy trial implies the public duty, as well as right, to prosecute offenders, and consequently the means of doing so. Thus in every aspect the Constitution, as the supreme law, commands the presence of every person, in private or official life, when his testimony is necessary for the due administration of justice. If, then, he be

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liable to process, and bound to appear, it is a necessary corollary, that he is liable to attachment for his disobedience to the command of the law.

The argument *ab inconveniente*, that it is necessary the Governor should always be at the seat of government, is preposterous, in view of frequent visits elsewhere, of business, courtesy, and pleasure. The absence of the Governor in the Rocky Mountains, on his way to California, at the time of these riots, is an apposite example. When his presence is needed elsewhere, no Court in the State would soil its ermine by a rude assault on his person. In all governments, composed of co-ordinate organs, there will be some friction; but rightminded men, mindful of their just powers, and their own dignity, are ever ready to pour oil on the points of contact.

Coming now to the practical test of the question, let us return to the facts. There were fearful crimes committed on the 21st and 22d of July. These are the undoubted subjects of judicial inquiry in the mode prescribed by law; to wit, through a grand jury. In that unknown and vast multitude of citizens and soldiers, who were guilty? Who were innocent? By the 22d section of the Declaration of Rights, it is declared that the "military shall in *all cases*, and *at all times*, be in *strict subordination* to the *civil* power." The military took many lives—the multitude some. Did the military act under the authority of the civil power? This is one of the first points of inquiry by a grand jury, for it involves the question, whether their acts were murder, manslaughter, excusable or justifiable homicide. Thus the evidence of civil authority becomes essential to the inquiry. Did the Governor, as commander-in-chief, command their presence, and aid in quelling the violence of the mob? Or was his authority assumed by unauthorized persons? These are questions which the Governor alone, as a witness, might be able to answer satisfactorily, by competent testimony in a common law proceeding. They are not State secrets, but acts of authority in their very nature public, and cannot be concealed from the inquiry of the law. The right of life and public safety are too sacred to be subordinated to any right to conceal the authority by which they are destroyed or jeoparded. If the executive authority was duly given, he neither can nor ought to withhold the knowledge which acquits of crime the military acting under his own orders. Indeed, from the character of our excellent Governor, he would not for a moment refuse to come to their rescue, if he believed his duty demanded it. On the other hand, if his authority was unlawfully assumed, or was simulated, or was exercised at the bidding of persons without right—an inference which his absence in California very naturally raises—and the military have been involved in an unlawful act, his duty and the rights of the people demand his testimony, that the parties who have thus misled them may be reached. This is no State secret as to them, but its concealment is a crime against society, which no one who knows the Governor would attribute to him, if aware of his duty.

At this point the case of Gray *v.* Pentland (2 S. & R. 23) may be noticed. There the deposition sent to the Governor affecting Pentland's character was a privileged communication, and protected by the Governor's discretion, for otherwise he might be deprived of necessary information in the performance of official duty. Hence the Court in an exercise of sound discretion would not compel its production. But, here, the authority of the Governor to call out the troops to aid in suppressing a riot is in its nature a public act, and his testimony is necessary to vindicate their rights, or to reach others if unauthorized by him. In every aspect of personal and official duty, the State has a right to the disclosure. A contrary doctrine strikes at the essential and fundamental principles of a free government as set forth in the Declaration of Rights.

Analogies also prove the truth of the general doctrine, that no officer, high or low, is above the demands of justice, or above the process of the law. For example, if the Governor's pardon, or other official acts be forged, or stolen, or procured by fraud or duress, is it possible he is not liable to be summoned before a jury, grand or petit, inquiring into the fact? His deposition cannot be taken in a criminal prosecution. Indeed there is no difference between a civil and a criminal issue, for the power to subpœna him to give his deposition is just as essential. So he is called to perform many acts of statutory duty. Is he exempt from subpœna when any of these acts become the subject of judicial inquiry? And if by courtesy he be permitted to be excused, on what principle does this apply to his chief officers of State? The cases in Pennsylvania abundantly prove that a *mandamus* will lie to them to compel the performance of ministerial duties. (Griffith *v.* Cochran, 5 Bin. 87; Com'th *v.* Cochran, 6 Bin. 456; Com'th *v.* Cochran, 1 S. & R. 473.) So the Court will restrain by injunction. (Mott *v.* Penna. R. R. Co., 5 Casey, 33, 41.) Doubtless this Court cannot interfere with the *discretion* of the Governor in the performance of any proper executive function, for in that his province is superior. Argument is not needed to prove this, yet it is the great work of the opposite opinion, while no labor is bestowed to vindicate the power of the Governor to obstruct the punishment of crime, by a refusal to testify. A subpœna to testify is not an interference with that discretion. It has the force of a summons or notice, not an

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arrest. This has been decided in two cases—U. S. *v.* Cooper (4 Dall. 341) and Respublica *v.* Duane (4 Yeates, 347). In the former, Judge CHASE said he knew of no privilege to exempt members of Congress from the service of a *subpœna*, though by the Constitution they are exempt from *arrest* in all cases except treason, felony, and breach of peace. In the latter case, Judge YEATES, citing a similar provision in the Constitution of the State, held that the service of a subpœna is not an arrest, and that the Court may grant an attachment or not according to the existing circumstances. These decisions bear directly on the question before us, for as to members of the Assembly there is an express provision against arrest in all cases except treason, felony, breach and surety of the peace, and violation of their oath of office. Now the Constitution makes no exemption whatever of the Governor, and he is brought directly within the maxim *expressio vel designatio personæ est exclusio alterius.* (Co. Litt. 210, *a.*) The decision in Respublica *v.* Duane (*supra*) is, therefore, strongly in point. But a case exactly in point, decided by that great judge and statesman, Chief Justice MARSHALL, is found in the trial of Aaron Burr for high treason. (Vol I. pp. 177 to 188.) The following points were adjudged: (1) That a subpœna to the President of the United States can be issued. (2) That it can go with a clause of *duces tecum* to bring a letter in the possession of the President. (3) That it can be issued before indictment found. (4) That the refusal of the President is a subject for the exercise of the sound discretion of the Court. On page 181 the Chief Justice, after stating that he is not aware of any decision that a subpœna cannot issue to the President, says that "it is not known ever to be doubted, that the chief magistrate of a State might be served with a subpœna *ad testificandum.*" A prominent feature of that case was that Col. Burr was prosecuted with intense earnestness, I might say bitterness, by the most eminent counsel in the United States (friends also of President JEFFERSON), who conceded the power to issue the subpœna. The same question arose again on the subsequent trial for a misdemeanor, and the same decision was made. Said Chief Justice MARSHALL: "That the President of the United States may be subpœnaed and examined as a witness, and required to produce any paper in his possession is not controverted." (Burr's Trial, Vol. II. 535.) He then discusses the question of the propriety of compelling the production of the letter of General Wilkinson, stating some reasons very similar to those in our case of Gray *v.* Pentland (*supra*), for which a Court would refuse compulsory process.

But, assuming a case where the Court would decline to compel the production of a paper, or an answer to an oral question, it does not dispense with the Governor's attendance for examination, unless no [some] other ground were alleged. But how does the Governor know in advance what will be the subject of his examination? *Non constat* that any question will be asked on a privileged matter. If such be asked, he can decline answering, and refer the privilege to the Court, which will decide it, just as it will the privilege of counsel, without requiring disclosure of the matter itself. I s nature is all the Court need know.

Another point may be noticed. It is said the imprisonment of the Governor under attachment would 'eave the State without a head. The case is hardly supposable, for when the Governor knows it is his duty to obey, he will do so. Certainly Governor Hantraft is not a gentleman who would be guilty of a *voluntary* contempt. If *voluntarily* guilty, he would deserve attachment for the dereliction of the law, which his own oath requires him to see faithfully executed. Impeachment, which has been insisted upon, is a harsher remedy; for the undeniable fact of his refusal to obey the process, would be the inevitable ground of removal from office. If, however, his disobedience be *involuntary* in consequence of pressing official duties, a court which would disallow his excuse would be visited with the highest censure. But assuming a voluntary contempt, and imprisonment, still the position is untrue. The State is not without a head, for the 13th section of the fourth article of the Constitution provides: "In case of the death, conviction on impeachment, failure to qualify, resignation, or *other disability* of the Governor, the power, duties, and emoluments of the office, for the remainder of the term, or *until the disability be removed*, shall devolve upon the Lieutenant-Governor." The 14th section provides for the disability of the Lieutenant-Governor, and devolves these duties on the Speaker of the Senate. It is said imprisonment is no disability, which is as much as to say the Governor may be in prison in Allegheny County, and, at the same time, at the seat of government, signing or vetoing bills, or performing other duties. If no disability, then the State retains its head. But if the Governor be disabled from being in two places at the same time, then the disability brings the 13th section into play, and the State is provided with a constitutional substitute. *Quacunque via data*, there is a chief executive.

It is said the Governor is the representative of the people, and therefore not responsible. This is true of executive duties, for therein the constitution, the adopted will of the people, is his warrant of authority; but it is untrue of judicial powers, for therein the judiciary represents the people, by the same warrant of authority; and if

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he violate the law, which it is the province of the judiciary to enforce by their authority, he is liable to the law. In a government of law, instituted by a free people for their own benefit, there is no royal prerogative to do nothing wrong; and therefore there can be no representation of their dignity, such as can strike down their law, and prevent its administration by its appropriate functionary.

On no ground of the Constitution, law, public justice, state policy, or sound reason, can I discover any exemption of any officer in the State, high or low, from the common duty all citizens owe to the due administration of justice. With these views, I cannot consent to rob the judiciary of its constitutional powers, and exalt the executive above the demands of justice, and the safety and welfare of the people. I cannot abnegate a power intrusted to me by the people, and will return to them a commission, soon to expire, unsullied by any dereliction of duty, or obeisance at the shrine of unwarranted power.

Jan. '76, 110. Jan. 17, 1878.

Clark v. Phila. and Reading R. R. Co.

Negligence—Contributory negligence—Infancy—Duties of parents—Duty of Railroad Co. towards trespassers on its tracks—Right to a clear track.

When the plaintiff's case, in an action for negligence, fails to show the omission of any duty incumbent upon the defendant, a non-suit will be entered.

The plaintiffs' child, aged nine, was upon a siding of the railroad company defendant some distance from the public street; while hidden behind some standing cars, a train backed against them, forcing them over her, and causing her death.

Held, that the failure of the engineer to whistle was not negligence.

Phila. and Reading R. R. Co. *v.* Hummell (8 Wr. 375), followed; Phila. and Reading R. R. Co. *v.* Long (25 Sm. 257), distinguished.

Error to the Common Pleas No. 4, of Philadelphia County.

Action on the case, by John Clark and Sarah, his wife, against the Philadelphia and Reading Railroad Co.

The narr. averred damage to the plaintiffs, as the parents of Isabella Clark, in consequence of her death, caused by the negligence of defendant's servants upon a siding connected with its railroad in Manayunk. Plea, not guilty.

The case was twice tried in the Court below, the first trial resulted in a verdict for plaintiff, and a rule for a new trial was made absolute (reported 1 WEEKLY NOTES, 315).

The following facts appeared from the plaintiffs' evidence at the second trial:—

The plaintiffs were the parents of Isabella Clark, a child of about nine years of age, and lived on Washington Street, Manayunk, seventy yards from the defendant's siding, where the accident happened. The space between Washington St. and the main track was an uninclosed lot belonging to the defendant, and the siding ran upon this lot and parallel with the main track. There is a high bluff beyond the junction of the siding with the main track, around which the latter curves, and which prevents an approaching train from that direction from being seen. The siding was used on an average about once a day for the unloading of freight from the cars. (It was not shown that there was any use of the lot or siding as a path or way by the people in the neighborhood.) On the day when the accident happened the mother, looking from her door, saw the child in company with Hannah Vogt, a girl of thirteen, engaged in picking up coal by some empty cars standing on the siding. Mrs. Clark called to Isabella, then went to her, took the coal bucket away from her, and ordered her to come home; but the child refused. Mrs. Clark testified: "I did not bring her away, because she wanted to stay until Hannah came away, and I let her remain." Mrs. Clark then left Isabella, and had barely reached her house, when a train of cars, backing on to the siding, struck the empty standing cars so as to send the end car over Isabella, and cause her death. The train was moving slowly and stopped almost instantly. One of the witnesses gave as his opinion that the child must have been sitting or standing on the back of the car which ran over her. Several witnesses testified that it was usual for trains backing on the siding to whistle, and that they did not hear a whistle upon this occasion.

The evidence as to the danger of the siding was conflicting. Mrs. Clark testified: "I did not allow her to go (to the siding) because I did not wish her to go there. I did not see any danger in the place nor in her picking coal. If I had thought there was any danger I would not have allowed her to remain. . . . I did not allow the child to go to this place to my knowledge; sometimes she would go if I did not watch her. If I saw her between the siding and the main track, I would not think it a proper place for her to be."

On this evidence, the Court (THAYER, P. J.) entered a non-suit, which the Court in banc refused to take off.

The plaintiff took this writ, assigning for error the refusal to take off the non-suit.

John Dolman, for the plaintiff in error.

To hold as a matter of law that the mother should have removed the child, assumes, without

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sufficient evidence, that the place was dangerous. The jury should have been allowed to say, taking the locality into consideration, the age of the child, that of her companion, and the conduct of the mother, whether or not the latter was guilty of contributory negligence.

P. A. & M. R. R. Co. *v.* Pearson, 22 Sm. 171.
R. R. Co. *v.* James, 1 WEEKLY NOTES, 68.
Penna. R. R. Co. *v.* Lewis, Ibid. 550.

Where both the duty and the extent of its performance are to be ascertained as facts, the question of negligence is for the jury.

McCully *v.* Clarke, 4 Wr. 406.
Kay *v.* R. R. Co., 15 Sm. 274.
W. C. & P. R. R. Co. *v.* McElwee, 17 Id. 311.
Penna. R. R. Co. *v.* Ackerman, 24 Id. 265.

Thos. Hart, Jr., for defendant in error.

Where the standard of duty has been fixed, and does not require to be found, its omission is negligence.

Penna. R. R. Co. *v.* Beale, 23 Sm. 504.
Penna. R. R. Co. *v.* Ackerman, 24 Id. 265.
Penna. R. R. Co. *v.* Weber, 26 Id. 157.
Weiss *v.* R. R. Co., 29 Id. 387.
Gerety *v.* R. R. Co., 2 WEEKLY NOTES, 387.

As to the duties of parents, and consequence of neglect of such duty, see—

Glassey *v.* R. W. Co., 7 Sm. 172.
P. A. & M. R. W. Co. *v.* Pearson, 22 Id. 169.
Howard Express Co. *v.* Wile, 14 Id. 201.

Mrs. Clark voluntarily and knowingly permitted her child to remain; such act has been adjudged negligence *per se*. P. & R. R. R. Co. *v.* Long (25 Sm. 257) does not impair this rule; there the question was of the compliance or non-compliance with it. Where the positive act of a parent has placed a child in a position of danger, the care of an adult should be provided.

Kay *v.* R. R. Co., 15 Sm. 269.

The failure of the train to whistle, supposing it to have been the case, was not negligence. The defendant had no reason to suspect the presence of any one on its tracks, and having the right to presume a clear track, had the right to act upon such presumption.

R. R. Co. *v.* Hummell, 8 Wr. 375.

The fact that the deceased was a child, the defendant not knowing of its presence, can in no way enlarge the duty of the latter.

Kay *v.* R. R. Co., *supra*.
Flower *v.* Penna. R. R. Co., 19 Sm. 216.

Jan. 28, 1878. THE COURT. The accident in this case occurred on a siding upon the private property of the railroad company and distant from the street. The child was hidden behind the standing cars, out of the view of the engineer who ran in other cars which struck the standing cars and forced them over the child.

We cannot perceive under all the facts in evidence that any duty lay upon the engineer which he ought to have performed toward this child. The case is wholly unlike that of the Philadelphia and Reading Railroad Company *v.* Long (25 P. F. Sm. 257), but does much resemble that of the Philadelphia and Reading Railroad Company *v.* Hummel (8 Wright, 375), which in its principles rules this.

PER CURIAM. Judgment affirmed.

July, '77, 30. Jan. 18, 1878.

Shields v. Garrett.

Mechanic's lien—Sub-contractor—Act of 22d March, 1849—Lumping charge—Particularity of claim—Dates of commencement and ending of each item of work must be stated—Same rule applied to such charge when one of a bill of items—This act applicable to sub-contractors.

To bring a lumped or aggregate charge in a mechanic's lien, filed by a sub-contractor, within the provisions of the Act of 22d March, 1849 (allowing such aggregation in liens filed in Philadelphia and Chester Counties), the dates when that particular work so charged was begun and finished must be distinctly stated.

If such charge be one of a series of items for which the lien was filed, it is not a sufficient fulfilment of the condition of the Act to state the times when the whole work was begun and finished.

A rule to strike out the objectionable item is a proper course to take under such circumstances.

Error to Common Pleas No. 4, of Philadelphia County.

This was a lien filed by Shields, a sub-contractor, against Garrett, owner of a certain row of houses, and Loux, the contractor for building the same.

The case was heard in the Court below upon a rule taken by the owner upon the claimant to show cause why the following item of the mechanic's claim filed should not be stricken out.

May 19, 1876. Job of flag pavement and granite curb, as per agreement $1076.

The whole bill of particulars attached to the claim was as follows:—

PHILADELPHIA, September 14, '76.

Mr. Eli Loux, for Buildings 21st and Pine Sts.,
To Shields & McGrath, Dr.
Dealers in Granite and Flag Stone.
Yard 22d St. below Locust.

1875.			
Nov. 19.	To resetting Curb at 21st and Pine,	$5 00	
Dec. 22.	To 10 6 Flag Stone, for well cover at 30 c.	3 15	
Dec. 23.	To 11.3 Flag Stone, for well cover at 30 c.	3 37	
1876.			
Jan. 5.	To ½ bbl. of Cement,	1 50	
April 18.	To 1 Iron Scraper, set in,	1 00	
May 19.	To job of Flag Pavement and Granite Curb, as per agreement,	1076 00	
May 20.	To resetting Curb at 21st and Albion,	6 75	$1096.77

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The above work was commenced on or about the 19th November, 1875, and finished on or about the 20th of May, 1876, and the materials were furnished from time to time within said periods, and the same were so done and furnished continuously.

This rule was made absolute by the Court below, THAYER, P. J. delivering the following opinion: "This lien, as appears on its face, was filed by a sub-contractor, who attempts to bind the owner of the property by the following charges in his bill of particulars:—

May 19, 1876. Job of flag pavement and granite curb, as per agreement, $1076.

Upon the authority of Russell *v.* Bell (8 Wr. 47), and Lee *v.* Burke (16 Sm. 336), we have no hesitation in saying, that the plaintiff cannot bind the defendant's property by any such lumping charge—a charge which conveys no information to the owner of the amount of materials furnished or of the price charged, but which rests entirely upon an agreement made between the plaintiff and the contractor. Such a charge might be good enough if made by the contractor against the owner. (Young *v.* Lyman, 9 Barr, 449.) But Young *v.* Lyman does not apply to the case of a sub-contractor. The Act of 1845 does not extend to h.m. As Mr. Justice SHARSWOOD observes in Lee *v.* Burke, the reason for requiring the particulars to be furnished does not exist in the case of a special contract between the owner and contractor, and *cessante ratione cessat ipsa lex;* but it is entirely different when the contract, though for a round sum, is not with the owner, but between the contractor and a sub-contractor. The building cannot be bound by any such special contract for more than the materials furnished and the work done, at fair market prices. Hence in such a case it is very important that the owner should be informed by the claim filed as to the particulars of the demand, that he may be enabled to make the necessary inquiries to satisfy himself of its justice as a lien on his property. This was the purpose of the Act of 1836.

This item of the claim being clearly bad, the remaining question is, whether it should be stricken out. It was decided in Lee *v.* Burke, and St. Clair Coal Co. *v.* Martz (25 Sm. 384), that no question as to the deficiency of the lien in law, arising upon the face of the record, can be determined on the trial of issues of fact, and that the defendant can only avail himself of such deficiency by a demurrer or a motion to strike off. In the case of Brown *v.* Price, (D. C., June Term, 1873, No. 24, unreported),* it appears by the record, which we have examined, that the District Court, in a similar case, ordered an illegal item to be stricken out of the claim. Following the practice adopted in that case, we see no reason why the defendant cannot have his remedy by a motion to strike out as well as by demurrer. They may be regarded as equivalent remedies for this purpose. The motion to strike out may be considered as a demurrer. We can see no inconvenience which can arise from such a practice. The plaintiff, after final judgment, has his writ of error in either case.

Rule absolute."

The plaintiff then took this writ, assigning for error the action of the Court.

Aaron Thompson, for plaintiff in error.

The Act of 1845 was passed to meet the case of Houtz *v.* Patterson (5 W. & S. 537), and Haley *v.* Prosser (8 W. & S. 133), which deprived the contractor alone of the right of lien, turning him over to his special contract, where one existed. Young *v.* Lyman (9 Barr, 449) followed this Act. As this Act was solely for the benefit of the contractor, the sub-contractor was still held to full compliance with the Act of 1836. But in 1849, March 24, a local Act was passed (P. L. 675, § 2),* which modified the Act of 1836 *sub modo*, in respect to sub-contractors (the contractor having been already provided for under the Act of 1845), for it embraced therein, by express terms, any mechanic and material man who performed work and furnished materials, and specially relieved them from the obligation of filing an itemized bill of particulars in or with the claim, provided, however, in lieu of it, certain other conditions were complied with, *viz.*, furnishing in or with the claim the dates of the commencement and finishing of the work, or of the delivery of the materials, and stating also the aggregate price of the work and materials. These are the only requirements to be observed under this Act by those who thus perform work and furnish materials, without distinction whether they be contractors or sub-contractors, but leaving still the nature and character of the work and materials to be stated, as a substantial part of the Act of 1836.

With these observances all the Acts on the subject seem to thus harmonize. Hundreds of claims have been filed under them, and many are still of record uncollected. By these the itemized claimant has his lien, the special contractor his, and the sub-contractor, who keeps no

* See a report of Brown *v.* Price, in note to Shields *v.* Garrett, reported in the Court below, 4 WEEKLY NOTES, 140.

* The Act of 1849 reads as follows: "That it shall be lawful for any mechanic or material-man in the city and county of Philadelphia, and county of Chester, who performs work and furnishes materials, to include both in the same claim filed; and where the value or amount of the work or materials can only be ascertained by measurement when done, or shall be done by contract for a stipulated sum, it shall be lawful to file a statement of the time when the work was commenced and when finished, and of the aggregate price of the work and materials, and all claims heretofore filed in conformity herewith and not decided judicially are hereby confirmed."

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books (it may be), but simply trusts to his contract for a stipulated sum, or to his certificate of measurement, of an aggregated price, also has his.

[SHARSWOOD, J. Yes, but your claim is not within the words of this Act of 1849, for you have put in a lumping charge with only one date.]

We have substantially complied with the Act by putting in the dates of the commencement and ending of a whole job of continuous work upon the same buildings. All the Acts should be taken together, and then our claim is substantially right.

The learned Court below seemed to totally ignore the Act of 1849, and treated our case as if it came under the Acts of 1836 and 1845, overlooking the fact that in neither of these Acts are the provisions found that are contained in the Act of 1849. They viewed the Act of 1849 as inconsistent with the Act of 1836, and thought that if sustained, it must, by implication, repeal the Act of 1836, whereas both the Acts are operative in their appropriate spheres—the one where itemized transactions are susceptible of entry, the other where they are not, because of a special contract for a stipulated sum, or where measurement comes in as the readiest and best way. Surely owners cannot complain, for they are sufficiently informed of the contract or measurement in the claim filed, and the price can be as effectually contested under this Act, if exorbitant or unjust, as can be done under any of the other Acts, and as has been done since the Act of 1845 was passed. For, as was said by Judge BURNSIDE, in Scarborough *v.* Thornton (9 Barr, 451), in criticizing the Act of 1845, "it is of no consequence, either to the owner or to the public, that he (the claimant) should state the number of perches of stone built, or the quantity of boards used; he states what is equally useful under the words of the Act, his contract."

Morgan and *Lewis*, for defendants in error.

If the construction of the Act of 1849 contended for by the plaintiffs in error, be correct, it virtually repeals that of 1836 as to the counties to which it is limited, and takes away from owners of property who contract for the erection of buildings thereon, the protection given them by that Act against parties with whom they are not brought into contact, whom they may never hear of until a claim is entered against their buildings, and who, but for the mechanic's lien laws, would have no claim whatsoever against either the said owners or their property.

Every case cited by the counsel for the plaintiff is a case where the claimant was a contractor, and not a sub-contractor. In fact not a single case can be found where a lien claim of this character filed by a sub-contractor has been held to be valid.

Besides, had this claimant been a contractor and not a sub-contractor, the claim filed would have been invalid. The Act of 1849 does not release contractors from a strict compliance with the Act of 1836, except, first, as to the statement of the time when the work was done and materials furnished, and, second, as to the prices of work and materials. As to these it is enough to state when the work was commenced and when finished, and the aggregate price of the work and materials. All other requirements of said Act must be complied with.

Smaltz *v.* Knott, 3 Gr. 227.

Jan. 28, 1878. THE COURT. There is nothing in this record which needs special notice. The Court below was right in striking the item of $1076 out of the mechanic's claim. The case is not aided by the Act of 24th March, 1849 (P. L. 675, § 2), for its provisions were not pursued by setting forth the dates of the beginning and end of the work comprehended in this item.

This reference to dates is material, for it is the substitute the Act makes for itemizing. The statement of the beginning and ending of the whole work, including all the other items in the bill, is no proper performance of the condition of the Act of 1849, for that had relation to the beginning and ending of the items which constitute the lumped or aggregate sum.

Judgment affirmed. PER CURIAM.

[*Cf.* Van Roden *v.* Campbell, C. P. No. 2, *post*, p. 126.]

Quarter Sessions.

Q. S. of Schuylkill Co. Feb. 1878.

Whitehouse v. Schalck.

Contested election—Practice—Bill of particulars—A bill of particulars may be ordered in contested election cases—The practice is analogous to the mode of procedure in civil and criminal cases.

Rule for bill of particulars.

On Dec. 6, 1877, a petition signed by twenty-five citizens and qualified electors of Schuylkill County was presented to the Court, setting forth that by the returns of the general election held November 6, 1877, A. W. Schalck was certified to have received 7999 votes for the office of District Attorney, and W. J. Whitehouse to have received 7828, and that the said A. W. Schalck received a certificate of election. The petition

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charged that the election was illegal and fraudulent, and the returns incorrect, false, and fraudulent, and contained 161 specifications of alleged frauds committed in every election district in the county, by the reception of illegal votes and by gross and wilful misconduct in the election officers.

On the 31st December, 1877, a motion to quash the petition was made by the defendant, on the ground that the names of the alleged illegal voters, their residence, and the disqualification of such voters were not sufficiently set forth to enable the defendant to file his answer under the Act of 1874.

On January 21, 1878, the motion to quash was overruled, and the defendant was ordered to file his answer in ten days from that date.

On January 22, 1878, upon the defendant's petition, verified by affidavit, setting forth that the allegations in the petition were too vague and indefinite to enable him to answer, the present rule was granted to show cause why a bill of particulars, specifying the names of the illegal voters, their residence, and the cause of their disqualification, should not be furnished the defendant; and at the same time the Court enlarged the time for filing the answer.

Samuel A. Garrett and *Charles N. Brumm*, for the petitioners.

A. Campbell, *James M. Healy*, and *J. W. Ryan*, contra.

Feb. 11, 1878. THE COURT. In a former motion to quash the petition filed in this case, the Court, under the authorities, decided that it was not necessary to set forth in such petition the names of the illegal voters and the causes of their disqualification, for within the 30 days allowed by law this might be found impossible to be done, for a fair investigation and to subserve the ends of justice. We accordingly overruled the motion.

The present rule is to furnish such information, within a reasonable time, as will enable the defendant to put in his answer. The Act of 19th May, 1874, requires the Court, in contested election cases, to proceed without unnecessary delay to hear and decide the complaint of the petition; and under the 17th section of the Act (P. L. 213), the Court or Judge trying the case is invested with "plenary power to make, issue, and enforce all necessary orders, rules, process, and decrees for a full and proper understanding and full determination and enforcement of the decision in every such case, according to the course of practice in similar cases made under the laws of this Commonwealth, or which may be necessary and proper to carry out the provisions of this Act."

A fair construction of this section confers upon the Court the power to regulate the proceedings, so as to do entire justice and equity to all parties, to guard against fraud and to give effect to the choice of the people.

The defendant asks that the specific facts, relied upon by the petitioners for contesting the election for district attorney, should be furnished him, before he can make a proper answer; and he alleges further that as the petition embraces every township, ward, and election district in the county (in which illegal votes are charged to have been received), the contestant could call and examine every person in the county, who voted at the November election in 1877, for district attorney, in order to find enough illegal votes to overcome the returned majority of the defendant, unless the petitioners should be required to specify the names of such voters and the causes of their disqualification, and thus narrow down the contest to such alleged illegal votes; that unless this be done, the contest would be vexatious and productive of great expense to the taxpayers of this county or to the petitioners.

The petitioners allege that if they were required to give a bill of particulars, specifying the names of the illegal voters and the causes of their illegality, it would prevent them from examining other voters that might from time to time be discovered. This undoubtedly would be true, and it would throw the burden upon them to ascertain these facts before proceeding in the case. (Commonwealth *v.* Snelling, 15 Pick. 321.)

The point made here has never been before this Court, and the authorities are very meagre upon the question, and only incidentally ruled. As it forms an important matter in practice, and will hereafter be cited as a precedent, we have given the subject due and careful consideration and are unanimous in our decision.

The question was directly ruled in Mann *v.* Cassidy (1 Brewster, 33), where an order was made by the Court to furnish the names of illegal voters and their disqualification; but as this was found impossible to accomplish, the Court said they would thereafter decline to make a similar order. The power of the Court to make the order was here recognized—the practicability of its exercise questioned. In Thompson *v.* Ewing (1 Brewster, 101), during the hearing of the case the Court declined to order the respondent to furnish a list of illegal voters embraced within his specifications of answer. The committee on contested elections of the House of Representatives of this State, have required the contestants in the Fowler *v.* Felthoff and James *v.* McKibben cases to furnish bills of particulars to the respondents.

It is well settled in civil and criminal cases, that a bill of particulars will be required to be furnished the defendant when applied for within a reasonable time before trial. In Gilpin *v.* Howell (5 Barr, 53), the Supreme Court says: "The rule of practice which sanctions a call for

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particulars has for its object definite information to the antagonistic parties of the plaintiff's cause of action." To answer this purpose, it has been repeatedly ruled that the particulars furnished ought to be as certain, and convey as much information as a special declaration.

2 Saunders on Pleading, 699.
Babcock *v.* Thompson, 3 Pick. 446.
Hale *v.* Fenn, 3 W. & S. 361.
Rex *v.* Hodgson, 3 Carr. & Payne, 422.
Lambert *v.* People, 9 Cowan, 586.
Roscoe's Crim. Evidence, 421.
Wharton's Prec. Indict. (Conspiracy), 615.
Rex *v.* Bootyman, 5 Carr. & Payne, 300.
Commonwealth *v.* Snelling, 15 Pick. 321.
Rex *v.* Hamilton, 7 Carr. & Payne, 448.
Adams *v.* Adams, 16 Pick. 254.
Gardner *v.* Gardner, 2 Gray, 434.
Tebbett *v.* Pickering, 5 Cush. 83.
Commonwealth *v.* Davis, 11 Pick. 434.
Commonwealth *v.* Wood, 4 Gray, 11.
1 Troubat & Haly, Part 1st, p. 422.
Commonwealth *v.* Miller, Brightly's Election Cases, 711.
Skerrett's Case, Id. 320.

In England the authorities are numerous upon the right of the defendant to demand a bill of particulars before plea to an indictment in criminal prosecutions, as well as in civil cases.

In the Commonwealth *v.* Maize & Lewis (3 Legal Chronicle, 29), where a demand for particulars was made on an indictment for embezzlement, this Court used the following language: "Notice of special matters in civil causes is in accordance with our practice, and necessary under the rules of Court." The general doctrine that every man is entitled to a specification of the charges against him is deeply engraven in our criminal law, and is essential to the enjoyment of personal liberty, and, therefore, no argument or adjudged case is necessary to sustain this principle. (Com. *v.* Wood, 4 Gray, 11.) In the Com. *v.* Giles (1 Gray, 469), MERRICK, J., says: It is now a general rule, perfectly well established, that in all legal proceedings, civil and criminal, bills of particulars or specifications of facts may and will be ordered by the Court, whenever it is satisfied that there is danger that otherwise a party may be deprived of his rights, or that justice cannot be done. Whether such an order shall be made is a question within the discretion of the Court where the cause in which it is asked for is pending, to be judged of and determined upon the particular facts and circumstances attending it.

These authorities control the practice in both civil and criminal cases, and, though they are not *ejusdem generis* with the present one, they are analogous, and in the absence of any authoritative decision, should govern, unless there is some good substantial reason to the contrary.

"The only safe course" (says Judge AGNEW) "in such case is to proceed in analogy to the practice in other cases, by notice of particulars, ordered and governed by the discretion of the Court." (Election Cases, 15 P. F. S. 36.) And in the same case he further says, on page 37: "Whether a bill of particulars or specification of facts shall be required is exclusively in the discretion of the presiding Judge." To the present prayer for particulars the usual and necessary affidavit is attached. (Rex *v.* Hodgson, 3 Carr. & Payne, 422.)

We therefore think that under the 17th section of the Act of 19th of May, 1874, and the practice in analogous cases, we have the power to order a bill of particulars in an election case, when such application is made before answer, and especially where we are informed by the counsel for the petitioners that they can now name a couple of hundred illegal voters, which would be sufficient to change the result of this election. This being the case, a bill of particulars can be readily furnished without any inconvenience to the petitioners.

And now, February 11th, 1878, rule made absolute, and the petitioners are directed to furnish the defendants in this case with the names of the illegal voters, and the election districts in which they reside; and, further, to furnish the causes of their disqualification so far as the same have come to their knowledge.

Opinion by WALKER, J., PERSHING, P. J., and BECHTEL, J., concurring.

Common Pleas—Law.

C. P. No. 2. Dec. 15, 1877.

Marble Co. v. Burke.

Execution—Distribution—Duty of sheriff to distribute money arising from sale of personal property—He cannot pay proceeds of personalty into Court—Authority of the Court under the Act of June 16, 1836, is discretionary—Practice.

Rule to take money out of Court.

The plaintiff's execution (*fi. fa.*), issued June 2, 1877, and was the first levied upon defendant's personal property; subsequently several other writs issued, and a sale of the personal property was made, which realized an amount more than sufficient to satisfy the plaintiff's judgment. One of the junior execution plaintiffs took a rule on the sheriff to pay the money into Court, which

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was discharged. The sheriff, however, subsequently, of his own motion, paid the entire sum into Court.

The record showed that a rule had been taken to set aside the *fi. fa.* under which the sale wa made, which rule had been discharged. Upon his ruling a writ of error had issued and is now pending.

Sharp & Alleman, for the rule, cited—
Williams's Appeal, 9 Barr, 267.

Thos. J. Barger, sheriff's solicitor (with whom was *R. C. Winship*), contra.

The question the Court is asked to pass upon is, whether the sheriff has a righ to pay money into Court, or whether he is bound to make dis tribution? he is a ministerial officer, and his authority is measured by the *fi. fa.* which commands him "to have th money before the Judges, etc." It is, therefore, his duty in all cases to pay the money into Court; if he chooses to take the risk of distribution in a plain case, he may, but he is not bound to do so.

McDonald *v.* Todd, 1 Gr. 17.
Wilson *v.* Amer. Photo. Co., 4 WEEKLY NOTES, 13.

The Act of June 16th, 1836 (P. L. 777), and Rule XXIII. of this Court, provide the sheriff with the means of protecting himself, and furnish execution creditors with a safe and speedy method of establishing their rights.

The validity of the lien of plaintiff's execution is pending before the Supreme Court, and the sheriff should not certainly be required to pass upon the effect of the writ of error.

C. A. V.

Jan. 12, 1877. THE COURT. The sheriff's duty in distributing the proceeds of an execution against personal estate is so plain that we may be surprised that it should become a subject of dispute. It is, as the language of the writ indicates, "to have the money before our Judges," etc., "to render to the said plaintiff." The sheriff is not to pay the money into Court; he is to have it b ore the Court, and it is his duty, and not the Court's, to pay it over to the party by whom the writ was issued. The common law gave no warr. nt for he imposition of such a burden on the Court, nor, so far as I am aware, did it authorize the Court to become the custodian of the fund for the purpose of distribution. Such an exercise of jurisdiction would have been mischievous in the great majority of instances, as tending to delay and costs without any corresponding good, because the rule laid down for the sheriff's guidance was clear, and could not lead him astray. When there was only one execution in his hands there could be no room for doubt, and when there were several the first execution creditor was entitled to priority, and the rest followed in the order of time. If the writ was regular on its face, it was not incumbent on the sheriff to inquire into the goodness of the judgment, or consider whether it was a sufficient warrant for the writ. (See Hecker *v.* Jarrett, 3 Binney, 404, 410; Moore *v.* Allegheny City, 6 Harris, 55, 58; Billings *v.* Russell, 11 Harris, 189.) Nor would the vacation of the writ or judgment make him responsible for acts done while they were still in force, unless he anticipated the mandate of the writ by paying the money over before the return day, or proceeded with notice that the good faith or validity of the judgment was denied. Such a notification rendered it the sheriff's duty to await the action of the Court, although if the party from whom it came delayed for an unreasonable time, the sheriff might quicken him by a declaration that if he did not move forthwith, the fund would be distributed among the parties who were *prima facie* entitled to the same. (See Williams's Appeal, 9 Barr, 267; Warmall *v.* Young, 5 B. & C. 660.)

Such seems to have been the practice in the English courts; and such when the levy is on personal property it still is in Pennsylvania, with some changes introduced by statute, and which do not materially vary the position of the sheriff. When lands became assets in this State, the method which had been pursued in the distribution of the fund arising from the sale of chattels was found to be entirely insufficient, because the rights of the several execution creditors depend not upon the order of their writs, but of their liens, and because liens may exist which have not been carried to judgment and execution. The sheriff consequently sought to escape from a responsibilty against which he could not adequately guard, by paying the money into Court, and as this practice conduced to the safety of all parties, it soon grew into a right, which, though at first presumably exercised on motion with the leave of the Court, finally became a matter of course. There seems, however, to have been some doubt in the first instance as to the validity of a jurisdiction which was certainly unknown to the common law. (See Patterson *v.* Sample, 4 Yeates, 308, 315.) And the Court would probably have hesitated before extending it to the proceeds of an execution against chattels, even if the case were one where the number and complexity of the questions involved rendered it desirable to bring them all into one hand. The Act of April, 1827, subsequently embodied in the revised statute of June 16th, 1836, put an end to these doubts by enacting that, "in all cases of sheriffs' or coroners' sales where there shall be disputes concerning the distribution of the money arising therefrom, the Court from which the execution shall have issued shall have power, after reasonable notice given either personally or by advertisement, to hear and determine the same according to law and equity."

The authority of the Court is clear under these

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statutes to dispose of all questions concerning the proper distribution of a fund in the sheriff's hands, whether it proceeds from a sale of real or of personal estate, but the Court may determine whether it will exercise the power, and it obviously ought not to put the parties to the expense and delay of further litigation, unless there is some controverted and material fact, or some legal question which admits of a reasonable doubt. In the case of real estate this cannot well be ascertained without the appointment of an auditor, because there may be equitable liens which do not appear of record, and parties who are ignorant that the land has been sold and their security imperilled; but the effect of an execution against personalty is widely different, and the money ought not to be ordered into Court without proof by affidavit of facts and circumstances, which, if true, would preclude the first execution creditor. It is moreover obviously for the Court, and not for the sheriff, to determine whether the case requires judicial consideration, and he should not anticipate the action of the Court in the premises by paying the money into the hands of the prothonotary, without a motion to that effect and leave obtained. This is the more clear because the sheriff need only stand fast to be secure. He can never be made responsible for paying the respective executions after the return day in the order in which they were delivered to him, unless he has notice that the right of a prior execution creditor is contested by one who is subsequent in point of time. If the party who raises such a question does not bring it to a hearing by moving that the money be paid into Court, the sheriff may make the motion himself, and call on the party to support it by affidavit, and if the application is then dismissed it will be an answer to any subsequent proceeding against the sheriff.

In this instance the sheriff paid the money into Court, not only without leave, but after the refusal of a motion to that effect by the party who contests the validity of the first execution, and we are, therefore, of opinion that the fund is not legitimately in the keeping of the Court, and that to appoint an auditor or distribute the fund ourselves would be a new and mischievous precedent. The rule obtained by the first execution creditor to take the money out of Court is consequently discharged. But, inasmuch as the sheriff seems to have acted in good faith, and from a mistaken view of his rights and duties, he may take a rule to withdraw the fund from the prothonotary for distribution in the usual course of business, and give notice of the rule to the parties, and if it is made absolute he will be reinstated in the secure position which he has unwittingly abandoned.

Rule discharged.

Opinion by HARE, P. J.

[*Cf.* Weis *v.* Weis & Fowler, 3 WEEKLY NOTES, 76; Snow *v.* Hyman, 2 Id. 352.]

C. P. No. 2. Dec. 15, 1877.

Van Roden v. Campbell, Owner, and Moyer, Contractor.

Mechanic's claim, by a sub-contractor, must specifically set forth the items of the claim—A lumping charge filed against the owner is bad, and will be stricken off.

Rule to show cause why a mechanic's claim should not be stricken off.

The mechanic's claim, filed by Van Roden, a sub-contractor, against Campbell *et al.*; owners, and Moyer, contractor, contained the following bill of particulars:—

1877, May 30. To plastering thirteen houses on Warnock, late Northland Street, below Keneset Street (below Lehigh Ave). Contract price,	$1105
To extra cornices to said houses,	143
" 39 extra centrepieces,	26
	$1274

Began work April 9, 1877.
Ended work May 30, 1877.

R. Alexander, for the rule.

The owner and sub-contractor have not dealt together. The claim is defective in not giving the owner information as to the number of square yards of plastering, and price per yard; the number of days work, and price per day, etc.

Lee *v.* Burke, 16 Sm. 336.
Russell *v.* Bell, 8 Wr. 47.

This claim is not saved by the Act of 1849 (Purd. Dig. 1034, pl. 45), which Act does not repeal the Act of 1836 (Purd. Dig. 1032, pl. 40), and should receive the same construction in regard to sub-contractors as the Act of Assembly of 16 April, 1845.

Shields *v.* Garrett, 4 WEEKLY NOTES, 140.
Brown *v.* Price, Ibid. (note).

A. B. Shearer, contra.

THE COURT. The law upon this whole subject of liens by sub-contractors, founded on specific contracts, is in a most unsatisfactory condition. This Court, in Shields *v.* Garrett, at the June Term, 1877, sustained a demurrer to a claim very similar to the present, and the Court of Common Pleas No. 4 reached substantially the same result in a different case between the same parties (Shields *v.* Garrett, 4 WEEKLY NOTES, 140). Both these cases are now before the Supreme Court, which, it is hoped, will make an authoritative exposition of the law. Until then, we adhere to our views heretofore expressed.

Rule absolute.

Per MITCHELL, J.

[See Shields *v.* Garrett (Supreme Court), *ante*, p. 120.]

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C. P. No. 2. Dec. 1877.

Rankin v. Rankin.

Issue devisavit vel non—New trial—Evidence of republication of former will by parol not admissible.

Motion for a rule for a new trial in an issue *devisavit vel non.*

The plaintiffs were the executors under an alleged will of Eleanor Rankin, deceased. On the trial the defendants offered in evidence a will of the decedent prior in date to the one in suit, to be followed up with evidence of a parol republication of the same. Objected to; objection sustained.

Verdict for the plaintiffs.

Andrew Zane, Jr. (*D. C. Harrington*, with him), for the motion.

Republication by parol has been repeatedly sustained.

Campbell *v.* Jamison, 8 B. 498.
Gable *v.* Daub, 4 Wr. 224.
Fransen's Will, 2 C. 202.
Jack *v.* Shoenberger, 10 H. 416.
Dixon's Appeal, 5 Sm. 424.
Charles *v.* Huber, 28 Id. 448.
Smith's Will, 9 Phila. 362.
Burns *v.* Burns, 4 S. & R. 295.
1 Williams on Executors, 246.

THE COURT, relying on Clark *v.* Morrison (1 Casey, 453), refused a rule.

C. P. No. 2. Feb. 9, 1878.

Ladner v. R. Q. Gibbon, L. B. Gillet, and J. E. Addicks, trading as Gibbon, Gillet & Co., limited

Practice—Process—Limited partnership under Act of June 2, 1874—How such limited partnership should be sued.

Rule for judgment against the defendant Gibbon, for want of a sufficient affidavit of defence.

Assumpsit, by the holder of a promissory note signed "Gibbon, Gillet & Co., limited," against the above-named defendants.

The affidavit of defence made by Robert Q. Gibbon, set forth: that in 1875 deponent entered into a limited partnership with Gillet and Addicks, trading as "Gibbon, Gillet & Co., limited" in accordance with the Act of Assembly; that in June, 1876, said partnership was dissolved and notice of dissolution duly given by advertisement and otherwise; that the note on which suit was brought was not signed by deponent or by his authority, or with his knowledge or consent, and not until more than ten months after the dissolution of the partnership and the retirement of deponent therefrom. The affidavit further set forth that the suit was improperly brought against the individual partners (among whom deponent was wrongfully included), instead of against the firm by its firm name.

A rule had been taken by plaintiff to amend the record by striking out the words "Robert Q. Gibbon, Lucius B. Gillet and John E. Addicks trading as," so as to make the suit comply with the limited partnership Act of June 2, 1874 (Purd. Dig. 1891), but this rule was withdrawn.

Staake, for the rule.

The affidavit is insufficient, inasmuch as it neglects to state that the note was not given by the liquidating partner or that it was not given for debts of the firm.

W. Drayton, for the defendant Gibbon.

After the dissolution of a partnership only the liquidating partner has the right to sign the name of the firm to a note, and this only when it is given for business of the firm.

Davis *v.* Desauque, 5 Wh. 530.
Robinson *v.* Taylor, 4 Barr, 242.
Brown *v.* Clark, 2 Har. 474.
Ward *v.* Tyler, 2 Sm. 393.
McCowin *v.* Cubbison, 22 Id. 358.
Lloyd *v.* Thomas, 29 Id. 68.
Hunter *v.* Reilly, 12 Cas. 509.

The allegations in the affidavit of a limited partnership, and that deponent did not know who signed the note, are sufficient.

Hogg *v.* Orgill, 10 Casey, 347.
Bausman *v.* Rogers, 2 WEEKLY NOTES, 428.

The Act of Assembly provides an alternative method of bringing suit.

G. L. Crawford, for the company "limited."

The Act of Assembly provides a method of bringing suit which should have been adhered to.

Act of Assembly of June 2, 1874, P. L. 271.
Act of Assembly of May 1, 1876, P. L. 89.

THE COURT discharged the rule for judgment, and ordered the record to be amended by striking out the individual names of the partners, in accordance with the rule which had been withdrawn.

C. P. No. 3. Feb. 9, 1878.

Gorman v. Gillen.

Affidavit of defence—Promissory note—Holder for collection only—Set-off as to payee—Allegation of fraud.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit upon a promissory note by the indorsee against the maker.

The affidavit of defence set forth: (1) That the defendant "believes, and expects to be able to prove, that the note sued upon in this action is the property of James P. McGuigan, the payee," and that the plaintiff, who was the brother-in-law of said McGuigan, was not a *bona fide* holder for value of said note, but merely permitted his name to be used for the purposes

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of suit, so as to avoid a defence thereto as against the payee. (2) That the note was given by defendant to the payee, McGuigan, in settlement of his interest in certain sums of money represented by him to be due to the firm of McGuigan & Gillen, then about being dissolved, McGuigan having kept the books of the firm, and being familiar with the accounts; that in truth no debts to that amount were due, but certain specified debts were due, much smaller in amount than McGuigan had stated them to be, which circumstance coming to the knowledge of the defendant, entitled him t a set-off as against the note to the amount of $119.11.

John H. Connella, for rule.

A mere allegation that the defendant believes and expects to be able to prove that the plaintiff is not a *bona fide* holder of the note is not sufficient. He must state the grounds for his belief.

Landis *v.* Metzgar, 2 WEEKLY NOTES, 80.
Breukeret *v.* King, Id. 321.
Bank *v.* Bartholomew, Id. 445.
Williams *v.* Harding, 1 Id. 344.
Sowers *v.* Ernest, Id. 443.
Gustine *v.* Cummings, Id. 105.
Salter *v.* Askin, Id. 388.
Moeck *v.* Littell, 3 Id. 341.
Brown *v.* Walton, Id. 76.

Fraudulent representations made by the payee to the maker, which induced the maker to give the note, constitute no defence against a *bona fide* holder.

Mackey *v.* Richardson, 2 WEEKLY NOTES, 226.
Broadbeet *v.* Huddleson, Id. 293.
Bank *v.* Schreck, 1 Leg. Chron. 65.

Even if the note were in the hands of the payee, the defence set up would be insufficient, there being no allegation of fraud.

Cowen *v.* Browning, 2 WEEKLY NOTES, 123.

William F. Harrity, contra.

When the facts forming part of defendant's case are not within his own knowledge, an affidavit of defence is sufficient which avers that he believes and expects to be able to prove them

Reznor *v.* Supplee, 2 WEEKLY NOTES, 401.
Black *v.* Halstead, 3 Wright, 64.
Thompson *v.* Clark, 6 Sm. 33.

An averment that a third person is the real owner of a note in suit, and that the real name of the present plaintiff is used to prevent a set-off, accompanied by an allegation of set-off against such third person, constitutes a good affidavit of defence.

Graphic Co. *v.* Marcy, 4 WEEKLY NOTES, 239.
McFadden *v.* Irwin, 2 Wh. 36.

THE COURT. We distinguish between this case and that of Cowen *v.* Browning (2 WEEKLY NOTES, 123), because here there is an allegation of facts which amount to fraud.

Rule discharged.

Orphans' Court.

Jan. 23, 1878.

Wistar's Estate.

Citation to file account—Person interested within the meaning of the Act of March 29, 1832—Where no account has been filed at the expiration of one year after decedent's death, a citation will be awarded without inquiry into the interest of the petitioner if a prima facie right is shown—Practice.

Sur petition for citation and answer.

Sarah Wistar, the decedent, died in December, 1866, and appointed as her executors, Richard and Lewis Wistar.

The petition of Edward Waln set forth the following facts: that the petitioner and Richard Wistar entered into an agreement in writing, under date December, 1866, in which said Wistar fixed the value and amount of petitioner's services for ten years' litigation (See Wistar's Appeal, 30 Sm. 484) at twenty-five hundred dollars, of which a large balance still remains unpaid, the petitioner therefore standing in the right of a creditor of the estate. He therefore submitted to the Court the question whether he was such a person interested as was contemplated by the Act of March 29th, 1832 (Purd. Dig. 1106, § 19), and prayed for a citation to the executors to show cause why they should not file an account.

A citation was awarded, to which an answer was filed by the executors alleging that the petitioner never was the counsel of the estate or that he was in any manner interested therein within the meaning of the Act, but was retained as the counsel of the respondents personally as devisees and legatees of the testatrix, and that his services had never been paid for out of or charged to the decedent's estate.

Edward Waln, P. P., for the petitioner.

N. H. Sharpless, contra.

Feb. 16th, 1878. THE COURT. The executors have not shown any valid reason for their non-compliance with the requirement of the Act of Assembly to file an account in one year from the granting of letters testamentary. They are now called upon to perform that duty by the petitioner, who alleges he is a creditor, and therefore interested in the estate. It is denied by the executors that he has a claim against the estate. But, as we have frequently held, we do not propose in this preliminary proceedin to try this question. (Dickson's Estate, 32 Legal Intel. 249; 1 WEEKLY NOTES, 534.) It can be more properly adjudicated upon the audit and settlement of the account. As it sufficiently appears that the decedent has been dead for more than one year, that petitioner is a claimant against her estate, and no account has yet been filed by the executors, the order upon the executors to file their account must be allowed.

Petition granted.

Opinion by HANNA, J.

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WEEKLY NOTES OF CASES.

VOL. V.] *THURSDAY, MARCH* 14, 1878. [No. 7.

Supreme Court.

Oct. & Nov. '77, 40. Oct. 16, 1877.

The City of Erie v. Caulkins.

Negligence—Master and servant—Independent employment—Municipal corporation, when not liable for negligence of contractor—What constitutes reservation of control by the corporation—Doctrine of respondeat superior discussed.

A municipal corporation is not responsible for an injury occasioned by the negligence of a contractor exercising an independent employment, unless there be such stipulations in the contract as to reduce the contractor to a mere agent of the corporation.

A provision that the chief engineer shall have power to direct changes in the time and manner of conducting the work does not amount to such a reservation of power by the corporation as will render it liable for injuries arising from the contractor's negligence.

The fact that the corporation has taken a bond from the contractor to indemnify it from any loss or damage arising from his failure to perform his duties does not fasten any additional liability on the corporation.

Painter *v.* The Mayor of Pittsburgh, 10 Wr. 213; Reed *v.* The City of Allegheny, 29 Sm. 300; followed.

Error to the Common Pleas of Erie County.

Case, by Harriet J. Caulkins, against the city of Erie to recover for injuries received by the plaintiff in 1872 from falling over obstructions in the street, and into a sewer in process of construction. The testimony set forth the following facts:—

In the fall of 1872 the city of Erie entered into a contract with one Peter Grant for the construction of a sewer in "State Street from the centre of Fifth Street southwardly to within twenty feet of Ninth Street, etc." During the progress of the work the plaintiff, while passing along Seventh Street about nine o'clock in the evening, fell into a place which had been left open, and met with the injuries complained of. It was in evidence that at the time of the occurrence the weather was dark and rainy, and that there was no lamp to warn passengers of the obstruction.

The contract of the city with Peter Grant was for the faithful and workmanlike performance of the latter in and about the construction of the sewer, etc., and contained, *inter alia*, the following specifications:—

The contractor will be required to guard the public effectually from liability to fall into the trenches, or from upsetting their vehicles against the earth thrown from them, during the whole progress of the work, both by night and by day; and will be held responsible for any damages the city may have to pay in consequence of neglecting the necessary precautions.

The contractor will be required to dismiss from his employment all incompetent or unfaithful persons; also to keep in perfect repair, for six months after its completion, the whole of his work, except in cases where the repairs may be rendered necessary by causes clearly beyond his control.

There was an additional provision that the chief engineer of the city might direct changes in the time and manner of performing the work, and should decide what, if any, additional compensation the contractor was to receive for any change so made. The usual stipulation was made that the streets should be kept open, and a bond was entered into by Grant to indemnify the city from all loss resulting to them from any failure on his part to perform his duty.

On the trial (before VINCENT, P. J.) the plaintiff presented points requesting the Court to charge the jury, substantially, that the city was at all times bound to keep the streets in such condition as would render them safe for passengers; that the city having, in the contract with Peter Grant, reserved the right of travel along the streets, and having taken from Grant a bond to indemnify themselves from loss arising from any negligent act of his, and having expressly reserved a controlling voice as to the manner of the performance of the work, they were liable. These points were affirmed.

The defendant's points were, in substance, that the city was not liable for the negligence of the contractor unless the relation of master and servant or principal and agent existed between them; that under the evidence and by the terms of the contract no such relation existed, and that the taking a bond of indemnity from the contractor to provide against possible loss did not increase or in any wise change the liability of the city.

The Court refused so to charge, and in the general charge said: "We have no means, except negatively, of knowing the exact terms of the contract referred to in Painter *v.* The Mayor (10 Wright, 213), but we may, we think, fairly infer that the city of Pittsburgh reserved no power to control the manner in which the work should be carried on, no right to use the street during the progress of the work, no power over the men employed by the contractor, and took no indemnity against any damage it might have to pay arising from the neglect or carelessness of the contractor in doing his work.

"In the case before us the city of Erie made all these reservations, and having made them, we think we are bound to conclude that the defendant did not intend to relieve herself from her

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general responsibility to those who might be injured in consequence of the carrying on of this work, and that the reservation of the control the contract gave them over the workmen employed by the contractor made them its agents, and it their superior, even if the reservation of the right to continue the use of the street did not. We intend to defer fully to the authority of the Supreme Court, as is our duty by the rules of law, as well as due and proper courtesy from an inferior Court to that of last resort. But it is also our duty to decide upon the applicability of the decisions to the case in hand; and we are of the opinion that the cases cited by counsel for the defendant are based upon a state of facts so different from the case before us as to make them inapplicable."

Verdict and judgment for plaintiff. Defendant took this writ, assigning as error the answers to plaintiff's and defendant's points and that portion of the charge above quoted.

Theo. A. Lamb (with whom were *Davenport* and *Griffith*).

That an independent contractor is not the servant or agent of the person employing him has been too frequently decided to be now questioned. The contract in the present case contains no such reservations by the city as to take the case out of the general rule.

Blake *v.* Ferris, 1 Selden, 48.
Keedie *v.* Northwestern R. R. Co., 4 Exch. 244.
Kelly *v.* The Mayor, 1 Kernan, 436.
Painter *v.* The Mayor of Pittsburgh, 10 Wr. 213.
Wray *v.* Evans, 30 Sm. 102.

Taking the bond of indemnity is entirely immaterial. It was to secure the faithful performance of the contract; but, if the conditions of the contract favorable to the city do not enure to the benefit of the party injured, the bond will not surely assist her.

Allen and *Rosenweig*, for defendant in error.

The doctrine contended for by the plaintiff in error does not extend to cases where the employer has not relinquished his control over the work.

Allen *v.* Willard, 7 Sm. 374.

There was no relinquishment in the present case. The reservation of power to the chief engineer to make changes in the "time and manner" of doing the work makes the city the principal in the transaction.

Jan. 7, 1878. THE COURT. The accident which is the foundation of the present case, resulted from the negligence of certain workmen who were engaged in the erection or construction of a sewer for the city of Erie. The excavation for this sewer, which was in one of the public streets, having been carelessly left unguarded, the plaintiff, on the night of the 26th of November, 1872, without any fault of her own, fell into it and received the injuries complained of. The question now before us is, who is the responsible party? The defendant asked the Court to say to the jury that, as the city had contracted with Peter Grant to construct this sewer, it was not responsible to the plaintiff for any injury she might have sustained in consequence of the negligence of Grant or his agents or servants. The Court refused so to charge; and on this ground: that, by the contract, the city reserved the power to use the street during the progress of the work, and to control the manner in which the work should be carried on; that it retained a power over the men employed by the contractor, and that by the contract it had provided for indemnity for any damages that might be recovered from it, arising from the neglect or carelessness of the contractor in doing the work. The first part of this proposition is not found in the contract except inferentially from the stipulation therein contained for the protection of the public from the danger of falling into the trenches, and from the upsetting of vehicles on the earth thrown out of them. It is, however, a matter of course that, in all cases of this kind, use shall be had of such parts of the streets as are not occupied by the contractor; but it is also of course that the contractor shall have the control of such parts thereof as are necessary for the purpose of execution of his work. The complaint, however, is not as to such portion of the streets as were in public occupancy, but as to those which, it is conceded, were necessarily occupied by the contractor under his contract. It must not be forgotten that the complaint is not that the street was used in an unlawful or unauthorized manner, but only that there was neglect in not erecting such guards, or in not maintaining such lights at night, as were necessary to protect the public from injury. Whether, therefore, the city did, or did not, retain the use of the street unoccupied by the work is of no kind of significance. The latter part of the Court's proposition is faulty in that the converse thereof was ruled in Wray *v.* Evans (30 P. F. S. 102). In that case there was this provision in the contract: "That all losses, accidents, and damages, of whatever kind and from whatever cause, which shall at any time happen to the work or any person or persons whomsoever, shall be wholly borne and made good by the party of the first part." This provision was certainly as specific as that in the contract under consideration, but because the company in that case provided against consequences in which it could not be involved, nothing was thereby added to its liability. Just so here, because the city supposed it might be liable for the negligence of its contractor, and so provided for indemnity, that surely did not make it so liable if it were otherwise exempt from the consequences flowing

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from his want of care. If, however, the broad statement, that the city reserved the power not only to control and direct the manner in which the work should be done, but, also, the power over the men employed by the contractor, be true, then, indeed, is the city responsible for the negligence of all who were engaged in the construction of the sewer. In such case Grant must be considered but as an agent, over whose acts and conduct, in the prosecution of the work, the city would have unlimited control, and it must, in that event, be answerable for his negligence. Is this then a correct version of the contract? This question can only be answered by that instrument itself. By the terms of this contract Peter Grant was to furnish all the material and do all the work necessary to build and complete an eighteen inch sewer in State street, from the centre of Fifth Street, to within twenty feet of the north line of Ninth Street, according to the plan and specifications then on file in the office of the city engineer, which were made part of the contract. The whole job was to be done in a workmanlike manner and under the supervision and to the satisfaction of the city engineer. In case there were alterations made by the engineer, in the specifications, he was to decide what change, if any, should be made in the pay of the contractor. An estimate was to be made not oftener than once every two weeks, when payment was to be made, according to the price fixed per foot for the work, fifteen *per cent.* being retained until the final estimate and approval of the whole job. So far, then, the whole charge of this work was put into the hands of Grant, and the city had no power over it except to see that it was all well done, and to this end stipulation was made for supervision by the city engineer just as was the case in Wray *v.* Evans (*supra*), and Reed *v.* Allegheny City (29 P. F. S. 300).

Do the specifications so modify and change the body of the contract as to alter the *status* of the parties, giving the city such general control over the work as to make it the *superior*, who shall be answerable for Grant and his employés? Let us see. By those specifications the contractor was required to dismiss from *his employment* all incompetent or unfaithful persons. In this we may observe that the statement, that the city had a general power over the men employed by the contractor, is too broad, for the contract is that *he* shall dismiss from *his employment* incompetent or unfaithful employés. Herein the fact of his superior and independent control over the workmen is recognized, for if the city retained this power, why contract with Grant for the doing of that which it could, at any time, do itself? Finally, we have this provision: "All work to be commenced and carried on at such times and in such places and in such manner as the engineer shall direct." The Court below laid especial stress upon that clause in the above specification which gives the engineer the power of directing the *manner* in which the work should be done, and in this it is supposed to be borne out by an expression made by Judge STRONG in Painter *v.* The Mayor of Pittsburgh (10 Wr. 213), as follows: "It is further ruled that a clause in the contract by which the contractor engaged to conform the work to such further directions as might be given by the street commissioner did not affect the case, that it only gave the corporation the power to direct the *results* of the work, without any control over the manner of *performing* it, which control alone furnishes a ground for holding the master or principal for the act of a servant or agent." But the word manner in the above quotation is evidently considered as having a meaning so general as to reduce the contractor to the grade of a mere servant or agent. Manner must, in such case, mean the power to control the work, not only as to its character, but also as to the particular means used to accomplish it. This must needs be so, for, as we have seen in the case of Reed *v.* Allegheny, a stipulation for a general supervision of the work does not reduce the contractor to the grade of an agent, although necessarily, in such case, the engineer must to some extent control the manner in which the contract is performed. It is quite obvious that the word manner must be construed with reference to the contract in which it is found. By the agreement under consideration, the work was not only to be done in such manner, but at such times and in such places as the engineer shall direct; if this were the whole of the contract the matter would be of easy solution; but turning to the body of the contract we find that Grant was bound to begin the work on or before the 25th of October, and to finish it by the 25th of December following, so that the engineer's directions as to time must be limited by the periods thus expressed; so as to place, that is fixed between certain points on State Street, and whilst the engineer might direct that the work should be done on either side, or in the middle of that street, as he might think would best subserve the public welfare, his directions that the work should be done on some other street or even beyond the points indicated on State Street, would be utterly nugatory. Just so with reference to the manner in which the work is to be performed; that is carefully prescribed in the specifications, and within these prescriptions the engineer may direct, but not beyond them. If he does require and direct something which is not found therein, he must then act as arbiter between the contracting parties, to fix the rate of compensation for the work thus required, and that rate becomes part of the contract. This in itself exhibits two inde-

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pendent contracting parties who have provided themselves with an arbiter to settle their disputes. It is not thus with mere agents or servants, for they themselves are but parts of the means used by the master to accomplish his design, and that he may choose to alter the theory or plan of the work before it is begun or during its progress is of no moment to them. This contract contemplates the accomplishment of a certain result; the means, so far as they are deemed necessary to give the work its proper character, are carefully specified; the province of the engineer was to see that these means were properly applied, in other words, to see that proper materials and methods were used to produce the required result. But in all this the contractor was supreme, for he had but to comply with his contract in delivering to the city a good job according to the terms of that contract. In doing this he was his own master; the city could not direct where he should get his material, how he should bring it upon the ground, or how many men he should employ. The city could not fill up the trenches which he dug in the ground designated for the sewer, neither could it erect barricades which he might not tear down if they obstructed his work; he was in the lawful possession of that part of the street which was necessary for the fulfilment of his undertaking, and the city could not dispossess him. We think, therefore, the principle of master and servant is not to be discovered in the contract between the parties, and that the defendant is not within the rule stated by Mr. Justice AGNEW, in Allen *v.* Willard (7 P. F. S. 374), that the liability of the employer of the contractor continues where he has not relinquished his control over the work to be done.

Again, it is scarcely open to question but that Grant himself was responsible for the negligence of those whom he employed about this work. He could not plead that he was but an agent, and that as such he employed the workmen, for in this matter, at least, the city could not control him. These were his own servants, who must look to him for their pay and direction; they had no claims against the city, and could hold it responsible for nothing; even were they negligent and unskilful, they could bid the city defiance until Grant chose to discharge them. If so, then, beyond controversy, Grant was to these employés the responsible superior, and there could be no other. As was said in Wray *v.* Evans, there cannot be two superiors severally liable for the acts of subordinate agents. This case, therefore, necessarily drops into that class of cases represented by Painter *v.* The Mayor (10 Wr. 213); Allen *v.* Willard (7 P. F. S. 374); and Reed *v.* The City (29 P. F. S. 300). In several of these cases this whole subject has been very carefully elaborated, and we need not, therefore, undertake to rediscuss the matter.

Judgment reversed.

Opinion by GORDON, J. SHARSWOOD, J., absent.

Jan. '78, 74. Jan. 21, 1878.

Morris v. Guier.

Affidavit of defence law—Instrument not within—Deed for premises subject to incumbrances, unsigned by grantee, the defendant—Averment, scope of.

The copy of a deed from a third party to the defendant, and unsigned by him, of a lot of ground "under and subject" to the payment of certain mortgages, of which the plaintiff was the assignee, and between whom and the defendant there was no privity of contract, is not an instrument within the affidavit of defence law.

In an action to hold the defendant personally liable for a deficiency resulting from the sale of the premises at a sheriff's sale, under the mortgage, for less than the face of the mortgage, the plaintiff filed a copy of the deed in question:

Held, that it was not such an instrument as would entitle the plaintiff to judgment for want of an affidavit of defence.

Error to Common Pleas No. 1, of Philadelphia County.

Assumpsit, brought September 29th, 1877, by Charles E. Morris against William Guier, to recover the sum of $1878.59, with interest, being the amount of a balance due on two mortgages, after deducting the amount produced by a sheriff's sale of the mortgaged premises.

The plaintiff filed, as the instrument of writing upon which this suit was brought, a copy of an indenture dated September 1st, 1874 (recorded at Philadelphia, in Deed Book F. T. W., No. 183, p. 76, etc.), from William T. B. Roberts and Emma his wife, to William Guier, of certain premises in the city of Philadelphia, in consideration of the sum of $2500. The deed then recited the existence of two mortgages, one for $1600, and the other for $900, secured thereupon, and conveyed the premises unto William Guier and his heirs, "under and subject, nevertheless, to the payment of the above recited mortgages," principal and interest. The deed was acknowledged by the grantors, and duly recorded, but was not signed by the defendant, the grantee. The plaintiff filed with the deed an averment, setting out the assignment to himself of the mortgages above recited; that the defendant took possession under the above deed; that he failed to pay the mortgage-debt and interest; that a *scire facias* was issued on the mortgage for

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$1600, on which judgment was obtained and damages assessed at $1750.67; that the premises were sold under a writ of *levari facias*, and that after deducting taxes, costs, etc., from the proceeds of sale, there was still due the plaintiff $1878.59, for which this suit was brought.

The defendant, in his affidavit of defence, admitted that he was the owner of the premises under the deed, but averred that he never had notice of the proceedings upon either of the mortgages, or of the sale of the premises, until after the acknowledgment of the deed by the sheriff; that the premises were bought by the plaintiff at a great sacrifice, and concluded with the suggestion that the instrument filed was not such an instrument of writing as to entitle the plaintiff to judgment for want of an affidavit of defence.

The plaintiff thereupon took a rule for judgment for want of a sufficient affidavit of defence, which the Court below (per BIDDLE, J.) discharged, saying, *inter alia:* "The deed, not being signed by the defendant, does not, of itself, show any obligation upon him, and the plaintiff, therefore, by his averments, seeks to create one. An averment may show to whom or to what amount the defendant is liable; but it cannot create the liability; that must appear by the paper filed. (Imhoff *v.* Brown, 6 Casey, 504.) The assumption to pay the mortgage debt, if it exists here, arises not from the deed, but from the defendant having accepted title under it. This is a fact to be proved, and not an inference to be averred. In point of fact, the deed here filed amounts only to an averment; so that judgment, if given, would be altogether on the plaintiff's averments, without any acknowledgment of the defendant to support them."

The plaintiff took this writ of error, assigning for error the discharge of the rule.

Lewis Waln Smith, for the plaintiff in error.

Where the instrument filed discloses a *prima facie* liability, the defendant is bound to discharge himself therefrom by affidavit before he can compel the plaintiff to go to a jury on the merits of the case.

Karthaus Coal and Lumber Co. *v.* Given, 1 WEEKLY NOTES, 366.

The words "under and subject to the payment" create a personal liability on the vendee, as between the vendee and mortgagee, and the vendee is liable in an assumpsit for the whole amount of the debt.

Campbell *v.* Shrum, 3 Watts, 60.
Peyton *v.* Samuel, 4 WEEKLY NOTES, 107.
Hoff's Appeal, 12 Harris, 201.

The liability arises out of the words of the deed. Attestation by witnesses, acknowledgment, and recording constitute a *prima facie* case of acceptance, and acceptance operates as an execution of the deed by the grantee.

Rigler *v.* Cloud, 2 Harris, 361.
Thomas on Mortgages, 193.

F. Carroll Brewster, contra, presented no paper-book, relying on the opinion of the Court below.

Jan. 28, 1878. THE COURT. The question in this case is not upon the plaintiff's right of action, but upon the instrument, a copy of which he has filed, and whether it falls within the affidavit law. He may have a good cause of action (which, of course, we do not determine), yet he may not be entitled to have judgment summarily, because no affidavit of defence is made. The writing set out in the copy is a deed *to* defendant from another for a lot of ground, and is not signed or subscribed by him. The plaintiff is no party to this deed, but is the assignee of the mortgages referred to in the deed; so that there is no privity of contract by writing between the two parties to the action. Under these circumstances, the instrument filed shows no right of action on the part of the plaintiff against the defendant. If the latter be liable, it must be by force of matters entirely extrinsic. The affidavit law does not apply to it.

Judgment affirmed.

PER CURIAM.

July, '76, 48. Jan. 17, 1878.

Fertig v. Maley.

Affidavit of defence law—What instruments within the act—Executory contract—Averment supplementing copy filed.

An agreement, in writing, under seal, whereby the defendant in consideration of the right to cut all the ice found in a certain pond during the winter, agreed to pay the plaintiff $150 upon a certain date, is an instrument within the affidavit of defence law.

Semble, that performance of the agreement by the plaintiff, and breach by the defendant may be set forth by an averment.

Error to the Common Pleas No. 1, of Philadelphia County.

Debt, by Maley against Fertig. The plaintiff filed a copy of an agreement, under seal, signed by the defendant, as follows:—

This agreement . . . . witnesseth, That the said Maley for the consideration hereinafter mentioned, covenants, promises and agrees, and by these presents doth covenant, promise, and agree to sell to the said Fertig all the ice produced on the pond situate in Oakdale Park during the winter season of 1875 and 1876, reserving to the said Maley the right at all times during the said winter of 1875 and 1876 the privilege of using said pond for skating purposes, but in no manner whatsoever to interrupt or interfere with said Fertig in the cutting or removal of the ice produced on said pond, and in consideration thereof the said Fertig covenants, promises, and agrees to pay to the said Maley the sum of two hundred and fifty dollars in

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manner following, to wit: one hundred dollars thereof on the execution of this agreement, and the balance thereof, one hundred and fifty dollars, to be paid on the first day of January A. D. 1876.

With this copy the plaintiff filed the following averment:—

The above named plaintiff avers that he has in all respects complied with the above agreement; that the said defendant has enjoyed all the rights and privileges granted to him under said agreement. That defendant has wholly failed to pay the one hundred and fifty dollars on January 1, 1876, or any part thereof, and that the same is now owing to the said plaintiff.

The defendant filed a suggestion of defence, averring that the instrument of writing upon which suit was brought is not such an one as entitles the plaintiff to judgment for want of a sufficient affidavit of defence; the said instrument being an executory, and not an executed contract, and the plaintiff must show performance on his part, and breach thereof by the defendant, before a jury, before he can recover of defendant.

The Court entered judgment for the plaintiff for want of a sufficient affidavit of defence.

The defendant took this writ, assigning as error the entering of the judgment.

O. A. Law, for plaintiff in error.

The performance on the one part, and breach on the other, cannot be shown by averment, but should be proved before a jury.

The copy filed should exhibit on its face that the liability of the defendant to pay money to the plaintiff was a direct and absolute undertaking, complete at the commencement of suit, and free from any qualification, contingent or collateral.

Imhoff *v.* Brown, 6 C. 505.
Bayard *v.* Gillasspy, 1 Miles, 256.
Montgomery *v.* Johnson, Ibid. 324.
Dugan *v.* Loyd, 2 Ibid. 259.
Dickson *v.* Shaw, Ibid. 262.
Miners' Bank *v.* Blackiston, Ibid. 358.

Where it is manifest, not merely that the contract is executory, but that the consideration itself is executory, the instrument cannot be helped by mere lapse of time.

J. E. Luse, for defendant in error.

The plaintiff had no duties to perform, but simply not to do certain things. The instrument is for the payment of money, and therefore within the spirit of the Act of March 28, 1835.

Purd. Dig. 495.
Frank *v.* Maguire, 6 Wr. 77.
Dewey *v.* Depuy, 2 W. & S. 553.
Rile *v.* Worl, 1 Phila. Rep. 45.

Jan. 28, 1878. THE COURT. The writing in this case was signed by the defendant, and exhibited a debt recoverable by action. We discover nothing in its nature to take this case out of the affidavit rule.

PER CURIAM. Judgment affirmed.

Jan. '77, No. 138. Jan. 28, 1878.

Kerns v. New Jersey Mutual Life Ins. Co.

Life insurance — Mutual company — Premium note—Payment of premium note a condition precedent to liability.

A mutual life insurance company issuing a policy upon receipt of a promissory note from the assured for the amount of the first premium is not liable upon the policy in the event of the non-payment of the note.

In such a case the note is a written admission contradicting a recital of payment contained in the policy, and an agreement that the policy shall be without effect in case the note be not paid.

Error to Common Pleas No. 4, of Philadelphia County.

Debt, by Sarah Kerns, administratrix of Edward Kerns, against the New Jersey Mutual Life Insurance Company, on a policy of insurance for $5000 issued upon the life of the plaintiff's decedent. Plaintiff filed a copy of the policy of insurance, which was in the usual form, dated December 14, 1874, and an averment of the death of the insured on February 14, 1876.

Defendants' counsel having omitted to file an affidavit of defence, judgment was entered in default thereof.

Subsequently, upon affidavits filed on behalf of defendants, setting forth that an affidavit of defence had not been filed for the reason that defendants had been advised that a policy of insurance was not a proper instrument to support a judgment by default under the affidavit of defence law, and that they had a just defence, etc., a rule to open judgment was granted.

The affidavit of James A. Kramer was as follows: "That deponent was the soliciting agent of defendants' company, and, as such agent, received the application of Edward Kerns for insurance by the above named defendants, and upon deponent's report of said application, the defendants made out the policy of insurance, upon which the above entitled suit is brought, and sent it to deponent to be delivered to said Edward Kerns, upon the payment by him of the first premium thereon. The delivery of the policy of insurance was delayed until the 12th of April, 1875, at which date said Edward Kerns being unable to pay the first premium of one hundred and ten dollars and thirty-five cents, deponent, at said Kerns's request, agreed to make an abatement of twenty-five per cent. (amounting to twenty-seven dollars and fifty-nine cents) upon said premium, and to take said Kerns's note in favor of the above-named defendants for the balance of said premium (amounting to eighty-two dollars and seventy-six cents), payable ninety days after the date thereof, upon the express

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agreement of the said Kerns that in case said note should not be paid at maturity, the said policy of insurance should be null and void; and thereupon, and in pursuance of said agreement, deponent took from said Kerns a certain promissory note for the last-mentioned sum of money, being the so as aforesaid reduced premium on said policy of insurance in words and form following, to wit:—

"$82.76. NEWARK, N. J., April 12, 1875.

"Value received, ninety days after date I promise to pay to the New Jersey Mutual Life Insurance Company, or order, at Second National Bank of Allentown, Pennsylvania, eighty-two $\frac{76}{100}$ dollars, being for insurance premium of Policy No. 19,994, issued to me by said company, it being understood and agreed that if this note shall not be paid at maturity, said Policy No. 19,994 shall be cancelled and become null and void, and be surrendered to said company, and the pro rata premium for the risk thereon incurred paid to them on demand.

(Signed) "EDWARD L. KERNS."

"Which note deponent then and there delivered to the defendants, who accepted the same. Deponent further says that said note was not paid at maturity, and said policy of insurance thereby became null and void."

The Court below, after argument, made absolute the rule to open judgment (reported 3 WEEKLY NOTES, 390), and subsequently the following agreement of counsel was filed:—

Agreement of counsel filed that upon above last-mentioned rule, the Court may enter an order and judgment with the same effect, to all intents and purposes, as if the affidavits of Percival and Kramer had been filed as an affidavit of defence and supplemental affidavit of defence, and plaintiff had entered a rule for judgment for want of a sufficient affidavit of defence, and the Court had discharged said rule upon a decision against the right of the plaintiff to judgment for want of a sufficient affidavit of defence.

Whereupon the Court entered the following:—

Eo die. Order of Court filed that above agreement be confirmed and ratified, and that the decision of the Court is against the right of the plaintiff to judgment for want of a sufficient affidavit of defence.

Plaintiff thereupon took this writ, assigning as error the action of the Court.

S. C. Perkins, for plaintiff in error.

The policy contains no allusion to any note; it admits that the premium was "duly paid." There can be no doubt that the risk began to run immediately.

The receipt of the premium is, no doubt, essential to the existence of the contract, but the rule of law is, that a company is estopped from denying the receipt of premium, when it is thus acknowledged in the policy, if the purpose is thereby to defeat the policy.

Madison Ins. Co. *v.* Fellowes, 1 Disney (Ohio), 217.
3 Kent's Comm. 260.
Goit *v.* National Protection Ins. Co., 25 Barbour, 189.
Provident Life Ins. Co. *v.* Fennell, 49 Ill. 180.
Dalzell *v.* Mair, 1 Campbell, 532.
1 Phillips on Ins., § 514.
Boehen *v.* Williamsburgh Ins. Co., 35 N. Y. Rep. 131.
Anderson *v.* Thornton, 20 Eng. Law & Eq. Rep. 339.
McAllister *v.* New England Mutual Life Ins. Co., 01 Mass. 558.
Basch *v.* Humboldt Mut. F. & M. Ins. Co., 6 Vroom (N. J.) 429.

Taking the facts set up in Kramer's affidavit, they show in any event a waiver of any requirement of prepayment of the premium as a condition precedent to the validity of the policy. And this waiver was accepted and assented to by the company. Where a credit is intended, the policy is valid, though the premium be never paid.

Miller *v.* Life Ins. Co., 12 Wallace, 285.
Lycoming Ins. Co. *v.* Schollenberger, 8 Wr. 263.

(No counsel appeared for defendants in error.)

Feb. 11, 1878. THE COURT. The note signed by the assured for the assessed premium when the policy was delivered, is a written admission that the recital of payment in the policy was not true, and therefore could not give effect to the policy as an actual payment would. It is not only such a written declaration of non-payment, but is a contract of even date qualifying the terms of the policy, and an agreement that the policy shall be without effect, and surrendered in case the note for the premium be not paid. It therefore superseded the policy to the extent of the agreement. It would be a harsh measure of justice to hold the company to the terms of the policy, upon a concession made to the assured for his benefit, and evidenced by his own writing of even date with the delivery, and intended by him to govern his rights. Clearly the company cannot be held to the letter of a policy not paid for, and so altered for the benefit of the assured.

PER CURIAM. Judgment affirmed.

Jan. '77. Jan. 22, 1878.

Stewart's Appeal.
Estate of Mary Ann Charlton, deceased.

Decedents' estates—Administrators, accounts of—Review of final decree by petition—When not allowed—Orphans' Court practice—Act of 13 October, 1840.

An administrator who has paid over money to a distributee in accordance with a decree of the Orphans' Court, will be protected against loss by reason of a subsequent opening and change of the decree.

Where, owing to irregularities on the face of the record, it is impossible for the Supreme Court to "determine the merits of the case, and to decree according to the justice and equity thereof," the cause may either be referred to an auditor, or the decree will be reversed, and the record

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remitted to the Court below for further proceedings, as the Supreme Court may deem most expedient.

Appeal from the Orphans' Court of Philadelphia County.

Appeal of Thos. Stewart, administrator of Mary Ann Charlton, deceased, from an adjudication of his account.

The record showed that the account was filed on February 5, 1876, was confirmed *nisi* on April 3, 1876, and the balance awarded to Mary Ann Conrad, sole distributee under the intestate laws. On April 10, 1876, an exception was filed by one Annie Dearing, but was withdrawn by writing filed April 24. The next entry of record was the following endorsement on the petition of Wm. M. Charlton, the alleged husband of the decedent: "April 27, 1876. Audit and adjudication opened. D. W. O'BRIEN." The petitioner, Charlton, set forth that he was the lawful husband of the decedent at the time of her death, that he had had no notice of the filing of the account, and that from information he believed the same to be incorrect. He prayed for a recommittal of the account and a rehearing thereof. This petition was sworn to and subscribed on *May 13*, 1876.

On May 5, Mary Ann Conrad filed a petition setting forth that she was advised that the decree *nisi* of April 3 had become absolute on April 24, and that of the balance of $2351.66, $1850 had been paid to her. She prayed that the remaining funds in the accountant's hands, after payment of Court costs, should be paid to her. The same day the Court ordered Stewart to pay her the balance last above mentioned, amounting to $488.11, on or before Saturday, May 13. On September 2, 1876, Stewart filed an answer to the petition of Wm. M. Charlton. On October 31 a supplemental adjudication was filed disallowing the claim of Charlton. To this adjudication Charlton filed exceptions, the first of which was sustained on December 2, and on December 8 a corrected adjudication was filed under which Charlton was allowed his share, as husband, under the intestate laws.

The administrator, Stewart, took this appeal, assigning for error, *inter alia*, the action of the Court in opening the adjudication after the same had become absolute by the rules of the Court, and the money in the hands of the administrator paid to the distributee, without evidence that there was error of law in the adjudication, and that the administrator had not paid over the balance found due by the decree of the Court.

A. H. and *H. F. Hepburn*, for the appellant.

Under Rule III. of the Orphans' Court, requiring exceptions to be filed on or before the third Saturday after an adjudication, the decree adjudicating Stewart's account became absolute on April 24—when the only exception was withdrawn—the third Saturday after the decree *nisi* having passed. Such a final decree can be opened only by appeal to the Supreme Court, or by petition in the nature of a bill of review under the Act of Oct. 13, 1840. (Purd. Dig. 1109.) The appellee did not comply with this Act, for he did not set forth, specifically, on the face of his petition, any defect on the face of the account, or any new matter.

Kachlein's Appeal, 5 Barr, 95.
Russell's Appeal, 10 Casey, 258.

Nor did he set forth that the balance found due by the decree had not been paid over by the accountant.

Russell's Appeal, *supra*.
Cramp's Appeal, 2 WEEKLY NOTES, 391.

The petition was not sworn to and subscribed until May 13, at which time Mary Ann Conrad had already admitted the receipt of a large portion of the fund, and which was the very day on which the accountant was ordered to pay her the balance.

Archer, contra.

There was no final decree below until that of December 8, in favor of the appellee. Until then the matter was *in fieri* and a bill of review was unnecessary. The record shows no adjudication, no order to pay over until that date. It was open and could be amended until then. This view is particularly equitable when the preliminary audit was in the absence of the husband. When a report is referred back, the whole case is re-opened.

Thoma's Estate, 26 Sm. 30.
Coates's Estate, 2 Parsons, 258.
Metz's Appeal, 11 S. & R. 206.
Bishop's Appeal, 2 Casey, 476.

In the last case, which construes the Act of 1840, it is laid down that a granting of a rehearing after a decree by default is not reviewable by appeal.

Feb. 4, 1878. THE COURT. This record shows that there was an adjudication by the Court, April 3, 1876, on the final account of the appellant, when it was confirmed *nisi* on payment of clerk's costs, and the costs were then paid. The third rule of the Court prescribes that if exceptions are not filed on or before the third Saturday following, the adjudication then becomes absolute. The exception of Annie Dearing was filed on the 10th of April, but was withdrawn April 24, which was the same as if none had been filed, and the adjudication then became absolute. In other words, it was a final decree. The Act of October 13, 1840 (Pamph. L. 1841, p. 1), provides the mode in which such final decree shall be reviewed upon a petition of review, presented by any person interested, alleging errors in the account, and setting forth such errors specifically

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verified by oath or affirmation, with this important and necessary limitation: "Provided that this Act shall not extend to any cause when the balance found due shall have been actually paid and discharged by any executor, administrator, or guardian." There was no formal petition of review filed in the Court, but we are disposed to regard the exception of William M. Charlton, filed April 27, though not verified by oath or affirmation, as sufficient, as it was not demurred to, and the Court proceeded to review or rehear the account.

There is on the paper-book a petition by W. M. Charlton for a rehearing, sworn to May 13th, and indorsed by one of the Judges "April 27, 1876. Audit and adjudication opened." On Dec. 2, 1876, the first exception of Charlton was sustained, and on the 8th of December a corrected adjudication was filed.

In the mean time, however, and pending these exceptions, and after the adjudication of April 3d, was opened, the record shows other proceedings. On the 6th of May, Mary Ann Conrad, the distributee to whom the balance in the hand of the appellant had been awarded under the decree of April 24, presented a petition setting forth that of the award of $2351.56 she had received from the appellant $1850, and praying that the balance, after deducting court costs, should be paid to her. Whereupon, on the same day, an order was made directing the administrator—the appellant—to pay to the petitioner the balance of $488.16 on or before Saturday, May 13, 1876.

A more irregular and inconsistent record has rarely been brought up to this Court for review. By the Act of April, 14, 1834, § 4 (Pamph L. 276), it is provided that in all cases of appeal from the Orphans' Court, this Court shall hear and determine the same as to right and justice may belong, and refer the same to auditors, when in their discretion they may think proper.

And again by the Act of 16 June, 1836, § 2 (Pamph. L. 683): "It shall be the duty of the Supreme Court of this Commonwealth, in all cases of appeals now made, or that may hereafter be taken from the decrees of the several Orphans' Courts, to hear, try, and determine the merits of such cases, and to decree according to the justice and equity thereof." Upon the record in this case it is impossible to decide according to the justice and equity of the cause. The most material fact—whether the appellant had actually paid the sum awarded, or any part thereof, to Mary Ann Conrad before notice of the application for a review—does not appear, though there is a solemn admission by her on record that she had received a large part of it. We might refer the case to an auditor, but in the present state of our business we consider it most expedient to reverse the decree, and remit the record to the Court below for a further hearing. If the sum or any part of it was actually paid over according to the decree, before notice of the application for a review, both the express provision of the Act of 1840 and the plain dictates of justice and equity require that the appellant should be protected.

Decree reversed and record remitted to the Court below for a further hearing

Opinion by SHARSWOOD, J.

Jan. '77, 201. Jan. 24, 1878.

App et al. v. Cadwalader.

Ejectment—Statute of limitations—Act of March 26, 1785—Adverse possession—Evidence of, incompetent, when a relation of tenancy established between plaintiff and defendant within twenty-one years—Evidence.

In ejectment, when the plaintiff has shown by the written acknowledgments of the defendant that a relation of tenancy under him existed within the period of twenty-one years before suit, evidence by the defendant of an adverse possession in himself prior to the establishment of this relation is incompetent, unless accompanied with proof of fraud or imposition, which induced him to acknowledge a relation of tenancy contrary to his rights.

Payment of taxes by the occupant, and assessment of the property in his name, does not prove the possession to have been adverse.

Error to the Common Pleas No. 2, of Philadelphia County.

Ejectment, by George Cadwalader against Samuel App, Ann Keen, and Edward Zeitler, for a lot of ground with a three-story brick dwelling thereon erected, situate on Frankford Road, in the Sixteenth Ward of the city of Philadelphia. Summons issued April 22, 1872. Plea, not guilty.

The case was before the Supreme Court on a former writ of error, when a *venire de novo* was awarded (reported 3 WEEKLY NOTES, 1).

Upon the trial (before HARE, P. J.), the plaintiff offered in evidence the following written agreement:—

I, George App, do hereby agree to take the lot on Frankford Road, twenty feet front by one hundred feet deep, adjoining my house to the south, on a ground-rent of three dollars per foot, equal to sixty dollars per annum, payable half yearly, clear of taxes, from the first day of November, A. D. 1839.

GEORGE APP, SR.,
GEORGE CADWALADER.

Witness:
T. C. CADWALADER. Philadelphia, Oct. 31, 1839.

Objected to by the defendants, because it was merely for the payment of ground-rent, and no ground-rent deed had ever been tendered by the plaintiff. Objection overruled, and the agreement admitted in evidence. Exception.

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The plaintiff then offered seven receipts from Cadwalader to George App, dating from October 25, 1845, to September 4, 1850, for ground-rent paid on the Frankford Road property. Objection by the defendants overruled. Exception.

Also the following letters:—

Philadelphia, September 4, 1850.

Dear Sir—I will thank you to make the deed for the lot on the west side of Frankford Road, now held by me, to my son Samuel App, of the district of Kensington, watchmaker, and oblige respectfully,

Your obedient servant,

GEORGE APP, SR.

GEN. GEORGE CADWALADER.

Philadelphia, April 8, 1851.

Dear Sir—I desire you to meet me at my house, 16 Frankford Road, Kensington, on Monday morning next, at 9 o'clock, in person.

Yours, etc., GEORGE APP, SR.

Objected to by the defendants, on the ground that they did not prove, nor tend to prove, title in the plaintiff, or his right to possession. Objection overruled. Exception.

Also the following letter, or notice:—

MR. GEORGE CADWALADER:

Sir—I notify you that, having failed to comply with your agreement to execute to me a ground-rent deed for the lot of ground, now in my possession, on the west side of Frankford Road, four hundred and thirty-three feet one inch south from Otter Street, in the district of Kensington, said lot having a front on Frankford Road of twenty feet, by one hundred feet in depth, and said neglect or refusal to execute to me a proper deed of conveyance for said lot or ground having continued for so long a time, and after repeated demand, and I now notify you that I no longer recognize your title to the same, and will also hold you accountable for the amount of rent already paid to you for the said lot of ground under the claim set up by you, but which I now believe to have no foundation in law or equity. GEORGE APP.

April 24, 1851.

Objection by the defendants overruled. Exception.

Also a deed from George App to the defendant Samuel App, for the same lot of ground, acknowledged and recorded May 12, 1851.

Objected to by the defendants, as irrelevant. Objection overruled. Exception.

The defendants offered to prove, by one Mary Freese, that George App had been in adverse possession of the land from 1829, and was in adverse possession at the time of signing the agreement of 1839, nor did he ever hold possession of the land under Cadwalader.

Objected to by the plaintiff, upon the ground that the possession of George App, or any person claiming under him, cannot be considered adverse, twenty-one years not having elapsed since the notice of 1851. Objection sustained, and evidence excluded. Exception.

The defendants then offered to show, by the certificate of the city commissioner, that George App had paid taxes upon the property, and that it was assessed in his name in the year 1836. Objected to by the plaintiff. Objection sustained, and the evidence excluded. Exception.

The Court directed the jury to find a verdict for the plaintiff.

Verdict for the plaintiff accordingly, and judgment thereon. The defendants took this writ, assigning for error the admission of the plaintiff's evidence, the rejection of their own, as above set forth, and the charge of the Court.

J. D. Bennett, for the plaintiffs in error.

The declaration of the plaintiff does not aver a demise, but simply a right of possession and title. It was incumbent upon him, therefore, to show that he had such right of possession and title at the time the agreement of 1839 was signed. It was a condition precedent that the plaintiff should give to App a good marketable deed, in fee. This he failed to do, and cannot now rely upon an executory agreement which he has failed to perform. In order to establish his title by ejectment, the plaintiff must *prove title.*

Bailey *v.* Fairplay, 6 Binn. 454.
Cadwalader's Ap., 7 Sm. 158.
Porter *v.* Dougherty, 1 Cas. 406.

There can be no relation of landlord and tenant here, for the intention of the parties was merely to sell upon ground-rent. Ejectment is not the proper action for the recovery of ground-rent.

Geo. Tucker Bispham and *Wm. Henry Rawle*, contra.

To the rule that a plaintiff in ejectment must recover upon the strength of his own title, and not upon the weakness of that of his adversary, is the well-settled exception that when the plaintiff can show, by an admission of the defendant, that the latter holds under him, proof of title is unnecessary. The defendant cannot controvert the plaintiff's title in any way without surrendering possession, and where possession is retained, the plaintiff must prevail in such cases, unless the defendant can prove a superior title.

Duchess of Kingston's Case, 2 Sm. L. Ca. 745.
Towne *v.* Butterfield, 97 Mass. 105.
Galloway's Lessee *v.* Ogle, 2 Binn. 468.
Cadwalader *v.* App, 31 Sm. 194.

The fact that the tenant or vendee may have been in possession prior to the lease or articles, does not alter this rule, unless the tenant show title.

Jackson *v.* Ayer, 14 Johns. 224.
Bigelow on Estoppel (2d ed.), 364.
Criswell *v.* Altemus, 7 W. 565.

Payment of taxes is not evidence of adverse possession.

Sorber *v.* Willing, 10 W. 141.
Naglee *v.* Albright, 4 Wh. 291.

Feb. 4, 1878. THE COURT. The plaintiff having shown by the defendant's own written acknowledgments, contained in the lease and let-

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ters of the defendant, that a relation of tenancy under him existed, it was incompetent to show an adverse possession preceding the lease, unless the defendant had shown, or proposed to show, fraud and imposition practised upon him, by which he was induced to enter into a lease contrary to his own rights. Of this there was no proof and no offer of evidence. The relation of tenancy, therefore, continued until it was openly and notoriously thrown off by the defendant, and until Mr. Cadwalader had notice expressly, or from such open and notorious disclaimer as would convince the jury that notice in fact existed. There being nothing of this kind until the letter of April 24th, 1851, we perceive no error in the trial of the cause.

PER CURIAM. Judgment affirmed.

Jan. '73, 329. Feb. 4, 1878.

Singerly v. Armstrong, to use, etc.

Covenant—Builder's contract to pay for work in a house at a fixed value—Breach—Measure of damages.

In a contract to pay a specific debt in a specific thing, the failure of the contracting party to pay in specie does not destroy the debt.

Where a creditor agreed to receive a house at a fixed valuation in payment of a debt, but the debtor subsequently refused to convey the same:

Held, that an action may be maintained against the debtor upon the original debt, and the plaintiff is entitled to recover the full amount of the original debt, and not simply the value of the house, which had depreciated.

Error to the late District Court of Philadelphia County.

Covenant by David Armstrong to the use of John Carson against Singerly.

Upon the trial (before THAYER, J.) it appeared that a sealed agreement, dated March 10, 1869, was entered into between the plaintiff, Lewis Scout and the defendant, wherein the defendant undertook that the said Scout, upon the conveyance by Christopher Binder to Scout of certain premises therein recited, would perform a contract made with the plaintiff by Binder, and the plaintiff agreed to accept in payment of his work in laying bricks on certain houses, erected on said premises, the notes of the defendant for the amount due him, and for the balance to accept a conveyance of one or more of the said houses, when completed, at the rate of $11,000, as the value of each house, or if the existing encumbrances remained chargeable thereon, at the rate of $5000. It also appeared that a conveyance of the premises had been made to Scout, and that there had been performance on the part of the plaintiff of his part of the agreement, but that Scout had refused either to give the notes, or to convey one of the houses.

The Judge in his charge instructed the jury, *inter alia*, as follows: "If the defendant refused to deliver the plaintiff a house for a part of the price payable in a house, unless he would agree to settle the balance due him in the same way, the plaintiff is entitled to recover the agreed price of his work in cash."

Verdict for the plaintiff, and judgment thereon. The defendant took this writ, assigning for error that part of the charge of the Court quoted.

R. C. McMurtrie, for the plaintiff in error.

It is common for men to associate together for the purpose of building, each workman agreeing to take in payment for his work a house at a certain price. It is in the nature of a partnership. To treat it as if it were a debt liquidated in money, with the option of payment in money, is erroneous. It is a contract. The question is, what is the measure of damages? Is it the price fixed for laying the bricks, or is it the value of the house? It is well settled that the measure of damages for the non-delivery of property according to contract is the value of the property at the time of the breach.

Penrod *v.* Mitchell, 8 S. & R. 523.
Roberts *v.* Beatty, 2 Pa. 63.

Where there is an alternative obligation on the defendant, he is entitled to the less onerous. The plaintiff lost the value of the house, and that is the standard of damages.

Samuel Dickson and Pierce Archer (with them *E. G. Platt*), contra.

The case is analogous to *indebitatus assumpsit* for goods sold and delivered at a price fixed by both parties. The plaintiff's right is to be restored to his position before the breach, and that right becomes fixed by the defendant's disaffirmance of the contract. The measure of damages in a breach of contract is not the value of the land, but the value of the services rendered.

Phillips *v.* Allegheny Car Co., 1 Norris, 368.
Meason *v.* Kaine, 17 Sm. 126.
White *v.* Tompkins, 2 Id. 363.
Hertzog *v.* Hertzog's Adm'r, 10 Casey, 418.

Contracts to pay in a specific article being in favor of the debtor, the debtor may elect either to deliver the specific property or pay in money, and a failure to deliver the property fixes the liability to pay in money.

Moore *v.* Kiff *et al.*, 2 WEEKLY NOTES, 451.

February 11, 1878. THE COURT. This was not the case of a purchase of real estate and a refusal to convey, where the principal purpose of the contract was the conveyance of the property for a certain consideration. In such a case the measures of damages often depends on a variety of circumstances, sometimes affected by the statute

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of frauds, sometimes by an inability to convey, sometimes by fraudulent practice, and sometimes by a wilful breach. Here, however, the cause of action was a specific debt for bricks delivered and laid, and payment was to be taken in a specific thing, to wit, a house. Clearly the failure to convey through the fault of the party contracting to pay in specie does not destroy the true nature of the cause of action, viz., the debt.

The effect of the doctrine contended for would be to put the creditor in the power of his debtor, by compelling him in case of default to take the value of the property, no matter how it had fallen, in lieu of his debt.

We do not perceive any error in the part of the charge excepted to.

PER CURIAM. Judgment affirmed.

Jan. '77, 206. Jan. 7, 1878.

Greenwald v. Kaster.

Partnership—Joint debtors—Release of one, effect upon right of action against the other—Conflict of laws.

The rule of common law that the release of one co-partner releases all, is inapplicable to cases where the clear intention of the releasors is to limit the effect of the release to one partner.

Where judgment is recovered in Pennsylvania against one partner alone for a firm debt contracted in that State, and subsequently a release of the other partner is executed in another State, the effect of such release upon the judgment is to be governed by the laws of Pennsylvania, and not by the laws of the State in which the release was executed.

A judgment was recovered in Pennsylvania by G. against K. upon a debt contracted in that State by the firm of K. & E. Subsequently G. executed in Indiana a release to E. expressly reserving all rights against K. The common law rule that the release of one partner operates as a release of all was in force in Indiana. Upon a feigned issue to determine the amount due upon the judgment against K.:

Held, that the effect of the release was to be determined by the laws of Pennsylvania, and that it therefore discharged K. from liability only to the extent of one-half of the debt.

Error to Common Pleas No. 3, of Philadelphia County.

Feigned issue, awarded upon the opening of a judgment obtained by F. Greenwald & Co. against Lazarus H. Kaster in an action of assumpsit for goods sold and delivered. Defendant pleaded payment. The facts of the case were as follows:

In 1869 Lazarus H. Kaster and Joseph Eckhouse, trading in Indiana under the firm name of Kaster & Eckhouse, purchased from the plaintiffs in Philadelphia a bill of goods. Shortly afterwards the firm of Kaster & Eckhouse dissolved, and in 1873 Kaster came to Philadelphia. Plaintiffs thereupon brought suit in Philadelphia against Kaster & Eckhouse, in which suit Kaster only was served and judgment recovered against him alone for $4547.98. Afterwards plaintiffs brought suit in Indiana upon the same claim against Eckhouse alone and recovered judgment, but upon payment of $700, executed to Eckhouse the following release:—

Ferdinand Greenwald & Simon Appel v. *Joseph Eckhouse.* No. 1432. In the Madison Circuit Court.

It is hereby agreed by Ferdinand Greenwald and Simon Appel, partners, trading as F. Greenwald & Co., plaintiffs in the above cause, acting by their attorneys, Robinson & Lovett, duly appointed by power of attorney, signed and acknowledged, and Joseph Eckhouse, the defendant, that in consideration of the payment of seven hundred dollars by the said Eckhouse to the said F. Greenwald & Co., this day received, the said Greenwald & Co. release all right of action against the said Eckhouse, and surrender all claims against him on account of all indebtedness of said Eckhouse, or the firm of Kaster & Eckhouse, to said Greenwald & Co., the said Greenwald & Co. reserving all rights, claims, and liens against Lazarus Kaster by reason of a certain judgment held by them and obtained against him in the District Court of the county of Philadelphia for forty-five hundred and forty-seven dollars and ninety-eight cents of date July 22, 1873. And it is further agreed that said cause now pending in the Madison Circuit Court shall be dismissed.

F. GREENWALD & Co.
By ROBINSON & LOVETT. Attorneys.
JOSEPH ECKHOUSE.

Executed and dated this 4th day of February, 1875.

Upon learning of this release Kaster obtained in the Philadelphia suit a rule to open the judgment against him on the ground that the release discharged him from liability. After argument this rule was made absolute and a feigned issue awarded (see 3 WEEKLY NOTES, 327).

Upon the trial defendant proved the foregoing facts and offered in evidence the release. Objected to; objection overruled; exception. Defendant also offered the depositions of several Indiana lawyers that in the latter State the Common Law rule that a release of one partner was a release of all remained in full force. Objected to; objection overruled; exception. The Court charged the jury as follows: "Under the state of facts presented your verdict must be for the defendant for the reason that a release to Joseph Eckhouse, the defendant's partner, executed in Indiana is a release of both. The defendant cannot be held on this judgment because of the release executed to Eckhouse the co-partner."

Verdict and judgment for defendant. Plaintiffs took this writ, assigning for error the admission of the evidence objected to and the charge of the Court.

Walter J. Budd, for the plaintiffs in error.

The rule of common law that a release of one joint obligor or co-partner operates as a release of all is applicable only to technical releases under seal.

Bennett *v.* Cadwell, 20 Sm. 253.

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Burke *v.* Noble, 12 Wr. 168.
Solby *v.* Forbes, 6 E. C. L. 11.

The release was not under seal. The affidavit upon which the rule to open the judgment was granted was a substitute for a bill in equity to restrain the plaintiffs from issuing execution on the judgment and for relief therefrom. The defence set up for relief from the payment of an honest debt is a purely technical one. Had the defendant gone into a Court of equity, he would have been required to pay half the debt or to show an equivalent to payment. For he who would have equity must do equity.

Sharp & Alleman, contra.

By the law of Indiana a release of one partner is a release of all. The release being effective by the law of the place of delivery is effective everywhere.

Story on the Conflict of Laws, § 411.
Berge on Suretyship 301.
Levy *v.* Levy, 2 W. N. C. 117.
Searight *v.* Galbraith, 4 Dall. 325.

[AGNEW, C. J. How is it under a judgment where the status of both parties is fixed in Pennsylvania? How far can a party whose status is fixed here set up such a release at law or in equity as a dissolution of a judgment already taken?]

Unless this is recognized as a release of both partners, the rights of Eckhouse thereunder are not protected, for if recovery were allowed against Kaster he would be entitled to an action over at common law against Eckhouse, independent of his agreement, for contribution. The release then to Eckhouse would be a nullity. To prevent this the law construes the release of one to be the release of all. The case is simply one of ignorance of law as to the effect of the release.

Jan. 21st, 1878. THE COURT. Lazarus H. Kaster and Joseph Eckhouse, late partners, doing business in the State of Indiana, contracted a debt for goods purchased of F. Greenwald & Co., in Philadelphia. In the action brought for recovery of that debt, judgment was taken against Kaster for want of appearance. The summons was returned *nihil habet* as to Eckhouse. Afterwards suit was brought against Eckhouse in Indiana. The plaintiffs, by their attorneys in fact, on the 4th of February, 1875, in consideration of $700 paid by Eckhouse, released all rights of action against him, and surrendered all claims on account of indebtedness of him, or of the firm of Kaster & Eckhouse, reserving all rights, claims, and liens against said Kaster by reason of their judgment against him in the District Court of Philadelphia, for the sum of $4547.98, Upon Kaster's application an issue was ordered to determine the question whether that release operated as a satisfaction of the judgment. At the trial of the issue the learned Judge instructed the jury to find for the defendant, for the reason that a release to Joseph Eckhouse, the defendant's partner, executed in Indiana, is a release of both. This decree is assigned for error, and is the only assignment that requires consideration.

Though the writing is not a technical release, and possibly could be construed as an agreement not to sue, it may be conceded that, by the laws of Indiana, it is a valid release, and governed by the principles of the common law.

The rule that a release of one joint obligor or promisor operates as a release of his co-obligors or promisors, has long been confined to technical releases, and these by means of recitals and provisos may be limited to one alone. In Solby *v.* Forbes (6 E. C. L. R. 11), a release of one of two partners, with a proviso that it should not prejudice the releasor's claim against the other, was held not to be a discharge of the other. And in Thompson *v.* Jack (54 Id. 540) the release of one of two joint and several obligors with a proviso, was held not a release of the other, because the whole deed should be looked at in order to see the intention of the parties, and when the intention of the parties is clear, strong grounds should be laid to induce the Court not to give effect to the deed according to such intention. So in Burke *et al. v.* Noble (12 Wright, 168), it was held that a release of one of several joint debtors on payment of his proportion of the debt does not discharge the others, if it was not the intention of the parties. If a deed can operate in two ways, one consistent with the intention and the other repugnant to it, Courts will ever be astute so to construe the law as to give effect to the intent. Therefore by the rules of the common law, the intention of the parties clearly expressed in the release to Eckhouse shall have effect.

Aside from the principles stated, how is Kaster discharged from the judgment? The debt was contracted, and judgment thereon obtained in Pennsylvania. By the law of this State the plaintiffs could compromise with and discharge Eckhouse from his proportion of the debt, which would be deemed as payment to them of such proportion without prejudice to their right to recover the other portion from Kaster and without prejudice to his right for contribution against Eckhouse. As to the extent of contribution, on settlement between Kaster and Eckhouse, we say nothing. No act has been done to defeat the right. The judgment fixed Kaster for the whole indebtedness.

The plaintiffs are considered as having received half of it from his former partner, and, in equity, have no claim for more than half the judgment. When Kaster comes and demands discharge from the whole upon averment, that he himself has paid no part of it, but that, for a small sum, they released Eckhouse, expressly reserving their rights against him on the judgment, he makes an uncon-

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scionable claim which should not be granted except in obedience to positive law. No law requires Courts to open their judgments to such an end. Had the plaintiffs entered credit for a moiety of the judgment there would have been no reason for an issue.

The jury should have been instructed to find for the plaintiffs for one-half the amount of the judgment.

Judgment reversed, and *venire de novo* awarded.

Opinion by TRUNKEY. J.

Jan. '77, 182. Jan. 7, 1878.

Cather v. Bray et al.

Landlord and tenant—Replevin—Form of verdict —Practice—Res adjudicata.

The fact that a verdict for defendant in an action of replevin contained no finding of the value of the goods, or of the amount of rent in arrear, does not prevent the entry of judgment for defendant thereon.

After a verdict for defendant in an action of replevin, it is no ground for arrest of judgment that, since the verdict, judgment has been entered for plaintiff in another Court of the same county upon a verdict obtained prior to the verdict in the first-named suit, in an action of replevin between the same parties, involving the right to another month's rent of the same premises.

Error to Common Pleas No. 2, of Philadelphia County.

Replevin, brought November 13th, 1875, by John Cather against John J. Bray, landlord, and Henry H. Dambly, bailiff. The sheriff returned: "Replevied as commanded, . . . and property delivered to the plaintiff." The narr. was in the usual form. John J. Bray filed an avowry, setting out a demise to the plaintiff by the defendant of certain premises in Frankford, at a yearly rental of $420, payable monthly; the holding of said premises by the plaintiff from the 25th day July, 1872, until the 1st day of November, 1875, and the taking of the goods, as for a distress, for the rent of the month of October, 1875, due and in arrear. Henry H. Dambly made cognizance as bailiff of the defendant.

The plaintiff pleaded an entry by the said defendants into and upon, and an eviction of the plaintiff from a certain two-story back building, part of the premises demised to him on the 6th day of September, 1875, before any part of said rent was due or in arrear. Replication and issue.

On October 20th, 1876, the cause was tried, and the jury found a "verdict for the defendants." This verdict contained no finding of the value of the goods, or of the amount of rent in arrears.

Previous to this verdict, a suit in Common Pleas No. 4 between the same parties, involving the right of defendant to distrain for the November rent of the same premises, had been tried, and resulted in a verdict for plaintiff. After the verdict in Common Pleas No. 2, plaintiff entered judgment on the verdict in No 4, and then filed a motion in No. 2 in arrest of jndgment, upon the ground that, as the suit in No. 4 was between the same parties and for the same cause of action, the judgment in that case was conclusive. The Court, however, entered judgment for defendant on the verdict.

Plaintiff took this writ, assigning for error the entry of judgment upon an incomplete verdict, and after the judgment in the case in Common Pleas No. 4.

Edward R. Worrell, for the plaintiff in error.

The jury failed to find the value of the goods and the amount of rent in arrear. A verdict in an action of debt, finding no specific sum, is void.

Schmertz *v.* Shreeve, 12 Sm. 457.
Weidel *v.* Roseberry, 13 S. & R. 178.
Miller *v.* Hower, 2 Rawle, 53.

The judgment in Common Pleas No. 4 concluded the Court of Common Pleas No. 2; for it is a principle of public policy that an issue shall not be twice determined.

Marsh *v.* Pier, 4 Rawle, 273.

Walter J. Budd, contra.

Notwithstanding the failure of the jury, through inadvertence, to find the value of the goods and the amount of rent in arrear, the common law judgment of *de retorno habendo* may be entered for the defendants on their verdict.

1 Saunder's Rep., 195, n. 3.
Allbright *v.* Pickle, 4 Yeates, 264.
Smith *v.* Aurand, 10 S. & R. 92.

Weidel *v.* Roseberry, cited on the other side, is an express authority for sustaining the judgment. If the plaintiff intended to rely upon the verdict in his favor in C. P. No. 4, he should have entered judgment thereon before the trial in this case, and have put it in evidence, or by suitable plea put it on record. Having failed to do so, he is now estopped by his own negligence.

Jan. 14, 1878. THE COURT. The defendants avowed for rent after a replevy of the goods and delivery thereof to the plaintiff, and accepted a verdict for the defendants without more, by entering judgment thereon. Whether this verdict and judgment will avail him in the end, we are not now called upon to say. But if there be error in this, it is one of which the plaintiff cannot complain. He has his goods.

The other error insisted upon is not available. This action was for the distress for rent of Octo-

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ber. The action in the Common Pleas No. 4 was for the distress for the rent of November.

The latter action was not concluded by judgment until the 17th of November, 1876, after the verdict had been rendered in the present action in October previously. The second suit on account of the November rent was neither pleaded nor given in evidence, if, indeed, it could have been. Clearly it was not matter which could be set up in arrest of judgment on the verdict of the previous October for a different month's rent.

We discover no error in the record, and the judgment is therefore affirmed.

PER CURIAM.

Jan. '77, 284. Jan. 15, 1878.

Bush v. The National Oil Refining Co.

Landlord and tenant—Use and occupation—Tenant by sufferance—Liability of, for rent.

A tenant holding over by sufferance after the termination of his lease is liable to the landlord for rent accruing during the time intervening between the termination of the lease and the election of the landlord to treat him as a trespasser by bringing an action of ejectment.

Error to the Common Pleas No. 1, of Philadelphia County.

Assumpsit, by The National Oil Refining Company against Bush, for the use and occupation of an oil refinery from April 1st, 1875, to August 5th, 1875. Plea, Non-assumpsit.

Upon the trial (before BIDDLE, J.), it appeared that the defendant had entered into possession of the premises on January 1st, 1874, while negotiating with the plaintiffs for a lease for one year with the privilege of five years. No lease was ever made, the parties being unable to agree upon the details. On October 1, 1874, the plaintiffs served on the defendant a notice to quit the premises on January 1st, 1875. The defendant did not regard this notice, but remained in possession. On July 26th, 1875, the plaintiffs instituted an action of ejectment to recover the possession. On August 5th, 1875, the defendant quit and surrendered the keys. The defendant paid rent to January 1st, 1875.

The defendant offered in evidence a certified copy of the proceedings in ejectment to show that the plaintiffs never recognized the defendant as their tenant or otherwise than as a trespasser. Objected to; objection sustained; exception.

The defendant presented, *inter alia*, the following points: (2) The notice to quit in October, 1874, followed by the ejectment, were a disaffirmance of the defendant's right to remain on the premises, and the plaintiffs cannot recover in this action. *Refused.* (3) Unless there is evidence that the plaintiffs consented to the defendant remaining on the premises, after Jan. 1, 1875, there can be no recovery in this action, and mere silence does not constitute such consent. *Refused.*

The Court charged the jury as follows: "If you believe that the landlord permitted the defendant to remain, and he did remain until August 5, 1875, and occupied the premises, he is entitled to recover whatever sum the premises were worth, for use and occupation."

Verdict and judgment for the plaintiffs. The defendant took this writ, assigning for error, *inter alia*, the charge of the Court and the refusal of his points as above.

Schick and *Junkin*, for the plaintiffs in error.

Tenants by sufferance are not liable for use and occupation.

Cruise on Real Property, Chap. 2, §§ 1, 4, 5 (London Ed. 1835).
4 Kent's Comm. 117.
Flood *v.* Flood, 1 Allen, 217.
Delano *v.* Montague, 4 Cush. 42.
Featherstonhaugh *v.* Bradshaw, 1 Wend. 134.

As to the statutes of 4 Geo. II., Chap. 28, and 11 Geo. II., Chap. 19, the first is not reported as in force in Pennsylvania, and of the second there are in force only two sections, which do not affect this subject. Consequently the common law prevails in Pennsylvania.

Bush was a tenant by sufferance, for having come rightfully into possession after his estate ended he continued in possession and wrongfully held over.

Woodfall's Landlord and Tenant, 187.
4 Kent's Com. *116.
Bannon *v.* Brandon, 10 C. 263.

Therefore, Bush is not liable in this action.

But if Bush was not a tenant by sufferance after Jan. 1, 1875, his relation to the owners was such that they were bound to elect to treat him either as tenant or trespasser. By their conduct, and especially by their action of ejectment, they elected to treat him as trespasser, and they cannot now sue him as tenant.

Wiltbank, contra.

By the law of Pennsylvania tenant by sufferance is liable for use and occupation. If, by merely holding over at sufferance, his contract relation is severed, then he holds by adverse title, and thus might acquire a fee against his landlord by lapse of time. That this is not so, is ruled in—

Bannon *v.* Brandon, 10 C. 263.
Long *v.* Mast, 1 Jones, 189.

In the Orphans' Court a landlord's claim for use and occupation against his tenant by sufferance has been allowed, and this was affirmed by the Supreme Court.

Stockton's App., 14 Sm. 58.

Had there been any validity in the distinction

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made, an issue could have been framed for a jury trial in a common law court.

Admitting that the bringing of the action of ejectment was a conclusive election by the landlord, it affected his future relations with his tenant, and not his relations in the past.

Jan. 28, 1878. THE COURT. The defendant below was a tenant holding over by sufferance after the termination of his lease, and the action was for the use and occupation of the premises for the time intervening between the termination of the lease and the election of his landlord to treat him as a trespasser by bringing an action of ejectment.

That the defendant came in and held possession under the plaintiffs as his landlord is an undisputed fact.

Until his landlord elected to treat him as a trespasser by terminating his tenancy by sufferance, he cannot gainsay the relation which he assumes by his own act of holding over. The law will raise an implied promise to pay for a use and occupancy thus acquired and continued. The relation is sustained by legal analogies. Thus a tenant so holding over cannot set up the statute of limitations against his landlord, without showing an open and notorious ouster, by an unequivocal act of hostility to the landlord's title, and notice thereof in fact, or which may be presumed from the circumstances. We see no error to complain of.

Judgment affirmed. PER CURIAM.

Common Pleas—Equity.

C. P. No. 2. Feb. 23, 1878.

Laughlin v. Finley.

Set-off—Equity will not ordinarily restrain action at law to allow an account to be taken for set-off merely.

Motion for special injunction.

The bill set forth that in March, 1876, the defendant Finley brought suit to recover the sum of $2400, the amount of a promissory note given to him by Laughlin (complainant) in payment of a half interest in a vessel which complainant purchased from defendant. This amount complainant admits to be due, but claims a set-off arising from other transactions involving the settlement of accounts too complicated to be properly liquidated by a jury.

The bill prayed an account, and that, in the mean time, the defendant be restrained from further proceeding in his said action at law.

Coulston, for the motion, cited—

Russell *v.* Miller, 4 S. 155.

Edmunds, contra, was not called on.

THE COURT. Equity will not, at least under ordinary circumstances, enjoin execution at law to await the determination in equity of a mere set-off, but the complainant may go on with his bill for an account, and on getting a decree for a balance in his favor may have it set off. And in a case of fraud, or, possibly, of insolvency, the Court of law may stay execution till the account has been taken. But this motion is certainly premature.

Injunction refused.

C. P. No. 3. Sept. 18, 1877.

Kersey Oil and Mineral Co. and H. A. Guernsey, a stockholder and creditor thereof, v. Oil Creek and Allegheny River R. R. Co.

Equity—What action of the directors of a corporation is ultra vires—Lease of the property of the company without notice to the president, who was a director and stockholder—What will affect lessee with notice—Ratification of lease by Act of Assembly—Compensation to lessee for improvements made ad interim—Mere silence does not amount to acquiescence—Fraud—Sufficient evidence upon which to state an account.

Sur exceptions to Master's report.

The material facts, as they appeared from the bill, answer, and Master's report, were as follows:—

The Kersey Oil and Mineral Company was incorporated in 1861, and had then a capital of $2000. Its powers were limited to boring for oil and mining minerals. Nothing was done under this charter. On 10 December, 1864, Henry A. Guernsey purchased the charter and the forty shares constituting the capital stock of the corporation, paying for the stock $1 per share. In 1864 an Act of Assembly was passed, authorizing the company to build a railroad not exceeding thirty miles in length, and to increase its capital to $1,000,000, in shares of $50 each. Under this a road was located to Oil City, a distance of eight miles.

On 25th May, 1865, Henry A. Guernsey, under resolutions of the board of directors, which appropriated to him ten thousand shares of the stock, and authorized him to complete the road,

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and to dispose of the remaining ten thousand shares for that purpose, entered into an agreement, in writing, with S. S. Briggs, S. A. Hatfield, Isaac Miller, and W. H. Coffin, by which, upon the payment by them of $60.000, to be used in the construction of the road from Oil City to Plummer, he agreed to issue and deliver to them certificates for 8000 shares of the Kersey Oil Co. It was also stipulated that Henry A. Guernsey should be the owner of the 10,000 shares, and that these 18,000 shares should be regarded as paid in capital, and that 2000 more shares (making in all the 20,000 shares at $50 each, authorized by the Act of 1864 to be issued) should be disposed of for the benefit of the said company.

It was further stipulated that after the completion of the road "the said Henry A. Guernsey is to receive from the net earnings of the said the Kersey Oil and Mineral Company the sum of $130,000, in full of all the indebtedness of the said company to him up to this date."

The company was duly organized, all of the parties to the agreement becoming officers, and the road was built for a distance of three miles and used by the corporation. Henry A. Guernsey was the president of the company from its reorganization, and superintended the construction of the road.

About the latter part of the year 1865 the other directors of the company, during the absence of Henry A. Guernsey, met without giving him any notice whatever of the meeting, and then passed resolutions directing the leasing of the road to the Farmers' Railroad Company, the latter agreeing to pay an annual rental of one dollar, and to transport the oil of the Kersey Co. at ten cents per barrel.

On the 27th day of February, 1866, Isaac Miller, vice-president, and S. A. Hatfield, James W. Guernsey, and W. H. Coffin, as directors of the Kersey Oil Company, acting under the authority of the above resolutions, executed a lease of their road to the Farmers' Railroad of Venango County, the latter company acting in that behalf by the said W. H. Coffin, its president. Hence he appears in the transaction both as lessor and lessee. It did not appear that any other than the said W. H. Coffin and one James Bishop constituted the Farmers' Railroad Company. The said company, under the lease, took possession of the Oil Company's road, completed the line to Rouseville, and operated the completed road.

Upon H. A. Guernsey's return to the oil region, he discovered that all the franchises of the company had been thus leased by the other officers to the Farmers' Company, and he, in the name of the Kersey Oil and Mineral Company, demanded a return of the company's property. Ever since, the said Henry A. Guernsey has kept up an organization of the said Kersey Oil and Mineral Company, having transferred a few shares to others, that they might serve as directors, and at each annual election has been chosen president.

On 10 April, 1867, an Act of Assembly was passed and approved, ratifying the said lease, "notwithstanding neither of the roads owned by said companies was fully finished and completed at the date of said lease."

In 1868 the Farmers' Railroad was consolidated with the Oil Creek and Allegheny River Railroad Company, against whom the present suit was instituted in 1871.

The bill prayed (1) a restoration of the possession of the said railroad, together with the rolling stock and other personal property of the Kersey Co.; (2) That the lease be declared null and void; (3) That defendants be required to account for all moneys collected and received by them for toll, freight, or fare on said railroad.

The answer admitted the lease, but averred that the same was valid, and that the complainants having remained silent and allowed the expenditure of large sums of money by defendants, were estopped from alleging the lease to be invalid.

From the foregoing facts, the Master deduced as findings of law: (1) That the Farmers' Railroad, having full notice through their chief officer, the validity of the lease must depend solely upon the authority of the lessors to make it; that the parties to the lease had, in all their prior transactions, recognized Henry A. Guernsey as the president of the Kersey Company and the owner of a controlling amount of the stock; that Henry A. Guernsey having no notice of the meeting of the directors of the company, their action was *ultra vires*, and the lease of no effect. (2) That the Kersey Oil and Mineral Company is a corporation having vitality to receive any reversion which might be acquired by the operation of the law upon the facts of the case. (3) That Henry A. Guernsey was a stockholder. (4) That Henry A. Guernsey is a creditor to the amount of $130,000, and entitled to demand the above sum, and would, therefore, on the ground of fraud, have a standing in a Court of Equity in the attitude of a creditor, if in no other. (5) That the complainants are not bound to tender restitution, no acts of theirs having amounted to an acquiescence.

The Master reported that the first and second prayers of the bill should be granted, but denied the third, because: (1) There was no evidence before him on which he could state an account, and (2) A Court of Equity will not entertain jurisdiction to compel the payment of money when the same may be recovered in an action at law.

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To this report the complainants filed an exception, because the Master had not stated an account, and the defendants filed fifteen exceptions, covering all the points of the case.

Samuel Gustine Thompson, for defendants.

The contract and lease was valid. It was executed under the seal of the company by the vice-president and a majority of its directors. The presumption is that it is valid.

Green on *ultra vires*, p. 453.
In re County Life Assn., Law Rep. 5 Ch. 288.

And, further, as to the validity of the lease.

In re Warwick and Worcester R. R. Co., 35 Eng. L. & Eq. 187.
Baird *v.* Bank of Washington, 11 S. & R. 411.
Megargel *v.* Hazleton Co., 4 Barr, 425.
Delaware and Hudson Canal Co. *v.* Penna. Coal Co., 9 Har. 131.

The lease was not a radical change, it was simply an auxiliary to mining oil, a means to get the oil to market.

The contract and lease cannot be rescinded without compensation to the Farmers' Company for the work done.

Fisher *v.* Wilson, 18 Indiana, 136.
Peninsular Bank *v.* Hanmer, 14 Mich. 208.
Jennings *v.* Gage, 13 Ills. 610.
Tisdale *v.* Buckmore, 33 Maine, 461.

The contract and lease cannot be rescinded, because the plaintiff's company is estopped by its acquiescence and silence.

Hamilton *v.* Hamilton, 4 Barr, 193.
Pittsburg *v.* Scott, 1 Pa. 309.
Carr *v.* Wallace, 7 Watts, 395.
Masson *v.* Bovet, 1 Denio, 74.
Lawrence *v.* Dale, 3 Johns. Ch. 42.
Wilbur *v.* Flood, 16 Mich. 41.
Bradley *v.* Ballard, 55 Ills. 413.
Williams *v.* Ketchum, 21 Wis. 432.
Leaming *v.* Wise, 23 Sm. 176.

William H. Armstrong, for plaintiffs.

Henry A. Guernsey represents the Kersey Oil and Mineral Company. He was recognized in every transaction by those who appear as the lessors to the Farmers' Company, as the owner of 10,000 shares of stock, and a creditor to the extent of $130,000. The whole tranaction was a fraud on Henry A. Guernsey. That the lease was recognized by all the parties as being of no effect is shown by the fact that they procured an Act to validate it. That Act, however, could not affect the rights of Henry A. Guernsey and the Kersey Company. The legislature has no constitutional right to divest vested rights, nor to affect stockholders by such an Act.

An account has been refused us by the Master. I understand the practice to be that the Master reports that an account should be stated, and then the Court directs him to make up an account.

[LUDLOW, P. J. Yes, such is the practice here.]

The plaintiffs are not compelled to tender restitution. This was an illegal, a fraudulent, a felonious taking. The whole object was to cheat and defraud Henry A. Guernsey; and the Farmers' Company, through their president, is bound with full notice.

Plaintiff's counsel cited:—

Langolf *v.* Seiberlitch, 2 Pars. Eq. 64.
Gordon *v.* Preston, 1 Watts, 385.
Comm. *ex rel.* Claghorn *et al. v.* Cullen *et al.*, 1 Harris, 133.
McCurdy *v.* Myers, 8 Wr. 535
Stewart & Foltz's Appeal, 6 Sm. 413.
Simons *v.* The Vulcan Oil and Mining Co., 11 Id. 202.

C. A. V.

Oct. 6, 1877. THE COURT (after stating the facts). The defendants derive title through the Farmers' Railroad Company, who claim title by virtue of the lease to them by the Kersey Oil Company. The validity of this lease is therefore the controlling question in this controversy.

The only business the Kersey Oil Company was employed in was the erection of the road, which was the only valuable property or franchise they possessed. The lease may be regarded as a transfer of the road for a nominal consideration. It is not speaking too strongly to say that the parties who executed and accepted the lease conspired to cheat the plaintiff, Henry A. Guernsey, out of his interest in the road; and that the lease was the means adopted to consummate that purpose.

There is no evidence that the lease was executed, or authorized to be executed, on a day fixed by the charter or by-laws; or at a time of which all the stockholders or directors had notice, or of which they may be presumed to have had notice. On the contrary, it conclusively appears Henry A. Guernsey, the president, and a director and stockholder, had not notice, and was not present, and did not join in or assent to the lease. There was therefore no authority in the other directors to make the lease, and it is invalid. In Gordon *v.* Preston (1 Watts, 387), GIBSON, C. J., says: "When the day has not been fixed by other competent authority this notice is indispensable to a legal convention for the transaction of even the ordinary business; but here an extraordinary act was to be performed, the hypothecation of the real estate, and there was therefore the greater reason that all the directors should be summoned."

The only effect which the Act of Assembly ratifying the lease could have would be to estop the Commonwealth from asserting that the parties to the lease had not the authority to contract. This is evident from the language of the Act itself. "That the lease . . . is hereby declared legal and valid, notwithstanding neither of the roads owned by said companies was fully finished and completed at the date of said lease."

It may be conceded that the directors of the Oil Company had a right to sell or lease the road; that *de facto* officers may legally act; that

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a majority of directors may bind the company, and that the majority may act either all together or separately. But the right to do a thing does not include the authority to do it illegally.

It is contended by the defendants that the lease cannot be rescinded without compensation to the Farmers' Railroad Company for the work done. It may not be questioned that "a party cannot rescind a contract and at the same time retain the consideration in whole or in part." Henry A. Guernsey was not a party to this contract. The oil company was not bound by it, because there was no authority in the directors to make it. Neither Guernsey nor the company received any consideration. If this were otherwise it must be recollected that the Farmers' Railroad Company had knowledge that the lease was invalid when they took possession under it, and at all times thereafter until the completion of their road. W. H. Coffin, their president, was a director of the oil company, and signed the lease. They were therefore wrong-doers, trespassers, and have no equitable claim to compensation.

It is further contended that the contract and lease cannot be rescinded because the plaintiff's company is estopped by its acquiescence and silence.

What is acquiescence? It is something more than non-resistance. It is more than passiveness, unless the passiveness induces belief in error, and then it becomes an act, as where one looks on and suffers another to purchase and spend money upon land under an erroneous opinion of title, without making known his claim.

It is, however, a well-settled principle "That equity will not, on the mere ground of silence, relieve one who is properly acquainted with his rights, or who has the means of becoming so, and yet wilfully undertakes to proceed in expending money on the lands of another without obtaining or asking his assent. His ignorance of it is wilful, and he acts at his peril. He has no right to complain because he is not deceived; or if deceived, it is his own fault. He, in fact, stands in the situation of a wrong-doer." (Carr *v.* Wallace, 7 Watts, 401.)

The Farmers' Railroad were wrong-doers. They knew, or might have known, that the lease was invalid. Their president was a director of the oil company when the lease was executed. He was, moreover, in the conspiracy to cheat the plaintiff, Guernsey, out of his interest in the road, and the lease was the means used. They are not, therefore, in a position to set up acquiescence as against any one. If this be not so, wherein has the plaintiff, Guernsey, acquiesed? He was not present when the lease was executed. He had no notice or knowledge that it was in contemplation. He says: "I lived at Philadelphia, and went home and left Mr. S. A. Hatfield in charge as superintendent; I was gone about two months; perhaps more. When I returned I found the railroad in possession of a company, representing themselves to be the Farmers' Railroad Company, Mr. Hatfield being one of that company. . . . I demanded possession of all the things they had taken possession of. I did this as president of the company. My demand was refused."

As against a trespasser and wrong-doer, what more was he required to do? It was not necessary for him, day by day, to repeat his demand and oppose their further progress. His demand was a standing protest against their possession and proceedings. It would be hard, indeed, in view of these circumstances, to hold that a mere delay to bring suit made good and valid the wrongful and oppressive acts of the defendants.

All of the exceptions of the defendants are dismissed.

We think there was evidence before the master from which an account might be stated. We therefore sustain the plaintiff's exception, and refer the report to the master to state an account.

Opinion by FINLETTER, J.

C. P. No. 3. Feb. 16, 1878.

Smoot v. Harrah.

Equity practice—Security for costs, where complainant resides out of the State—Rule of Court No. XIV.—Proper practice in equity is by motion—But a rule for security for costs will not necessarily be discharged.

Rule for security for costs.

The plaintiff, a citizen of the District of Columbia, filed a bill in equity in this Court, but entered no security for costs. Thereupon this rule was taken under Rule of Court XIV., which provides:—

"In cases where plaintiffs reside out of the State . . . . the defendant, on motion and affidavit of a just defence against the whole demand, may have a rule for security for costs; and for want of security, at a time named by the Court, judgment of non-suit will be entered on motion."

J. M. Moyer, for the rule.

Samuel Gustine Thompson, contra.

A *rule* for security for costs is unknown in equity proceedings. The proper course is to make a formal motion. Rule of Court XIV. applies exclusively to the common-law side of the Court. This is clearly proven by the rule itself, which says: "And for want of security . . . . *judgment of non-suit* will be entered, etc." There can be no such thing as a non-suit in equity.

THE COURT. This is not a rule of course. We certainly have a right to order security in

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cases of this kind, and although the proper practice is to make a formal motion, yet in this case it will, perhaps, be better to make this—

Rule absolute.

Per YERKES, J.

Common Pleas—Law.

C. P. No. 2. Feb. 2, 1878.

Gibb & Son v. Geisz.

The maker of a promissory note, not endorsed, cannot be made to pay the costs of a protest by the holder.

Rule for judgment for want of a sufficient affidavit of defence.

Plaintiff, the payee of a promissory note, brought suit thereon against the maker, and also for the costs of protesting the same. There was no endorser.

Defendant filed an affidavit of defence denying his liability for the costs of the protest, but making no defence to the remainder of the claim.

J. M. Gibb, for the rule.

W. R. Wister, contra. The object of demand, notice, and protest being only to fix the liability of the endorser, the maker should not be unnecessarily subjected to the costs of the same.

Rule absolute, deducting the costs of protest.

C. P. No. 2. Feb. 29, 1878.

Hope Building Association v. Dunagan.

Practice—Where a purchaser of property at a sheriff's sale failed to comply with the terms of the sale and refused to return the writ, the prothonotary, on demand of counsel, issued a duplicate writ—Proper mode of procedure in such case.

Rule to show cause why a duplicate writ of *levari facias* should not be quashed and stricken from the record.

At the sheriff's sale in January, 1878, the terms of which were that the "balance due on the purchase money should be paid within fifteen days of the date of the sale," defendant purchased a parcel of real estate. In accordance with the practice of the sheriff's office the defendant borrowed the original writ for the purpose of preparing the sheriff's deed. The terms of the sale not having been complied with at the end of the fifteen days, and defendant refusing to restore the writ to the sheriff, the latter through the plaintiff's counsel procured a duplicate from the prothonotary and returned it "terms of sale not complied with." Defendant thereupon obtained this rule, upon an affidavit setting forth the foregoing facts, and further, that as purchaser he had mortgaged the property to a building association in order to raise the balance of the purchase money due the sheriff, which balance was now ready to be paid; that he had been requested by counsel for the plaintiff to return the writ in order that the property might be again exposed for sale as through a mistake it had not been bid up to the amount it should have brought; this he refused to do, and that plaintiff's counsel thereupon procured the prothonotary to issue the duplicate writ.

Gorman, for the rule. The prothonotary can not of his own motion issue a writ. This writ has gone out without authority, and therefore should be stricken off.

E. C. Quin, contra. This writ was issued in consequence of the purchaser's own wrong. As he failed to comply with the terms of sale or restore the original writ, he has no standing here.

THE COURT. The proper practice would be for the prothonotary to come into Court and get an order to replace a lost paper by a duplicate. The original writ was not in fact lost at all, but was detained in the hands of the purchaser after the time when it ought to have been restored to the sheriff and the purchase-money paid. Under such circumstances the Court would enforce the immediate restoration of the original by very summary process, rather than issue a duplicate. But the purchaser is not in a position to make this objection, nor would he be in any way a gainer by it if we made this rule absolute. In that case the sheriff would simply transfer his return of "terms of sale not complied with" from the present duplicate to the original writ, and the purchaser would stand exactly as he does now—in the position of having forfeited his rights by delay beyond the stipulated time. What he really wants the Court to do is in effect to set aside a sheriff's return regular on its face because he says it is not true in fact. We do not think the facts sustain his assertion in this respect, and even if they did with entire clearness, the Court has no power to interfere. The remedy in such a case is the ancient action against the sheriff for a false return.

Rule discharged.

Oral opinion by MITCHELL, J.

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C. P. No. 2. Feb. 16, 1878.

Raible v. Schall.

Affidavit of defence—Requisites of affidavit of loan—Sufficiency of denial of loan.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit for a loan of money.

Plaintiff filed an affidavit of loan, stating the terms of the loan and the dates thereof.

The affidavit of defence set forth that it was "not true that the said plaintiff loaned to deponent the sum of eighty dollars on the 24th day of May, 1877," etc., specifically denying in the above form the several items of plaintiff's claim filed, and concluding with a general denial that deponent had authorized any one else to borrow or plaintiff to lend to any one else, etc., on deponent's account.

B. F. Fisher, for the rule.

W. Hopple, contra. The dates, as well as the terms of the loan, are a material element of the affidavit of loan required to be filed.

THE COURT. A judgment on this claim filed would be no bar to a suit for loans averred to have been made on different dates. For this reason, although the affidavit bears strong marks of evasiveness, we are reluctantly obliged to refuse judgment.

Rule discharged.

C. P. No. 3. Jan. 19, 1878.

O'Connell v. Summers.

Practice—More specific bill of particulars—Suit for value of "way-going crop."

Rule for more specific bill of particulars.

The narr. contained only the common counts in assumpsit. The following bill of particulars was filed:—

"Plaintiff claims value of way-going crop, planted by him upon premises of defendant (24th ward), occupied by plaintiff as a farm as tenant of said defendant $60.00.

"Plaintiff allows a credit of $22 paid by defendant on account."

Charles H. Hart, for the rule.

Neither the character of the crop, the number of acres, nor the locality of the property is stated.

Joseph R. Rhoads, contra.

"Way-going crop" sufficiently indicates its character.

THE COURT. The kind of crop and the number of acres should be stated.

Rule absolute.

U. S. Circuit Court—Law.

Aug. 18, 1877.

Prevost v. Gorrell. [No. 1.]

Mining—Drainage of mine—Rights and duties of adjacent mine operators—Measure of damages in tort—Anticipated profits as an element of computation—Duty imposed upon upper mine owner by connection of his, with adjacent mine—Dominant and servient tenements—Easement.

Rule for new trial.

Trespass on the case, for injuries to the plaintiff's business, as a coal operator, through the defendant's alleged wilful and negligent acts in causing water to flow from his mine into the plaintiff's, through a connection between the two collieries, which adjoined each other, which connection had been made prior to the plaintiff's occupation.

The evidence showed that the plaintiff and the defendant were lessees of adjoining collieries, under a common landlord; the plaintiff's lease being of the Centralia colliery and dating from 1873, the defendant's being of the Hazel Dell colliery and dating from 1870. The workings of the collieries had been joined in 1871 by the trespasses of one Freck, the prior lessee of Centralia, across the line of his lease, and upon the colliery of the defendant. The lower gangway of Centralia being lower than that of Hazel Dell, the flow of water was from the latter to the former colliery. Much evidence was given as to the defendant's having taken advantage of the connection to rid his mine of water by causing it to pass over to Centralia. Evidence was also given of the insufficiency of his pumping apparatus. The plaintiff gave evidence of the profits he would have made, but for the defendant's illegal acts, on the coal he mined, and also on what he was prevented from mining by the defendant's default.

The situation of the two collieries is shown by the plan in Coal Co. *v.* Freck, 1 WEEKLY NOTES, 124.

The plaintiff, in his points, asked the Court to charge: that the defendant was not responsible for the natural flow of water from his (defendant's), colliery upon the plaintiff's, which flow would have taken place through the connection between the collieries, *provided* the defendant had continued to mine in a skilful and workmanlike manner, but that the defendant was responsible for the results of the flow of his drainage upon

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the plaintiff's colliery to the extent and in the manner following, viz.: (1) For such of the drainage of the defendant's colliery as was made to flow upon the plaintiff's colliery by the use of artificial contrivances which would not have been resorted to by the defendant in the course of good and skilful mining. (2) For such of the drainage of the defendant's colliery as overflowed into the plaintiff's colliery after rising in a pool to a certain height in the defendant's colliery, *provided* such accumulation and overflow of water in the defendant's colliery was occasioned by the defendant's insufficient pumping capacity and bad mining. (3) For such of the defendant's drainage as he artificially conveyed from one part of his colliery to another, and thence permitted to escape upon the plaintiff's colliery; as to which last water the defendant was not exempted from responsibility by any inadequate effort or insufficient means which he might have taken to prevent the result. (4) For such of the surface water as was introduced into the defendant's colliery by reason of badly constructed ditches upon the surface, under the defendant's control and for which he was responsible, and was thence permitted to flow into the plaintiff's colliery, and which, if the defendant's pumping capacity had been sufficient for the requirements of skilful mining upon his part, would have been removed by him through his pumps without injury to the plaintiff.

Further, that the measure of damages was the loss sustained by the plaintiff through the defendant's wrongful acts, including loss of the legitimate earnings of his business as a coal operator during the period in question, of which the jury found he had been directly deprived by the wrongful acts of the defendant, provided such loss of earnings was clearly proved. All the points containing the above propositions were affirmed.

The defendant requested the Court to charge, *inter alia* (1) That under his lease he had a right to mine out all the coal therein demised by such method of good mining as he could have pursued if no connection had existed between the two collieries, and that he was not bound to change such mode of mining in consequence of the trespasses by the predecessor in occupation of the plaintiff's colliery which had resulted in the connection between the mines, especially if such change would increase the expense of mining and cause a loss of coal. *Answer.* The defendant undoubtedly had the right to take out all the coal within the boundaries of his lease, subject only to the requirements of skilful and careful mining; but if, by reason of the trespass of the lessee of the adjoining mine, a connection between it and his mine became practicable within the boundaries of the latter, and *he* made such opening, he would not be absolved from the duty of reasonable precaution against avoidable injury to such adjoining mine.

(2) That though the necessary consequence of the defendant's mining was to increase the natural flow of water towards the connection between the mines, and, through such connection, into the plaintiff's mine, and thus damage was occasioned to the plaintiff, if this method of working was simply consistent with the reasonable exercise of the defendant's own rights and sprang from no malice towards the plaintiff, the plaintiff could not maintain an action for any damage occasioned thereby. *Affirmed.*

(3) That the defendant was not bound to have pumping capacity sufficient to provide for more than the ordinary and usual drainage of his colliery, and that if in cases of sudden and violent rains, a large quantity of water first accumulated in the defendant's colliery beyond the power of his pumping capacity, and thence escaped through the opening into the plaintiff's colliery, the plaintiff could not recover for the damage occasioned thereby. *Answer.* The duty of the defendant, as to the measure of his pumping capacity, is not limited to the ordinary flow of water assumed in this point. It extends also to the flow occasioned by heavy and continued rains and melting snow, which, by their well understood periodical recurrence, may be anticipated. These are comprehended in the ordinary flow for which the defendant was bound to provide.

(4) That the plaintiff could not recover for profits which he might have made, but for the injuries occasioned by the defendant's unlawful acts, such profits being of a speculative nature, uncertain, contingent, and too remote. *Answer.* In cases founded upon tort, a tort-feasor is liable for the whole loss resulting directly from his unlawful acts. He is therefore liable for loss of such profits as are a matter of computation and susceptible of definite ascertainment. In this case, these are to be measured by the difference between the cost of mining and preparing coal for the market and the market price of the coal when prepared and ready for delivery, and upon such quantity as the plaintiff has satisfactorily shown to the jury he was provided with the necessary means and facilities to mine and prepare for market, and that he could ship and sell.

(5) That if Freck, the predecessor in occupation of the plaintiff's colliery, by driving his gangway upon a lower level than the gangway in the defendant's colliery, and cutting openings across his line, made the plaintiff's colliery a servient or subjacent tenement, he thereby subjected the same to the flow of all the water, which by nature rose in or flowed upon the defendant's colliery, which last colliery was, as to the plaintiff's, a dominant or superior tenement. *Answer.* In answer to this point, we adopt the language of

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AGNEW, J., in the case of the Locust Mountain Coal and Iron Company *v.* Gorrell (Leg. Int. March 29th, 1872), as an accurate exposition of the law applicable to the facts here stated, viz.: When therefore, as in the present case, the miner in the upper mine, in carrying forward his gangway, strikes into a breast which has been wrongfully worked by a trespasser up the dip of his coal vein, he is not justified in emptying the water flowing down the drain, or gutter, of his gangway into the opening thus struck, if by reasonable means he can carry the water across the drain into the gutter or drain leading into his own sump . . . good mining requires the owner of every mine to ditch his gangway and lead off the water gathering in it to his own sump, and thus to clear his mine of its enemy. There is no good reason, therefore, why the owner of the upper mine should suffer the flow of his gangway to run down upon the lower mine, when by reasonable diligence he can prevent it."

(6) That the defendant owed no duty to the subjacent (plaintiff's) colliery; that he had a clear right to mine out all his coal down to his lower gangway, and the plaintiff was bound to receive the natural flow of water from the defendant's colliery though the openings mentioned in the preceding point, or protect himself against it by leaving a sufficient pillar to prevent such flow. This rule is not modified by the mining of coal in the defendant's colliery, and the consequent subsidence of the surface at the outcrop of the vein. *Answer.* The defendant had a right to mine out all his coal to his lower gangway, but not in disregard of the effect of his mode of operating upon the subjacent mine. The operator of such mine cannot complain of the mere natural flow of water from the upper mine. Here again I adopt the language of AGNEW, J., in the case before referred to: "When water, following the law of gravitation, after the removal of the coal in a careful and proper manner, finds its way by percolation, or through fissures unforeseen and unknown, into the lower mine, its owner cannot complain of it as an injury done by the owner of the upper mine. . . . I incline to think also that openings made before by a trespasser from the lower into the upper mine, and unexpectedly struck by the upper owner in mining, do not differ from natural fissures in the effect produced upon the lower mine." Beyond this natural flow the defendant was not absolved by the facts stated from the duty of providing appropriate, reasonable means to prevent the injurious inflow of water into the adjoining mine.

The verdict was for the plaintiff for $128,808.41.

This rule for a new trial was thereupon taken by the defendant.

Bailey (with him *Bryson*, *Schick*, *Spinney*, *James Ryon*, and *John W. Ryon*), for the rule.

A. S. Biddle, *Bartholomew*, *Hughes*, and *G. W. Biddle*, contra.

Eo die. Rule discharged.

[See Thomas Iron Co. *v.* Allentown Mining Co., 28 New Jersey Equity Reports, 77, and cases cited in the reporter's note. And see next case.]

Oct. 11, 1877.

Prevost v. Gorrell. [No. 2.]

Practice — Execution — Attachment — Rev. Stat. U. S. §§ 915 and 985 — Lien of judgment — In States divided into more than one district of the United States, judgment obtained in the C. C. of the U. S. in either district is a lien from its date on all defendant's real estate within the State — Searches.

Motion for an order to the clerk to issue an attachment in execution.

On the seventh of July, 1877, a verdict was obtained by the plaintiff in the Circuit Court of the United States for the Western District of Pennsylvania, and judgment, *nisi*, was entered thereon the same day. A rule for a new trial was subsequently, on the 18th of August, 1877, discharged, and the judgment made absolute. (See last case.) A certified copy of the record of the case was thereupon filed in the Circuit Court of the United States for the Eastern District of Pennsylvania. The plaintiff's counsel now moved in this Court for an order directing the clerk to issue an attachment in execution upon the certified copy filed here of the record of the judgment obtained in the western district.

A. Sydney Biddle (with him *Bartholomew*, *Hughes*, and *G. W. Biddle*), for the motion.

By the Revised Statutes (p. 174, § 915), it is provided that, "in common-law causes in the Circuit Courts the plaintiff shall be entitled to similar remedies, by *attachment* or other process, against the property of the defendant, which are now provided by the laws of the State in which such court is held for the courts thereof, etc." It has also been held that the United States districts are to be considered as analogous to counties.

Now, if we had obtained judgment in the Court of Common Pleas of Allegheny County, we could have filed a certified copy of that judgment in the Court of Common Pleas of Philadelphia County, and could have issued an attachment in execution in the latter Court on that certified copy (Act of April 16, 1840; Purd. Dig. 821). No injury can result from the fact that the same judgments exist in different counties on which executions may issue. The Court in which the original judgment was obtained controls it.

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King *v.* Nimick, 10 Casey, 298.

In Baker *v.* King (2 Grant, 254), it was said that where a judgment had been removed under the Act (*supra*) into the court of another county, it had the same force, so far as regarded execution process, in the county to which it was transferred, as if originally entered there. This Court is therefore bound, until the original judgment is satisfied, to allow execution to issue on the certified judgment filed here. It is true that by § 985, p. 184, of the Revised Statutes, it is provided that "all writs of execution upon judgments or decrees obtained in a Circuit or District Court in any State which is divided into two or more districts, may run and be executed in any part of such State; but shall be issued from, and be returnable to, the Court wherein the judgment was obtained." Under that provision we could undoubtedly issue an attachment in execution from the Western District, and have it executed in the Eastern. Our contention is that we have the choice of the two modes of remedy.

THE COURT (MCKENNAN and CADWALADER, JJ.). This is a new question of practice, and is not perfectly clear. It depends upon what is meant by "similar remedies" in sect. 915 of the Revised Statutes. The Act from which that clause is taken was passed in 1872, while sect. 985 is taken from an Act passed in 1826. As by the latter Act all writs of execution may be executed throughout the State (where the State is divided into several districts), it would seem more reasonable to suppose that the clause of the subsequent Act of 1872 was meant to give to the plaintiff the additional advantage of the writ of attachment (whether as a writ of execution or not) where it had not before been enjoyed, in which case the meaning of the statute would be that the plaintiff was entitled to similar writs of attachment as in the State Court, but not necessarily to a completely similar use of the writ, as is contended here. This we decide to be the meaning of the statute where, as here, the plaintiff has a complete remedy under sect. 915, combined with sect. 985, without discussing the question of its meaning where the latter section does not apply, as where the districts are in different States.

Under this view the plaintiff's lien on the defendant's real estate in the Eastern District depends, not upon the certified copy he has filed here, but upon the original judgment he has obtained in the Western District, and goes back as to all real estate situated in this district to that date; for the right of lien depends upon the right of execution; and, as all writs of execution, which the plaintiff had a right to issue on his judgment, might "run and be executed in all parts of the State," by sect. 985, this lien was equally operative from the same date upon real estate situated in all parts of the State. (Massingill *v.* Downs, 7 Howard, 768.)

Oral opinion by MCKENNA, CIR. J.; CADWALADER, J., concurred.

[This decision is of practical importance to the profession and to conveyancers, as under it searches must in future be made in both districts of the Circuit Court of the United States in Pennsylvania, instead of, as has heretofore been the practice, only in that in which the real estate is situated.]

Oct. 13, 1877.

Prevost v. Gorrell. [No. 3.]

Practice—Execution—Rev. Stat. U. S. § 985—Writs of Execution from U. S. Courts in States divided into more than one district run all over State.

Sur application for instructions to the marshal in the execution of a writ of *fi. fa.*

A writ of *fi. fa.*, directed to the marshal of the Western District, had issued from the Circuit Court of the United States for the Western District of Pennsylvania, upon a judgment in the plaintiff's favor obtained in that Court. Under this execution, property in that district had been levied upon, and the same writ was then handed to the Marshal of the Eastern District, with directions that he should seize under it property in the last named district.

The marshal applied to the Court at Chambers, for instructions, alleging that under the Act of Congress he was not instructed as to whether he had authority to levy under the writ directed to the marshal of the western district, or whether an independent writ (either concurrent or subsequent) issued from the western district, and directed to himself, was necessary.

A. Sydney Biddle, argued that the language of the Act was plain. Sect. 985 of the Revised Statutes, p. 184, provides that "all writs of execution upon judgments or decrees obtained in a Circuit or District Court, in any State which is divided into two or more districts, may run and be executed in any part of such State; but shall be issued from, and made returnable to, the Court wherein the judgment was obtained."

THE COURT (MCKENNAN, CIR. J.). The language of the statute is plain: "All writs of execution" are to run and be executed all over the State, where it consists of more than one district. "May" means at the plaintiff's option. He has a right to concurrent execution all over the State. It is impossible to give the words of the statute effect unless every writ is allowed to run in all the districts in the same State. The formal direction to one marshal is of no consequence, since the same Act of Congress which enlarges the territorial power of the writ enlarges the direction correspondingly.

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WEEKLY NOTES OF CASES.

VOL. V.] *THURSDAY, MARCH* 21, 1878. [No. 8.

Supreme Court.

Perkins et al., Commissioners for the erection of Public Buildings, v. Slack et al., Members of the Select and Common Councils of Philadelphia.

Constitutional law—Special commissions for municipal purposes—Public Building Commission of Philadelphia—Act of August 5, 1870—How far modified by Art. XV. § 2, of Constitution—Art. III. § 20, construed.

An Act of Assembly, passed in 1870, appointed special commissioners by name to erect public buildings in the city of Philadelphia, and commanded them, until the buildings were finished, to make a requisition, near the end of every year, on the city councils for the amount of money required by them for the commission for the succeeding year, and further enacted that "the same councils shall levy a tax sufficient to raise the amount so required."

Article XV, section 2, of the new State Constitution, which went into effect January 1st, 1874, provided that "no debt shall be contracted, or liability incurred, by any municipal commission, except in pursuance of an appropriation previously made therefor by the municipal government."

The Commissioners made a requisition in November, 1876, for $1,500,000, as the amount required by them for the purposes of the commission for the year 1877.

The city councils having refused to raise any part of this amount, the Commissioners applied for a mandamus to compel the councils to levy a tax to raise the amount:

Held (PAXSON and SHARSWOOD, JJ., dissenting), that the obligation imposed upon the city councils by the Act of 1870, to raise annually the amount required by the Commissioners for the erection of the buildings, was not repealed by Article XV., section 2, of the Constitution, and that the Councils were still bound to levy a tax, or otherwise raise the amount for which requisition had been made.

Per TRUNKEY, J. Article XV, section 2, prevented the Commissioners from making any contracts after 1874, until an appropriation to pay for them had been actually made by the city councils. To that extent the Act of 1870 was modified, but no further. There being no positive repugnancy between the Constitution and the other provisions of the Statute, saving that all liabilities incurred should be in pursuance of a previous appropriation by the municipal government, the provisions of the Constitution and of the Statute could stand together.

Article III, section 20, of the Constitution, provided that the Legislature "shall not delegate to any special commission . . . any power to interfere with any municipal improvement:"

Held, that this proviso was prospective only, and did not affect a special commission theretofore existing.

Error to the Common Pleas No. 1, of Philadelphia County.

This was a petition for a mandamus setting forth:—

(1) That Samuel C. Perkins, Thomas J. Barger, and others, were a majority of the commissioners for the erection of Public Buildings in Philadelphia, appointed under the Act of 5 August, 1870 (P. L. 1871, p. 1548); that the commissioners had, in accordance with this Act, made contracts for the erection of Public Buildings, a large portion of which was already constructed, but that they were not yet completed.

(2) That by said Act the commissioners were authorized and required, until the completion of these buildings, to make a requisition on the councils of Philadelphia prior to the first of December of each year for the amount of money required by them for the erection of the buildings for the succeeding year, and the said councils were thereby required to levy a special tax sufficient to raise such amount, and the Mayor and all other city officials were thereby also required to aid in the execution of all that the commissioners might require; that in accordance with the Act the relators had on the 29th of November, 1876, made due requisition on the city councils for $1,500,000, as the amount required by them for the purposes of the commission for the succeeding year, 1877; but that the councils had refused to levy any tax to raise the amount so required or to make any appropriation out of their annual taxation.

The petition prayed for a writ of alternative mandamus, to require the defendants either to levy a special tax to raise the amount required, or to show cause why they should not do so.

A writ of alternative mandamus having issued, the respondents filed their return, setting forth:—

(1) That the relators were not the creditors of the respondents, but their mere agents, and, therefore, not entitled to a mandamus against those for whom they were acting.

(2) That, under the State Constitution, and the Act of Assembly, the respondents were vested with a discretion in the levying of taxes.

(3) That the respondents had by law no authority to levy such special tax as was prayed for.

(4) That by the Constitution the commissioners were forbidden to contract any debt or incur any liability except in pursuance of an appropriation previously made therefor by the city councils, and that it nowhere appeared that the requisition made by the commissioners was to provide for sums due under contracts made prior to the adoption of said Constitution, or that any appropriation whatever had been made by councils.

(5) That it did not appear when or what contracts for the erection of the buildings had been made, or whether the requisition was for money

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to be paid under contracts then made or only contemplated.

(6) That, if there were any contracts binding on the City, there was a full and adequate remedy by law for their enforcement.

The relators having demurred to this return, the Court below refused the prayer for a mandamus, and entered judgment for the defendants on the demurrer, BIDDLE, J., delivering the opinion. (See report of the case in the Court below, with the opinion of BIDDLE, J., in full, 4 WEEKLY NOTES, 167.)

To this judgment the relators took a writ of error, assigning as error the refusal of the Court below to grant the mandamus, and the entry of judgment for defendants.

The parts of the Act of August 5, 1870 (P. L. of 1871, p. 1548), relevant to the present case are—

SECTION 1. "Be it enacted, etc., that Theodore Cuyler, Samuel C. Perkins," (and others) "are constituted commissioners for the erection of the public buildings required to accommodate the Courts, and for all municipal purposes in the city of Philadelphia. . . . The said commissioners shall, within thirty days thereafter, advertise for proposals and make all needful contracts for the construction of said buildings as soon thereafter as may be found practicable, which contracts shall be valid and binding in law upon the city, and upon the contractors when approved by a majority of the said board of commissioners; and the said commissioners shall make requisition on the councils of said city prior to the first day of December in each year for the amount of money required by them for the purposes of the commission for the succeeding year, and said councils shall levy a special tax sufficient to raise the amount so required; *provided*, that said councils may at any time make appropriations out of the annual tax in aid of the purposes of this Act; *and provided, further*, that the amount to be expended by said commissioners shall be strictly limited to the sum required to satisfy their contracts for the erection of said buildings, and for the proper and complete furnishing thereof. . . . It shall be the duty of the mayor, the city controller, city commissioners, and city treasurer, and of all other officers of the city, and also the duty of the councils of the city of Philadelphia to do and perform all such acts in aid and promotion of the intent of this Act of Assembly as said commission may from time to time require."

George Biddle, for plaintiffs in error.

The Act of 1870 first creates a special commission to erect public buildings in the city of Philadelphia, and empowers it to make contracts binding upon the city; secondly, it imposes on the city councils the obligation to appropriate sufficient funds to build these buildings, either by a special tax or out of the proceeds of their general annual tax. That the Legislature had, in 1870, the right to pass an Act compelling the city councils to supply the necessary funds for the erection of these buildings, is decided in the case of the Board of City Trusts (City of Philadelphia *v.* Fox *et al.*, 14 Sm. 169), and the South Street Bridge case (City of Philadelphia *v.* Field, 8 Sm. 320), and is conceded by the Court below, and by the respondents.

The question, therefore, is, does any clause in the present Constitution, adopted in 1874, repeal this part of the Act? The language of Article III, Section 20, viz.: "The General Assembly shall not delegate to any special commission . . . any power to interfere with . . . any municipal improvement," etc., has been decided by this Court to be prospective only. (Indiana County *v.* Indiana Agricultural Society, 4 WEEKLY NOTES, 481; Lehigh Iron Co. *v.* Supervisors of Lower Macungie Township, 31 Sm. 482, S. C., 3 WEEKLY NOTES, 29.) The only other section affecting the Act of 1870 is Article XV, Section 2, viz.: "No debt shall be contracted or liability incurred by any municipal commission, except in pursuance of an appropriation previously made therefor by the municipal government."

We concede that this section prevents the Building Commissioners in future from making contracts binding on the city until an appropriation is first made. But the Act of 1870 imposes on the city councils the duty of making an appropriation, either by special taxation or otherwise. The language of this article gives to municipal bodies no discretion as to whether they shall make appropriations or not, when required to do so by law; and (unless it be assumed, as a premise, that they are invested with such sole discretion, independently of the State) the Legislature can always compel the city to make appropriations required for the performance of any duty, *e. g.*, to build a poor-house or a prison, etc. So, likewise, the proper department or commission can first compel the city to make the appropriation, and, this being done, make the necessary contracts.

If the Court holds that by the language of Art. XV, § 2, all discretion as to making appropriations has been conferred upon municipal bodies, then the Commonwealth can no longer require any municipality or county to perform any function against its will; for if the city councils can refuse to make appropriations for the police department, board of health, or board of education, they can stop the performance of these functions altogether. But this was not intended by the Constitution. For example, Article X provides that "the General Assembly shall provide for the maintenance and support of a thorough and efficient system of public schools." Now, were school boards constituted for all cities by a general law which required the councils to make appropriations for public schools at a certain rate, neither the school board nor the Commonwealth could, under respondent's construction, compel an appropriation from a city or county that chose to refuse.

J. Howard Gendell and *E. Spencer Miller* (with whom were *C. E. Morgan, Jr.*, and *Wm. Nelson West*, City Solicitor), for defendants in error.

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The true construction of Article XV, § 2, is that cities shall henceforth control their own expenditure, and hence, that all discretion as to the levying of taxes shall be exclusively vested in them. It was designed to render the recurrence of such cases as the South Street Bridge case (City of Philadelphia *v.* Field, *supra*) impossible in the future. See also the opinion of THAYER, P. J., in The Park Commissioners *v.* The City (2 WEEKLY NOTES, 124), and also the Debates in the Constitutional Convention (vol. vi. pp. 232, 234), where this very Building Commission is discussed. The word "appropriation" does not refer to the source from which the subject of appropriation is to come, but the object for which it is intended; and means that which is deemed fitting and appropriate for the object by the party who is to make it, that is, the City Councils.

Hence the words, "No debt shall be contracted . . . . except in pursuance of an *appropriation* previously made therefor by the municipal government," mean that unless the city councils designate what they deem proper and fitting to be done upon these buildings, by making an appropriation, no debt shall be contracted. This construction is strengthened, when we recollect that by Article III, § 20 (*supra*), the Constitution had already prevented the creation of any future commission of this kind. Unless, therefore, Article XV, § 2, refers to existing commissions, there will never be anything for it to act upon.

[AGNEW, C. J. Is not, according to your argument, the provision in the Constitution *ipso facto* a repeal of that portion of the Act of 1870 which requires the city councils to make the appropriation asked for?]

It is not necessary for our argument to go so far. We say that the commissioners are now obliged to consult with councils, and the latter can then decide how much they will appropriate each year.

[AGNEW, C. J. Were not the councils bound to appropriate, before the Constitution?]

Yes.

[AGNEW, C. J. Then is not the question in the case, whether or not the Constitution, of its own force, repeals so much of the Act of 1870 as imposes upon the city councils the obligation to make the appropriation, when asked for?]

Our case does not require us to go so far.

But the mandamus prayed for in this cause could not, in any case, issue. The Court now, in 1878, are asked to reverse the judgment below, and direct to be issued a mandamus to compel the city councils to levy a special tax for the now past year, 1877, which is impossible. Besides, the individuals who constituted the city councils in 1877 have gone out of office, and the present councils, their successors, are not parties to this proceeding. A judgment on a mandamus ordering the performance of an official duty against an officer, as if yet in office, when, in fact, he had gone out after service of the writ and before judgment, is void. Such a judgment cannot be executed against his successor.

The Secretary, etc. *v.* McGarrahan, 9 Wallace, 298.

This proceeding, moreover, is instituted by a *majority* only of the Commissioners; no discussion of the matter and the resolution thereon by the whole Board is averred. McCready *v.* The Guardians of the Poor (9 S. & R. 94) shows that the majority will conclude the minority only when they are all assembled. So SHARSWOOD, J., says in The State Road (10 Smith, 332): "Being an authority of a public nature, it is settled that all must convene, and deliberate, although a majority may decide," citing—

Chad's Ford Turnpike, 5 Binney, 481.

So far as contracts already made are concerned, such as that with the Messrs. Struthers, which is to furnish the marble work for $5,000,000, they have an ample remedy at law, whether this mandamus be refused or not.

Geo. W. Biddle, in reply.

Article XV, § 2, ordains that "no debts shall be contracted . . . . by *any* municipal commission," not merely by any *special* commission. While the creation of *special* commissions in the future is forbidden by Article III, § 20, it does not forbid the creation of new city departments, or Boards, by *general* legislation. The language of Article XV, § 2, is meant to apply to these bodies, which are, in fact, commissions, and many of which are created for cities of the third class by the Municipal Act of 1874 (Pamphlet Laws, p. 257). While it does undoubtedly also apply to this and all existing commissions, it is not to these alone, but to all similar bodies called into being by future general laws. The argument, therefore, that, unless it be construed to affect the powers of this commission, this Article will practically have no operation, is without foundation. It is meant to prohibit a city department making contracts unless the very money to be paid under them has actually been appropriated by the city government, and thus prevent the incurring of floating debt. The power to create debt without *at the time* making an appropriation for it, is now left nowhere but in the City Councils themselves, as was said by this Court in the Callowhill Street Bridge Case (Tatham's Appeal, 30 Sm. 470).

As to the objection that a majority only of the commissioners cannot sue, the commissioners are not plaintiffs, but merely relators. Whatever discretion they have was exercised in making the requisition upon the Councils, and in fixing its amount. If, after this, the commissioners had

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not instituted this proceeding, the Commonwealth, through her Attorney-General, could have done so, making these commissioners, as well as the City Councils, respondents. Any one commissioner, after the amount had been fixed, and the requisition made by all, could have used the name of the Commonwealth to institute this suit.

March 11, 1878. THE COURT. On every hand it is admitted that the Act of Assembly of August 5, 1870, providing for the erection of public buildings in the city of Philadelphia, is constitutional and is law, except so much as has been repealed by Section 2, Article XV, of the new Constitution. It ought to be as generally conceded that Courts have no power to repeal a statute, and that all denunciations of it as a scheme to obtain money from the people without consent of their immediate representatives, or as a measure that tries to the uttermost the law-abiding character of the citizens, may be properly considered by a constitutional convention or the Legislature, but not by a tribunal whose sole duty is to ascertain and say what the law is. Where the expression of the lawgiver is clear, even if the object of the law be odious, no construction can nullify it. In such case it will be strictly construed. To elude a statute by a pretense of respect for the intention of its makers, and falsely interpret what has no need of interpretation, is the basest form of its violation. A statute can be repealed only by an express provision of a subsequent law or by necessary implication.

These and other long-received rules should not be thrust aside because they are trite. The Act of 1870 constituted certain citizens, with power to fill vacancies, commissioners for the erection of public buildings in the city of Philadelphia, and required them to organize, procure plans, employ a secretary, treasurer, solicitor, architects, and assistants, and do all other acts to carry out the intention of the statute. The location of the buildings was to be determined by a vote of the electors at the general election in October, 1870. Within thirty days thereafter the commissioners were to advertise for proposals, and as soon as practicable make all needful contracts for the construction of said buildings, which contracts shall be valid and binding upon the city. "The said commissioners shall make requisition upon the councils of the city prior to the first day in December in each year for the amount of money required by them for the purposes of the commission for the succeeding year, and said councils shall levy a special tax sufficient to raise the amount so required." "Said councils may, at any time, make appropriations out of the annual tax in aid of the purposes of this Act." The amount to be expended by said Commissioners is strictly limited to the sum required to satisfy their contracts for the erection of said buildings and for the furnishing thereof. "It shall be the duty of the Mayor, the City Controller, City Commissioner, and City Treasurer, and of all other officers of the city, and also the duty of the councils of the city of Philadelphia, to do and perform all such acts in aid and promotion of the intent and purpose of this Act of Assembly as said commission may from time to time require." Such are the terms of the Act.

The section of the Constitution relied on as abrogating the statute is: "No debt shall be contracted or liability incurred by any municipal commission, except in pursuance of an appropriation previously made therefor by the municipal government." Obviously this prevents new contracts until appropriations to pay for them shall have been made. The Commissioners cannot expend money in excess of the sum appropriated —the indebtedness of the city shall not be increased beyond the means provided for payment. To that extent is the statute modified or repealed. Necessary implication can go no further. There is no positive repugnancy between that section of the Constitution and the other provisions of the statute. Saving that all liabilities incurred shall be in pursuance of previous appropriation by the municipal government, the provisions of the Constitution and the statute can stand together. The Commissioners make the requisition for the work, for its execution is theirs; the councils appropriate the means, and then only can contracts be made to bind the city. Had the Act required the municipal government instead of the Commissioners to erect the buildings, followed by an amendment directing that government to first make appropriations for the work, and contract no liability in excess thereof, no one could understand the amendment as curtailing the powers or duties of the government in any other respect. Equally clear is it that every duty imposed by the Act of 1870 upon the Commissioners and upon the councils and officers of the city continues in full force, excepting the one modification. To read the law is to know that all power and discretion in the erection of the public buildings have been entrusted to the Commissioners, and the power and duty of making appropriations and raising the money have been imposed upon the councils.

The will of the law-making power appears in plain and distinct expression; nevertheless, it may be well for a moment to consider the context of the Constitution and the expressed object of its framers, as bearing on the true meaning of section two, Article XV. Confessedly, section twenty, Article III, avoids no law relative to any commission created prior to 1874. The reports of the debates show much discussion of the subject, repeated attempts to amend that section so as to annul all laws creating such com-

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missions, denunciations of various commissions, including the Building Commission of Philadelphia, and a persistent refusal by the convention to insert a word which would abolish then existing commissions, or limit the powers which had been given them. Section two, Article XV was little discussed, no one speaking against it. Doubtless its mover and a few others believed it was broad enough to throttle all commissions. In itself it is in harmony with other provisions of the Constitution relating to municipal indebtedness, and, as already seen, has potency to prevent incurring liabilities in advance of the means provided for payment. Its scope and just bearing must have been understood by the strong majority of the convention which had so steadily rejected amendments designed to destroy commissions, to section twenty, Article III. That majority included able lawyers, who well knew that no statute or part thereof not positively repugnant would be repealed by implication. It cannot be inferred the convention intended what on a full discussion was refused. More easily may it be inferred that an unskilled hand missed its object. When the convention intended a repeal of existing laws, it was done in no ambiguous or uncertain phrase. For instance, Article III, section twenty-one, forbidding the enacting of acts relating to personal injuries, declares "such acts now existing are avoided." Section twenty-two, upon another subject, contains an identical clause. Section two, Article IX, declares certain tax laws void, and section one, Article XVI, provides that certain charters and grants shall have no validity. Moreover, section two, of the Schedule, expressly continues in force all laws not inconsistent with the Constitution, and now, as formerly, the Legislature have supreme control over all municipal corporations, subject only to expressed constitutional limitations. Formerly a special law could be made for every city; now the power must be exercised by general laws. Thus additional reason appears that the Act of August 5, 1870, is still valid.

That statute being the law to the parties, the case is not difficult. The learned Judge below was of opinion that if that Act were not made nugatory by the new Constitution, the right of the petitioners to the writ of mandamus would be uncontrovertible. In Park Commissioners *v.* City of Philadelphia (2 WEEKLY NOTES, 124), it was said: "That the relators are entitled to this remedy, and that the City Councils and all other municipal officers and agents are amenable to it, in cases where a clearly defined duty is imposed upon them by law, and which duty does not in any way reflect upon the exercise of official discretion, has been often determined and is too clear to admit of the least doubt." After a careful review of the Acts of Assembly relating to the Park Commissioners, it was said: "None of these laws gives the commissioners authority to make requisitions upon Councils for loans; on the contrary, there is a plain purpose that the city shall retain control over the subject." There the rule was correctly held, but it distinctly appeared that the law vested the discretion in the city government and not in the Park Commissioners. The rule was well stated and applied in Commissioners *v.* The City of Philadelphia (7 Phila. 298).

The conclusion to be deduced from the authorities is that where power is given to public officers, either in peremptory or permissive form, whenever the public interest calls for its exercise they are bound to act. If the power be judicial or discretionary, the Court will not control their deliberation or coerce their discretion. They may be ordered to do their duty, but must be left free to act according to the dictates of their own judgment. But when a ministerial act is to be done, a specific act or duty is enjoined, and if there is no other specific remedy, performance will be compelled by mandamus.

The petition of the relators sets forth the Act of Assembly, the organization of the Commission and entering upon their duties, the construction of a large portion of the buildings, which are unfinished, a requisition upon Council for $1,500,000, made November 29, 1876, and the neglect and refusal of the Councils to levy any tax or make any appropriation or otherwise aid in the promotion of the purposes of said Act as required. The return of the respondents makes no suggestion that the facts alleged in the petition are untrue.

Six assignments of cause against the writ are given and have been considered. But little more need be said in reference to the points they suggest. The first avers that the writ cannot issue at the suit of the relators, who are mere agents of the respondents. In this the facts are not as assumed. The Commissioners were not appointed by and are not subject to control of or dismissal by, and are not required to settle their accounts with, the Councils. They have no private interest in the premises which are not in common with other citizens. To them has been committed a public trust, which they cannot, if they would, transfer to another body without legislative action. They entered upon the duties of their office, have made contracts, have expended vast sums of money in construction of a large portion of the buildings which are at present unfinished. The Councils have refused an appropriation; the work stops. The duties of the Councils are sharply defined in the Act of 1870. While they disobey, the law is inoperative, and the construction suspended. When the Commissioners are thwarted in the performance of their duties by

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neglect of Councils to perform theirs, they may sue out the writ in the public interest. The second assignment avers that Councils are vested with a discretion in levying taxes and appropriating money; and the third that they have no power to levy a special tax for the expenses of the fiscal year commencing January 1, 1877. Whatever discretion is given them under other statutes, for other purposes, matters not in reference to their duty under the Act of August 5, 1870 In argument it was urged they had no power to levy a special tax because it was not done on the 1st day of December. It is sufficient to say that the presumption is that they refused to do their duty because of a belief that it was permissive and not absolute. Were it possible that they purposely neglected a known duty, the statutory command remained to appropriate the money and raise it by a special tax or out of the annual tax. Mistake or perfidy may delay, but cannot defeat the law. The law remaining, the duty continues and does not expire with the year 1877. The chief object of the law is construction of the public buildings, a work suspended by neglect of Councils to do a specific act, and that act is still required to be done, and when done, suspension ceases.

The last three assignments refer to contracts of the Commissioners. Nothing in the statute, as modified by the section in the new Constitution, requires, as a precedent condition to the duty of Councils to make the appropriations, specific information to be given of contracts made prior to 1874, or of those contemplated, which cannot be made except in pursuance of an appropriation.

Upon consideration of the whole case we are impelled to the conclusion that the learned Judge erred in refusing the mandamus. The return shows no cause against it. There is no averment that the sum required is unreasonable and unnecessary for the purposes of the statute, nor of any fraud or abuse of powers by the commissioners. It may be well to remember that the commissioners are not irresponsible or outside the pale of the law. Should they abuse their trust, fraudulently incur liabilities, or attempt to charge the city for anything not within the purview of the Act, the Courts are open for prevention, redress, or punishment. The law of the land, which has the means to compel a recalcitrant public officer to do his duty, provides for his restraint when he is proceeding to violate it, and for redress, or his punishment, when he has defrauded the public. Concerning legislation to vest powers in special commissions, the people have said that they will have no more of it, and at the same time refused to avoid existing laws giving such powers. The authority that enacts may repeal. But while a statute is in force no opinion of its wisdom or policy of any judicial or ministerial officer or private citizen will justify or excuse its violation.

The judgment refusing the writ is reversed, and judgment for the Commonwealth, and a peremptory mandamus awarded. The record is ordered to be remitted for the enforcement of this judgment.

Opinion by TRUNKEY, J.

Dissenting opinion by PAXSON, J., in which SHARSWOOD, J., concurs:—

Whatever we may think of its wisdom, no one at the present day doubts the legality of the Act of 5th August, 1870 (P. L. of 1871, p. 1548), creating the Building Commission. That question may be considered at rest. It follows that if said Act remains in full force and unimpaired, the relators are entitled to their mandamus. But, since the passage of said Act the fundamental law of the State has been changed, and two provisions introduced therein which seriously affect said Act. Section 20 of Article III of the Constitution provides that: "The general assembly shall not delegate to any special commission, private corporation, or association, any power to make, supervise, or interfere with any municipal improvement, money, property or effects, whether held in trust or otherwise, or to levy taxes, or perform any municipal function whatever." This command is addressed to the Legislature, and speaks for the future only. It was not intended to derogate from the powers granted to special commissions created prior to the adoption of the constitution.

Then we have Section 2 of Article XV, which is as follows: "No debt shall be contracted or liability incurred by any municipal commission, except in pursuance of an appropriation previously made therefor by the municipal government." This section was evidently intended to operate directly upon commissions existing at the time of the adoption of the Constitution. Such construction is apparent from its terms. That it was so intended by the framers of the Constitution clearly appears from an examination of the debates of the convention (Vol. 6, p. 232–4); public attention had already been drawn to the fact that irresponsible commissions imposed upon the city by legislation, and yet clothed with absolute control over the purse of the city in the prosecution of their work, were repugnant to our whole theory of government. It was known to the convention that the public buildings at Broad and Market Streets had been projected upon a scale of magnificence better suited for the capital of an empire than the municipal buildings of a debt-burdened city, and that the time might come when their further prosecution would become an oppression upon the tax payers too grievous to be borne, unless the councils, the immediate representatives of the people, should have a power of control

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over the amount to be annually expended. The result has fully vindicated the wisdom of the convention. What then is the effect of this section of the Constitution upon the Act of 1870? I agree that it does not repeal the Act. It does not abolish the commission; it permits the erection of the buildings to go on under their direction. Nay, more; I do not think it affects so much of the Act as makes it the duty of councils to provide the means for their completion. But I think it equally clear under this section that it is for councils to say to what extent the means shall be supplied, excepting in so far as contracts have been made by the commission prior to the adoption of the Constitution. That is to say, no new contract could be made by the commission after the adoption of the Constitution until an appropriation to pay therefor shall have been previously made by councils. In other words, the effect is to give the control of the purse to the city instead of to the building commission.

It was conceded upon the argument that the Constitution had modified the Act of 1870 so far as to prevent the commission entering into any new contract without an appropriation, and that the greater part of the sum demanded was for new work not contracted for prior to the adoption of that instrument. This much is clear. But, it was urged, that, because it is still the duty of councils to make appropriations, they are bound to appropriate any sum the commission may demand. I am unable to see the force of this reasoning. It is admitted the Constitution prohibits the making of any new contract without a previous appropriation. True, say the building commissioners, we cannot make a contract, but we have the right to compel councils to appropriate whatever sum we demand, and then we can contract. This view, in my judgment, is in direct conflict with the letter and spirit of Sect. 2, Article XV, of the Constitution, and its adoption by this Court practically expunges said section from that instrument. For if it does not apply to existing commissions it cannot apply at all, as the creation of any such special commission is prohibited for the future. I do not think the framers of the Constitution or the people who adopted it intended a vain thing when they introduced this section.

In view of the importance of this question I deem it my duty to place upon record my respectful but earnest dissent from the judgment of the majority of the Court.

July, '75, 84½. Feb. 6, 1878.

Kensington National Bank v. Yerkes, defendant, and the Wyoming Insurance Company, garnishee.

Fire insurance—Unsigned conditions printed on back of policy—When part of the contract—Interpretation of clause providing that policy should become void upon creation of an incumbrance on the premises—Confession of judgment, effect of.

Where a policy of fire insurance, among other provisions and express conditions, provided that the loss should be "payable in sixty days after the notice, proof, and adjustment thereof, in conformity to the conditions annexed to this policy," and certain unsigned provisions, entitled "Conditions of Insurance," were printed on the back of the policy, such endorsed and unsigned conditions are part of the contract between the insurer and insured.

One of the conditions printed upon the back of such a policy provided that "should there at any time, during the life of the policy, an incumbrance fall or be executed upon the property insured sufficient to reduce the real interest of the insured on the same to a sum only equal to or below the amount insured . . . . then the policy shall become void;" the insured confessed a judgment greater in amount than the value of the property:

Held, that the policy was thereby avoided, even though no execution ever issued upon such judgment.

An incumbrance "falls" upon a property when a judgment is entered.

Error to the Common Pleas No. 4, of Philadelphia County.

This was an attachment-execution in which the Kensington National Bank were plaintiffs, Charles T. Yerkes, defendant, and the Wyoming Insurance Company, garnishee. Plea, *nulla bona*. Upon the trial, before ELCOCK, J., it appeared that the Wyoming Insurance Company had issued to the defendant a policy insuring against fire, for five years from September 15, 1871, a barrel factory, in the sum of $2850.

The policy contained this clause:—

"The said loss or damage to be ascertained and estimated according to the true and actual cash value of the property at the time the same shall happen, and to be paid sixty days after the notice, proof and adjustment thereof, *in conformity to the conditions annexed to this policy.*"

Immediately following this clause were various provisos; such as that the policy should be void in case of other insurance not notified to the company; that the company should not be liable in case of insurrection, or invasion, etc. On the back of the policy were printed a number of sections entitled "Conditions of Insurance," the seventeenth of which was as follows:—

"The insurance by the policy shall cease at and from the time the property hereby insured shall be levied on or taken into possession or custody, under any proceeding in law or equity, and should there, during the life of this

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policy, an incumbrance fall or be executed upon the property insured, sufficient to reduce the real interest of the insured in the same to a sum only equal to or below the amount insured, and he neglect or fail to obtain the consent of the company thereto, then, and in that case, the policy shall be void."

On December 8, 1871, Yerkes confessed judgment to the Bank in the District Court of Philadelphia, for $148,614.03. In August, 1872, the insured property was burned, being worth at that time $60,000. No levy under the said judgment was ever made on the property. Yerkes gave the garnishee no notice of the judgment held by the bank. The garnishee offered no evidence, and the Court directed the jury that under the 17th section of the "Conditions of Insurance" they must find a verdict for the garnishee.

Verdict and judgment accordingly. A rule for a new trial was subsequently discharged (reported 1 WEEKLY NOTES, 508). Whereupon the plaintiff took this writ, assigning for error the instruction of the Court to the jury

A. Sydney Biddle and *R. C. McMurtrie*, for the plaintiff in error.

The conditions of insurance printed on the back of the policy are no part of the contract of insurance. There is no specific reference to them in the policy. Not only this but there are numerous conditions in the body of the policy, which was a very cogent reason why the insured should look no further. There was no evidence that his attention was called to these provisions on the back of the policy.

If it were a question of doubt as to what the contract was, it should have been left to the jury to determine whether the insured consented to this condition, without which express assent it could not form part of the contract. The cases of the liability of common carriers on tickets or bills of lading are in point. It is well settled that if a condition is printed on the back of such ticket or bill of lading, and the contract does not make it part of itself, it is to be considered nothing more than a mere notice limiting the common law liability. The defendants in such case must show that the notice was brought to the notice of the party to be bound by it.

Jefferson Ins. Co. *v.* Cotheal, 7 Wendell, 80.
Kimball *v.* Railroad Co., 26 Ver. 247.
Adams Express Co. *v.* Haynes, 42 Ill. 89.
M. C. Railroad Co. *v.* Hale, 6 Mich. 243.
McMillan *v.* Railroad Co., 16 Id. 74.
Limburger *v.* Westcott, 49 Barb. 283.
Moses *v.* Railroad Co., 4 Foster (N. H.), 71.
C. & A. R. R. Co. *v.* Baldauf, 16 Penn. St. 67.
Vernor *v.* Sweitzer, 32 Id. 208.
Beckman *v.* Shouse, 5 Rawle, 188.

The condition alleged to have been broken was only a promissory stipulation in the nature of a representation, and the Court should have left it to the jury to say whether the breach of this representation had increased the risk, instructing them that, if it had not, the breach of the condition was no defence.

Pawson *v.* Watson, Cowper, 785.
Allston *v.* Ins. Co., 4 Hill, 329.
Burritt *v.* Same, 5 Id. 188.
Ins. Co. *v.* Monninger, 18 Ind. 359.

The condition is ineffectual for the purpose. It must be strictly construed, because it is an exception to the contract. These words are taken from the New England policies, where they mean a levy or sale divesting the title. A debtor's interest is not lessened in his property by the fact that it is incumbered with his debts. To have this effect, the debtor must be hopelessly insolvent.

Samuel Dickson (with whom was *John C. Bullitt*), contra.

That the seventeenth condition was a part of the policy is settled by—

Desilver *v.* The State Mutual Ins. Co., 2 Wr. 130.

The only remaining question is whether the Court below rightly construed the condition. Their ruling is supported by the case of Brown *v.* The Commonwealth Insurance Co. (5 Wright, 189), which arose upon a condition absolutely identical with the present.

Feb. 18, 1878. THE COURT. We think the conditions printed upon the policy form a part of its terms. Not only do they in fact appear upon the instrument itself, accepted by the assured and presumably were noticed by him, but they are referred to in the body of the policy, which declares that payment is to be made sixty days after the notice, proof, and adjustment of the loss "in conformity to the conditions annexed to this policy." The assured was thus referred to the "annexed conditions" in order to find those affecting the payment of his loss, and necessarily must discover the others in doing so. It would be going too far to say that he did not accept his policy affected by the conditions printed upon it, and thus referred to. Under the 17th condition the policy ceases *ipso facto* when the insured property is levied upon or taken in possession or custody, under any proceeding in law or equity. The next clause is "and should there, during the life of this policy, an incumbrance fall or be executed upon the property insured, sufficient to reduce the real interest of the insured in the same to a sum only equal to or below the amount insured, and he neglect or fail to obtain the consent of the company thereto, then and in that case the policy shall be void."

The former clause having relation to an act of law, this is intended to protect the company against the act of the assured himself. Hence if he suffer a judgment to be entered against him the incumbrance *falls*, and if he executes a mortgage, it is *executed* upon the property, and he must give notice and obtain consent; or other-

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wise, if the incumbrance gives another a right and reduces his own interest in the property to a sum not exceeding the amount in the policy, he forfeits his policy.

PER CURIAM. Judgment affirmed.

July, '75, 75. Jan. 17, 1878.

Connelly et al. v. City of Philadelphia.

Sheriff's sale—Discretionary power of Court to set aside sheriff's sale—Power of revision by the Supreme Court.

The Court of Common Pleas has the power to set aside a sheriff's sale at any time before the deed is acknowledged, or even after that act, if done at the same term.

Such Court may intervene to protect the rights of a judgment creditor, where it has reason to believe that his rights have been compromised, either through fraud or mistake.

Quære, whether the Court of Common Pleas has the power to intervene after final action by the sheriff, and settle conflicting claims of mere bidders.

Error to the Common Pleas No. 1, of Philadelphia County.

The facts of this case were as follows:—

The city of Philadelphia proceeded, in the ordinary way, under a tax-lien for $219, to the sale of certain property of Robins, owner, and Task, registered owner. There being two lots, the property was sold in two parcels, as No. 1 and No. 2. No. 1 was sold to Louis E. Pfeiffer for $125; and Patrick J. Connelly signed the book, and was recognized by the sheriff as purchaser of No. 2 for the same amount. Two days thereafter a rule was taken by the City to set aside the sale of No. 2, and pending its disposition the *levari* was returned, as to No. 2, "sold to Connelly for $125," and the deed was executed, acknowledged, and delivered by the sheriff to Connelly.

Upon the hearing of the rule, depositions were read by which it appeared that Louis E. Pfeiffer, solicitor of the Lien Department of the Delinquent Tax Office, had bid the highest price, being $125 for No. 2; that it had been knocked down to him by the auctioneer, but that upon appearing at the clerk's desk a few minutes afterwards for the purpose of signing and complying with the conditions of sale, he found that some person had anticipated him by signing as purchaser.

The Court ordered that the sheriff's deed delivered to Connelly be returned to the prothonotary for cancellation.

Connelly thereupon took this writ, assigning as error the order of the Court.

John Dolman, for the plaintiff in error.

A purchaser at sheriff's sale becomes seized of an estate in land, and when an order is made depriving him of that estate, a court of error has jurisdiction to review such order, and correct any error therein.

Young's Appeal, 2 Pa. R. 380.

This case is a contest between rival bidders. The decision of the sheriff, and return of the *levari*, is conclusive. The sheriff's decision can only be properly impeached by an action at law.

Charles E. Morgan, assistant city solicitor, for the defendant in error.

The action of the Court in setting aside the sheriff's sale, under a rule granted prior to the execution of the deed, is not the subject of a writ of error or appeal to this Court. It is an act belonging entirely to the discretionary powers of the Court below.

The only exception to this rule is where there is no exercise of such powers until after the title of the purchaser has been confirmed by the sheriff's delivery of a deed to him.

Rees *v.* Berryhill, 1 W. 263.
Sloan's Case, 8 Id. 194.
Jackson *v.* Morter, 3 WEEKLY NOTES, 140.
Hoffa's Appeal, 3 Id. 144.
Laird *v.* McCarter, 2 Id. 213.

Feb. 11, 1878. THE COURT. There is no doubt about the power of the Court of Common Pleas to set aside a sheriff's sale at any time before the deed is acknowledged, or even after that act if done at the same term. The motion to set the sale aside in the case now under consideration, was made before the acknowledgment. That the deed was executed, acknowledged, and delivered after the motion and pending the rule, does not affect the question, for the authority of the Court over the matter could not be thus divested. The Court having, then, the power to do what it did, and the exercise of that power being discretionary, ordinarily it cannot be revised by the superior tribunal. It is said, however, that the Court below exceeded its legitimate authority, in that it undertook to set aside the sheriff's sale at the instance of a mere bidder, whose rights in the premises were fully and finally determined by the sheriff's return. Conceding this to be a contest between bidders only, we are, nevertheless, not prepared to say that there may not be cases in which the Court might properly intervene to protect the rights even of such persons. But we are not called upon to decide a proposition exactly of this kind. On looking into the evidence, which, as is said by Mr. Justice MERCUR, in the case of Jackson *v.* Morter (1 Nor. 291), we may do, not, indeed, to revise the conclusion of the Court as to the weight thereof, but to ascertain the ground of its action, we discover that the mover in the rule was the solicitor of the Lien Department of the Delinquent Tax Office. As this sale, which the Court set aside, was made upon a judgment obtained

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for the city, upon a claim for unpaid taxes due upon the property in controversy, we thus discover the contest to be between the judgment creditor and a bidder. That a Court may intervene to protect such a creditor, where it has reason to believe that his rights have been compromised, either through mistake or fraud, is not doubtful.

The solicitor bid in the property for a price sufficient only to cover costs, and, as he says, upon stepping up to the clerk's desk a few minutes afterwards, in order to sign and comply with the conditions of sale, he found Connelly had been ahead of him. Granting this to have been only a mistake, it is, nevertheless, obvious that if he is permitted to take the property, the city must lose its opportunity of making its taxes by a resale of the premises, which it would otherwise possess.

Now, as judgment creditors and mortgagees are often obliged to bid in property for the amount of costs, or costs and some previous lien, expecting to save themselves from loss by what they may afterwards realize from such property, we can easily see how important it is that a Court should have and exercise just such a power as that put forth in this case; otherwise the creditor may be constantly exposed to the risk of losing his just debt by the trick or mistake of a bidder backed by the sheriff.

Proceedings affirmed.

Opinion by GORDON, J.

July, '77, 113. Feb. 1, 1878.

Barclay v. Wainwright.

Mechanic's lien—What the subject of—Improvement lease, what constitutes—Affidavit of defence, when sufficient—Parol evidence, admissibility of, to contradict a written instrument.

Although, as a general principle, the estate of a lessor is not bound by a mechanic's lien filed for work done at the instance of a lessee, yet, if it appears that the possession of the lessee is under an improvement lease, the land will be bound.

In order to constitute a lease an improvement lease, it is not necessary that it should contain an express covenant on the part of the lessee to build; it is enough if it be shown that such was the manifest intention of the parties.

An allegation, in an affidavit of defence to a *scire facias* sur mechanic's lien, that the materials were not furnished upon the credit of the land, but solely upon the transfer of certain securities to the material man, is sufficient to carry the case to a jury.

Parol evidence is admissible to show that at the time of the assignment of a mortgage to a material man, as collateral security for his debt, it was expressly agreed and made part of the consideration of such assignment that no proceedings should be taken by mechanic's lien until the maturity of the mortgage, even though it was written in the assignment that by reason thereof the right of the material man to proceed upon his lien should in no wise be waived.

Hopper *v.* Childs (7 Wr. 310), and Reid *v.* Kenney (4 WEEKLY NOTES, 450), distinguished.

Error to the Common Pleas No. 1, of Philadelphia County.

This was a *scire facias* sur mechanic's lien filed against William K. Barclay, owner, and Ransom Rogers, contractor, for lumber furnished towards the erection of a theatre upon a lot of ground at the S. W. corner of Tenth and Callowhill Streets, in Philadelphia. The *sci. fa.* issued September 5, 1876. Barclay and Rogers both put in affidavits of defence, the former alleging as follows: That being the owner in fee of the premises, on which there was already a theatre erected, he leased them to the said Rogers for five years, with the privilege of purchase, etc., under the terms of said lease, and that he was in no other way interested in Rogers's business, except as set forth in the lease. That he believed and expected to prove that the plaintiffs were cognizant of this relationship of lessor and lessee existing between the two defendants; that they saw the lease, and on that account, under the advice of counsel, refused to furnish material and work until Rogers had secured them by a mortgage upon other real estate, and that the materials were not furnished upon the credit of said land, but solely upon the transfer of other securities to them by said Ransom Rogers.

The lease, dated June 1, 1875, referred to in the affidavit, and attached thereto, contained substantially the following provisions:—

That Rogers should pay a rent of $8840 per annum; but as he was about to expend large sums in improvements, this rent should not begin till the 1st of June, 1876, after which time weekly payments, of $170 each, should be made. It was provided, however, that if Rogers should not have a theatre well built, costing at least $17,500, in one year from the date of the lease, he should pay rent for the first year; but if such a building should be completed at any time before the termination of the lease, this first year's rent should be refunded. It was also provided that Rogers should pay, in addition to the rent, all license fees, and other charges, gas and water bills, Barclay paying the taxes, unless they were increased, in which case Rogers should pay the excess, being entitled to a credit if they were diminished; that Barclay should not be called on for repairs, etc., or to insure; but that Rogers should insure for at least $15,000, and assign the policies to Barclay as security that Rogers would perform his covenants, Barclay, however, being bound, in case of a fire, to apply the money recovered on the policies to rebuilding. All structures or erections were to become the property of Barclay

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at the termination of the lease, and he was to have the right to buy all the personal property appurtenant to the theatre, at a value to be settled by reference if the parties could not agree. Rogers was not to use the premises for any unlawful purpose. He was allowed to assign or underlet. He had an option to buy on terms fixed at any time during the lease, Barclay, however, having the privilege, if Rogers did not buy for two years, upon giving sixty days' notice, to sell said premises to anybody who would buy, etc.

The affidavit of Rogers set forth, that in May, 1876, he agreed with the plaintiffs to procure them a certain mortgage, which was to be assigned to them in full satisfaction and payment of the debt due them. That he procured the mortgage, had an assignment executed to the plaintiffs, and that at an interview held with them for the purpose of settlement, a written agreement was made between himself and them, which was attached to his affidavit, and as to the construction of which agreement he averred "that it was then and there distinctly understood and agreed between plaintiffs and deponent, that no proceeding should be had upon said mechanic's claim until the maturity of said mortgage, which agreement was the consideration of said assignment, and upon the faith of said agreement deponent signed said paper."

The agreement so attached, after reciting the facts of the indebtedness, and the assignment of the said mortgage as collateral security, said mortgage being payable in May, 1877, proceeded as follows:—

"And it is hereby expressly understood and agreed, by and between the said parties hereto, that the assignment of the said mortgage (which is to be made to Chandler P. Wainwright individually) is not to be taken as a payment or satisfaction of the said claim of Wainwright & Bryant, for lumber, as aforesaid, unless the said mortgage, when due, shall be promptly paid, with interest, to the said Wainwright & Bryant; and nothing herein, or in connection with the taking of the said assignment of mortgage, shall be construed to be a waiver of the right of the said Wainwright & Bryant to proceed against the said theatre, and the lot upon which the same is erected, on the southwest corner of Tenth and Callowhill Streets, under the Act securing to mechanics and others payment for their labor and materials, and its supplements, known as the mechanic's lien law, but that the said Wainwright & Bryant shall be free to so proceed forthwith."

The plaintiffs took a rule for judgment for want of sufficient affidavits of defence, which was made absolute by the Court below (reported 4 WEEKLY NOTES, 323), whereupon the defendants took this writ, assigning for error the entry of judgment.

W. W. Wiltbank and *E. Spencer Miller*, for plaintiffs in error.

Since the Act of 1836, it has been well established in Pennsylvania that a leasehold interest is not the subject of a mechanic's lien.

Church *v.* Griffith, 9 Barr, 117.
White's Appeal, 10 Id. 252.
Haworth *v.* Wallace, 2 H. 111.
Schenley's Appeal, 20 Sm. 98.

The contract in this case was a lease, and not under a building agreement. It is true that no rent was to be charged for the first year, but that was a mere encouragement to take the lease; and although a new building was to be erected under its terms, it must be remembered that to do so, the original structure had to be first pulled down. Barclay did not require, or stipulate, that either of these things should be done; and what Rogers did was not at his instance. Rogers, indeed, was not bound to do anything. He had merely a license to build if he chose. The essential distinction would appear to be, that, when the lease contains a covenant on the part of the lessee to build, then the lease becomes a mere building agreement in disguise.

Woodward *v.* Leiby, 12 Cas. 437.
Leiby *v.* Wilson, 4 Wr. 63.
Fisher *v.* Rush, 21 Sm. 40.
Reid *v.* Kenney, 4 WEEKLY NOTES, 450.

In the case last cited, the Court distinctly decided that, to amount to a building agreement, the contract must compel the lessee to build.

In the case at bar there is no covenant to build. It is left to the option of the lessee. If he build, it is for his own benefit, not for the advantage of the owner.

As to the averment made in the affidavit of Rogers, concerning the time agreed to be given before commencement of proceedings under this lien, the Court below disregarded it under the impression that the verbal agreement contradicted the written one. But, under Lippincott *v.* Whitman (3 WEEKLY NOTES, 313) such evidence was clearly admissible. See also—

Powelton Coal Co. *v.* McShain, 25 Sm. 238.
Caley *v.* Phila. & Chester R. R., 30 Sm. 364.

S. E. Megargee and *James W. Latta*, for defendants in error.

This paper may be styled a lease, but it is, in reality, the strongest kind of a building contract between Barclay and Rogers, by which the latter was to build a theatre, costing at least $17,500, upon the lot of the former, in consideration whereof Rogers was to have a lease of the premises for five years at a nominal rental, pay no rent for the first year, and also have the privilege of purchasing the property at a fixed price. Barclay had it in his power to *compel* Rogers to build by the provision making Rogers liable for $8840 a year for the entire five years for what was an unproductive piece of property unless improved. What was the inducement to Rogers to "build a theatre upon his lessor's land?" It was this—"Erect a substantial theatre upon my lot costing at least $17,500," says his lessor by the lease, "and I will contribute $8840 towards the cost by charging you no rent for the first year;

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further, I will give you a lease for five years, and I will also permit you to purchase the property at a fixed price upon easy terms."

To say that in this case "there is no *covenant* to build," is to raise a question of no importance to the issue. There is not a line in any one of the cases cited, as to improvement-leases, which rest the decision upon the fact that there was, or was not, a covenant to build, *contained in the lease*. In several of the cases there was no such covenant. The question is, is there a *contract* to build?

As to the agreement between Rogers and the mechanics' lien men, by its terms the latter certainly reserve to themselves all right under the lien law, and leave themselves free to proceed forthwith. And it will take very strong evidence to show that forthwith meant one year thence. Rogers does not set forth in his affidavit that this verbal agreement occurred at the time of the execution of the paper, or that the agreement was signed by fraud, accident, or mistake. Nor does he allege his parol evidence clearly, precisely, or indubitably; and it is, therefore, not within even the modern liberal decisions allowing a written or sealed instrument to be contradicted by parol evidence.

Martin *v.* Berens, 17 Sm. 461.
Penna. R. R. Co. *v.* Shay, 1 Norris, 201.
Greenawalt *v.* Kohne, 4 WEEKLY NOTES, 497.

Feb. 25, 1878. THE COURT. It would not be easy, and might be dangerous, to lay down any general rule by which to determine, in all cases, whether an improvement-lease does or does not come within the intent and spirit of the 24th section of the Act of April 28, 1840 (Pamph. L. 474), so as to subject the ground and building to the lien of a mechanic or material man. As was said by Chief Justice LOWRIE in Woodward *v.* Leiby (12 Casey, 441), "We do not confound building contracts payable in rents with improvement leases; though we do not anticipate experience by any theoretical definition of their exact differences. Our most common improvement-leases provide only for such labor as is to be done by the tenant himself and his servants, and no question of mechanics' lien can arise on them. But contracts of letting and building are infinitely various in their forms, and no definition of ours can prevent this variety, for none would be bound to conform to it; and we must be content to ascertain, as cases arise, the special character of each contract, and the class to which it belongs."

It will not do, therefore, to hold, as we have been strongly urged to do by the learned counsel of the plaintiff in error, that the presence of an express covenant in the lease to build, is that which distinguishes a building contract from an improvement-lease. It is true there was such a covenant or agreement in Woodward *v.* Leiby (12 Casey, 437); Leiby *v.* Wilson (4 Wright, 63); and Fisher *v.* Rush (21 P. F. Smith, 40); but in Hopper *v.* Childs (7 Wright, 310) there was none. The lessors there agreed to let the lessee erect at his own expense a shingle mill, to allow him to use timber on the tract, and the lessee to pay the lessor a certain sum for every thousand shingles manufactured by him. It is true that in the latest case of Reid *v.* Kenney (4 WEEKLY NOTES, 452), the absence of the covenant to build was relied on; but it was not all that was relied on, for after stating that the lease contained a mere license, of which the lessee might or might not avail himself, the opinion adds: "His omission to build, or his actual building, in no wise affected the amount of the rent he was to pay."

Considering the whole agreement before us, we think it falls within the category of building contracts. It is true that there is no express covenant to build, but the amount of the rent the lessee was to pay was directly affected by his omission to build or his actual building. If he did proceed to erect the contemplated building, he was to be released from the payment of the stipulated rent for the first year. In effect, the lessor contributed this sum of $840 towards the erection of the building. This lease is undoubtedly a very ingenious instrument, but if we were to allow it to prevail as a mere improvement-lease, the lien of mechanics and material men might in every case be evaded.

We think, however, that there was quite enough in the affidavits of Rogers and Barclay to carry the case to the jury. The former swears very positively that at the execution of the agreement for the collateral, May 18, 1876, it was then and there distinctly understood and agreed between plaintiffs and deponent that no proceeding would be had upon said mechanics' claim until the maturity of said mortgage, which agreement was the consideration of said assignment, and upon the faith of said agreement deponent signed said paper. This is precisely within the case of Miller *v.* Henderson (10 S. & R. 290), and the facts, as sworn to by the affidavit, would be evidence of fraud; when, under all the cases, parol evidence is admissible to vary the terms of a written contract.

We think, also, there was sufficient in Barclay's affidavit to prevent the entry of the judgment below. He says that he believes, and expects to be able to prove, that the labor and materials for which the claim has been filed, "were not furnished upon the credit of said land, but solely upon the transfer of other securities" to the plaintiff by the contractor, as he has narrated in the affidavit. If made out to the

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satisfaction of the jury, this certainly would be a good defence. (Presbyterian Church *v.* Allison, 10 Barr, 413.)

Judgment reversed, and a *procedendo* awarded.

Opinion by SHARSWOOD, J.

Jan. '78, 73½. Jan. 28, 1878.

Haskell v. Jones.

Promissory notes—Rights of holder for value—Note given for patent right—Act of April 12, 1872—Constitutional law.

The Act of Assembly of April 12, 1872 (P. L. 60), entitled "An Act to regulate the execution and transfer of notes given for patent rights," is not in conflict with Article I., Section 8, of the Constitution of the United States.

A note given for a patent right, not marked in accordance with the provisions of the Act of 1872, is valid in the hands of a *bona fide* holder for value, and is held by him freed from all the equities between the original parties, in the same manner as any negotiable paper.

Error to the Common Pleas No. 1, of Philadelphia County.

Assumpsit, by Haskell *et al.* against Jones, upon a promissory note drawn by the defendant to the order of one Baldwin, and by the latter endorsed to the plaintiffs. The plea was non-assumpsit. After a trial upon this plea, there was a verdict for the plaintiffs, subject to the opinion of the Court upon the following reserved point, viz., whether the plaintiffs were entitled to recover upon all the facts of the case, which, it was agreed, were as follows:—

That the plaintiffs are residents and citizens of Massachusetts; that they are the holders of the note in suit for value; that it was received by them in the regular course of business and before maturity; that they had no notice of the consideration for which the note was given, and were ignorant of the Act of Assembly of Pennsylvania, approved April 12th, 1872,* that the defendant gave the note in suit to Patton & Baldwin, the payees, and that part of the consideration for the note was the right to make, use, or vend a patented invention; and that the words "given for a patent right" were not written or printed on the face of the note.

The Court below, after argument, entered judgment for the defendant upon the point reserved *non obstante veredicto*. The plaintiffs took this writ, assigning for error the entry of judgment for the defendant on the point reserved.

Lewis Waln Smith, for plaintiffs in error.

The Act of 12 April, 1872, is in conflict with Section 8, Article I., of the Constitution of the United States, which conferred on Congress the power "to promote the progress of science and useful arts by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries," and is, therefore, unconstitutional and void. A long line of decisions by the Supreme Court of the United States has been rendered which bear upon the question what powers conferred on Congress under the Constitution are thereby exclusively vested in Congress, and, consequently, forbidden to the States.

Brown *v.* State Maryland, 12 Wheaton, 419.
Willson *v.* The Blackbird Creek Company, 2 Peters, 245.
Gibbons *v.* Ogden, 9 Wheaton, 1.
New York *v.* Milne, 11 Peters, 102.
Passenger Cases, 7 Howard, 283.
Cooley *v.* Board of Wardens, 12 Howard, 311.
Gilman *v.* Philadelphia, 3 Wallace, 713.
State Taxes Cases, 15 Wallace, 232, 284, and 300.

Similar Acts have been passed in various other States, and have uniformly been held to be unconstitutional.

Woolen *v.* Barker (Ohio), Am. Law Record, 1877, 236.
Ex parte Robinson (Ill.), 2 Bissell, 311.
Helm *v.* First National Bank, 43 Indiana, 167.
Hollida *v.* Hunt, 70 Illinois, 109.
Cranston *v.* Smith (Michigan), Albany L. J. 1877, 330.
Crittenden *v.* White (Minnesota), 9 Chicago Legal News, 112.
Patterson *v.* Commonwealth, 11 Bush (Ky.), 311.

But in this case the note does not fall within the law. The negotiability is only taken away when the words "given for a patent right" are written upon its face. By no system of reasoning can it be established that an innocent purchaser for value can be affected by the Act.

Edwin S. Dixon, for defendant in error.

The Act in question does not undertake to prescribe how a patent right can be used or sold; it simply regulates, as its title implies, the execution and transfer of notes given for patent rights.

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* The following is the Act referred to:—

"Whenever any promissory note or other negotiable instrument shall be given, the consideration for which shall consist in whole or in part of the right to make, use, or vend any patent invention, or inventions claimed to be patented, the words 'given for a patent right' shall be prominently and legibly written or printed on the face of such note or instrument, above the signature thereto, and such note or instrument in the hands of any purchaser or holder shall be subject to the same defences as if in the hands of the original owner or holder.

"If any person shall take, sell, or transfer any promissory note or other negotiable instrument, not having the words 'given for a patent right' written or printed legibly and prominently on the face of such note or instrument above the signature thereto, knowing the consideration of such note or instrument to consist, in whole or in part, of the right to make, use, or vend any patent invention, or inventions claimed to be patented, every such person or persons shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined in any sum not exceeding five hundred dollars, or imprisoned in the county jail not exceeding sixty days, or both, in the discretion of the Court." (P. L. 60.)

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An examination of the authorities cited by the plaintiffs in error (notably *ex parte* Robinson), will show that the Acts which the Court was called on to construe were very different from our Act. It has been expressly held that an action founded on a transaction prohibited by statute cannot be maintained.

Thorne *v.* Ins. Co., 30 Sm. 15.

Feb. 25, 1878. THE COURT. If the Act entitled "An Act to regulate the execution and transfer of notes given for patent rights," passed April 12, 1872 (Pamph. L. 60), makes absolutely void all such notes in which the words "given for a patent right" are not prominently and legibly written or printed on the face of such note above the signature thereto, there would be great reason for the contention that the Act is unconstitutional and void. No State can so interfere with the right of a patentee, secured to him by the Acts of Congress, to sell and assign his patent.

But such is not the operation of the Act according to its letter and spirit. By the express provision of the statute the only effect of the insertion of such words is that "such note or instrument in the hands of the purchaser or holder shall be subject to the same defences as if in the hands of the original owner or holder." By necessary implication notes without such words inserted in them remain on the same footing as before the Act. The sole object of the Legislature was to secure, so far as could be done consistently with the rights of innocent third persons, that notice of the consideration should be given to all who should take the paper. Nothing is better settled than that between the original parties to a note given for a patent right, it is a good defence to show that the alleged patent is void—in other words, that it is no patent right at all, and that the consideration has therefore entirely failed. (Bellas *v.* Hays, 5 S. & R. 427; Geiger *v.* Cook, 3 W. & S. 266; Holliday *v.* Rheem, 6 Harris, 465.) All who take with notice of the consideration, take necessarily subject to the same defence. There is nothing in all this which interferes with any just right of the holder of a valid patent under the Acts of Congress, nor that the maker of the note shall be permitted to show against a holder with such notice that it was obtained by fraudulent misrepresentation. This very plainly distinguishes our Act from the statutes of other States, which have been held unconstitutional.

To secure the insertion of these words the second section of the Act makes it a misdemeanor punishable by fine or imprisonment, or both, for any person "knowing the consideration of a note" to be the sale of a patent right, to take, sell, or transfer it without the words "given for a patent right" inserted, as provided by the Act. It is too plain for argument, that this section in no way affects the right or title of the holder of such a note, who takes it not knowing that the consideration was the sale of a patent. He commits no illegal or indictable offence. The negotiability of a note in which the required words are not inserted, is in no way affected by the Act. The innocent holder, who takes it before maturity for value without knowledge or notice of the consideration, takes it, as heretofore, clear of all equities between the original parties.

We think, therefore, that the Court below were clearly wrong in entering judgment *non obstante veredicto* on the reserved point in favor of the defendant.

Judgment reversed, and now judgment for the plaintiff upon the verdict.

Opinion by SHARSWOOD, J.

[*Cf.* Wright *v.* Baum, 1 WEEKLY NOTES, 107; Baldwin Manufacturing Co., Id. 107, 145; Butterfield *v.* Stine, Id. 413.]

Jan. '77, 127. Jan. 29, 1871.

Steelman v. Doughty.

Assumpsit, when it lies—Joint owners of a vessel—When liable inter sese in assumpsit for money had and received.

Where the joint owners of a vessel have agreed upon the share of profits in their business to be received by each owner, and have appointed one of their number general agent or managing owner, with the power of disbursing the dividends, assumpsit will lie against such owner for failure to pay over dividends ascertained to be due.

Error to the Common Pleas No. 4, of Philadelphia County.

Assumpsit, brought by Doughty and Kappella against Steelman for dividends amounting to $133.83 alleged to be due the plaintiffs as joint owners of the schooner Mary A. Hood, from earnings collected by the defendant as managing owner and not paid over to the plaintiffs. Pleas, the general issue, and a special plea which set forth that the plaintiffs, the defendant, and several others, having undertaken to build and navigate a certain vessel, the plaintiffs as builders, contracted with the defendant as managing owner, representing all the owners, to finish the schooner Mary A. Hood, but that the plaintiffs did not finish the vessel in the manner agreed on, by reason whereof she was unfit for sea; that a majority of the owners having directed the defendant to finish the vessel, he had done so at the cost of $133.83, and had charged the outlay to the plaintiffs on settling the accounts of the later business ventures; after which settlement he had paid them their share of profits subsequently earned;

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so that the plaintiffs were not entitled to the dividends, amounting to $133.83, in the declaration mentioned.

At the trial the plaintiffs proved to what share of the profits of the voyages of the Mary A. Hood they and the other owners were severally entitled; that dividends had been paid by Steelman, managing owner and captain, according to this proportion, with the exception of $133.83, which Steelman had retained out of the dividends to which the plaintiffs were entitled.

The defendant testified, in support of his plea, that the plaintiffs not having finished the vessel in accordance with their contract, he had been obliged to do so, and he offered in evidence bills for finishing amounting to $133.83, and testified that he had retained that sum out of the plaintiffs' dividends. This testimony was substantially denied by the plaintiffs.

The defendant requested the Court to charge, *inter alia:* "This being an action by a part owner against the representative of all the owners for an alleged share of dividends, the remedy is not at law, but the plaintiffs should proceed in equity, and the verdict must be for the defendant." *Refused.*

In the general charge the Court said: "The only question you have to consider is, what amount must be deducted from the share of the plaintiffs in the earnings of this vessel. If you find that the agreement was that the vessel was to be finished, and the vessel was unfinished, as the defendant alleges, when delivered, and that the defendant expended the amount sued for, or any part of it in completing her, then you will deduct what was thus paid out by the defendant."

Verdict and judgment for the plaintiff, for $133.87. The defendant took this writ, assigning for error the answer to his point as above and the charge as above quoted.

W. W. Wiltbank, for the plaintiff in error.

Joint owners of a vessel, though not technically partners, may for many purposes be regarded as quasi partners.

1 Parsons on Shipping and Admiralty, 91.

Assumpsit will not lie between these quasi partners for unsettled balances.

Ozeas *v.* Johnson, 4 Dall. 434.
M'Fadden *v.* Hunt, 5 W. & S. 468.

Independently of the ownership of the vessel, there was an actual partnership in her trading ventures. The defendant was merely the cashier of this firm. The effort here is, not to collect an ascertained balance, found due upon settlement of accounts, and remaining unpaid; but, to go back of a settlement of accounts, and recover upon a re-adjustment of them by a jury, and in the absence from the forum of all but one partner, outside of the claimants. The plaintiffs have taken the earnings allowed them as accruing after the adjustment, and have so affirmed that arrangement; and now they are going into the adjustment itself. The objections are twofold: first, it cannot be pretended there was an *assumpsit* on the part of the cashier, the managing owner, in their favor: and, secondly, the rights of the other owners, who have not been summoned, and have not had their day in Court, are prejudiced; for, if the money is to go to the plaintiffs, it is to go out of the treasury of the joint-owners of the vessel. The defendant's point should have been affirmed. By charging as he did, the Judge directed the jury to open, and re-adjust, a closed partnership account, without regard to its intricacy, or to the rights of the absent partners.

J. Warren Coulston, contra.

In this case the Judge's charge, as a whole, is a fair submission of the facts to the jury.

The account was stated, the balance was struck, the dividends of each owner were ascertained, and the defendants kept back a known sum of money. In such a case assumpsit would lie even between partners; *a fortiori* it will lie between joint tenants of a vessel. The action for money had and received may in many cases be substituted for a bill in equity, and is governed by the same principles.

Haldane *v.* Duche, 2 Dall. 176.
Miller *v.* Ord, 2 Binney, 382.

Feb. 11, 1878. THE COURT. The Court very fairly left to the jury the fact, whether the plaintiff owed anything upon the finishing of the vessel. The jury found this fact against the defendants. The dividends having been set apart in the hands of a common depositary, therefore enured to the use of the owners, and a right of action accrued to recover them from him. The verdict establishes that he had no right of set-off against the plaintiffs' dividend, and therefore the right of recovery was complete. We see no error in the record.

PER CURIAM. Judgment affirmed.

July, '75, 67. Feb. 6, 1871.

Delp v. Sowers.

Promissory note—Affidavit of defence—Averment that plaintiff is not a bona fide holder.

In a suit on a promissory note by the endorsee against the maker, the affidavit of defence averred that B., to whose order the notes in suit were drawn, was still, as the defendant believed and expected to be able to prove, the owner of said notes, and that the plaintiff's name was used as a mere cover to prevent a defence; and then set out a good defence against the payee:

Held (reversing the judgment of the Court below), that the affidavit was sufficient.

Moeck *v.* Littell (1 Norris, 354), approved.

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Error to the Common Pleas No. 1, of Philadelphia County.

Assumpsit by William H. Sowers against Earnest & Delp on two promissory notes drawn by the defendants to the order of Aaron F. Baker, and by him endorsed.

The affidavit of the defendant Delp averred "that Aaron F. Baker, to whose order the notes in suit are drawn, is still, as deponent believes and expects to be able to prove upon the trial of the cause, the owner of said notes. And that the said plaintiff's name is used as a mere cover to prevent the defendants from having a defence to them." The affidavit then showed a good defence against Baker. The same defendant, before judgment, filed a supplemental affidavit setting out the grounds for his belief that the payee was still the real owner of the notes.

The Court below entered judgment for want of a sufficient affidavit of defence (reported 1 WEEKLY NOTES, 443). The defendant thereupon took this writ of error, assigning for error the entry of judgment.

Andrew Mayer, for the plaintiff in error.

The allegation that the defendant expected to be able to prove that the payee was the real owner of the note was sufficient, as a good defence against the payee was disclosed.

Thompson *v.* Clark, 6 Sm. 33.
Eyre *v.* Yohe, 17 Id. 477.
Selden *v.* Neemes, 7 Wr. 421,

W. Wynne Wister, Jr., contra.

The averment of belief that the plaintiff is not the real owner of the notes is not sufficient (Knight *v.* Pugh, 4 W. & S. 445), but, even if so, the averment ought to be positive, as was the case in—

Selden *v.* Neemes, *supra.*
Eyre *v.* Yohe, *supra.*

An endorser of a negotiable note taken before maturity cannot be called upon to show either his title or that he gave consideration for it, unless defendant makes out a *prima facie* case that it was obtained by fraud or force, or that it was lost.

Gray *v.* Bank of Kentucky, 5 Casey, 365.
Sloan *v.* Union Banking Co., 17 Sm. 470.

Feb. 25, 1878. THE COURT. It was not contended that the affidavits of Delp do not set forth a good defence as against Baker, the payee. This not being in doubt, is a good defence shown against the plaintiff, who is the ostensible holder of the notes. The averment is "That Aaron F. Baker to whose order the notes in suit are drawn, is still, as deponent believes and expects to be able to prove on the trial of the case, the owner of said notes. And that the said plaintiff's name is used as a mere cover to prevent the defendants from having a defence to them."

This is substantially identical with the affidavit in Moeck *v.* Littell (1 Norris, 354), which was held sufficient. The supplemental affidavit in effect reiterates the averment. For the reasons given by MERCUR, J., in Moeck *v.* Littell, the assignment is sustained.

Judgment reversed, and a *procedendo* awarded.

Opinion by TRUNKEY, J.

[*Cf.* Moeck *v.* Littell, 3 WEEKLY NOTES, 341; Osmer *v.* Souder, Id. 155; Houston *v.* Allen, Id. 134; Brown *v.* Walton, Id. 76, and cases cited in note.]

Common Pleas—Law.

C. P. No. 1. March 9, 1878.

Fouse v. Carrick.

Security for costs.—Non-suit for failure to enter sec. reg.—Practice

Rule to enter non-suit.

On Feb'y 23, 1878, the Court made absolute a rule on plaintiff, a non-resident, to enter security for costs within ten days. This order not having been complied with, the present rule was taken, under Rule of Court XIV., § 1.

J. Alcorn, for the rule.

Rule absolute.

C. P. No. 3. Feb. 9, 1878.

Robert Hare Powel et al. v. Whitaker, in his own right and as Administrator of E. C. Cook.

Highways — Ground rent — Land damages—Opening of street through land subject to ground rent—The owner of the rent has a lien for arrears upon the damages awarded.

Amicable action of assumpsit.

Case stated.

On and before the 20th day of November, A. D. 1874, Thomas G. Cook was seized in fee simple and in possession of a lot of ground under and subject to a yearly ground rent of $1200, owned by Robert Whitaker in fee simple. On the 20th of November, 1874, an ordinance of councils directed the extension of a certain street through said lot. On the 13th of April, 1875, the said Thomas G. Cook, whilst still seized of said lot in fee simple and in possession, assigned and transferred to Robert Hare Powel & Company, to whom he was largely indebted, and in consideration of his indebtedness, all his right, title, and interest, claim and demand, to and in any and all damages due him on account of the opening of said street through his property, of which

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assignment Edward C. Cook then had notice. At that time proceedings were pending beforea jury for the ascertainment and assessment in money of the said damages. Prior to the report of said jury the said Thomas G. Cook by deed delivered on the 13th day of August, 1875, granted and conveyed the said lot of ground to Edward C. Cook, his son, in fee simple.

On the 13th day of November, 1875, the said Robert Hare Powel & Company, Robert Whitaker, and Edward C. Cook agreed without prejudice that the said parties should unite in the proceedings for the immediate ascertainment of and recovery of the said damages, and when ascertained and discovered, the same should be distributed as said parties might thereafter agree, or in default of agreement, as might be determined by due legal proceedings.

Thereafter, the said Edward C. Cook died, and letters of administration of his estate were granted to the said Robert Whitaker. On September 18, 1875, Robert Whitaker brought an action of covenant against Frederick Ladner and Thomas G. Cook to recover the arrears of said ground rent then due from February 1, 1872, to August 1, 1875, inclusive, with interest; and on the 19th October, 1875, recovered judgment thereon for $4633.39 against the said defendants, and the premises were sold by the sheriff upon execution of said judgment on the first Monday of December, 1875, to the said Robert Whitaker for $1000, whereof he received $626.33 on his said judgment. Thereafter the jury appointed to assess the damages consequent upon the opening of the aforesaid street duly made report, and their report having been confirmed finally by the Court of Quarter Sessions, the sum of $450 thus awarded now remains on deposit to be received by that party in whose favor may be the judgment of the Court.

Wiltbank, for Robert Hare Powel *et al.*

The enactment of the ordinance of November, 1874, immediately acquired for the city the right ot way, leaving the fee in the owner of the land. In consideration of this, Cook acquired a right to compensation in money. This right Powel & Co. took by the assignment, and thus the money later allowed by the road jury was wholly independent of the land, not subject to distress, nor at any time the property of the tenant so as to answer a judgment against him. Whitaker's proceeding was against the land after the right of way had been acquired by the city, and could affect neither the right of way in the city, nor the equivalent therefor which Powel & Co. held for value. Whitaker could impound nothing till his judgment was had; and then Powel & Co., as judgment creditors, had the prior right to the fund. An attachment laid by them would have held the money; and by the agreement the parties were not prejudiced by delay for proceedings before the jury.

Gity *v.* Dyer, 5 Wr. 470.
City *v.* Dixon, 2 Wr. 247.
Ex parte Hawkins, 13 Sm. 569.
1 Ldg. Cas. in Eq. 841, 842.
Cadman *v.* Cadman, L. R. 13 Eq. 470.

Geo. L. Crawford, for Whitaker, ground-rent landlord.

Road damages are to be applied to the discharge of liens.

In the matter of Noble Street, 1 Ashmead, 276.
Workman *et al. v.* Mifflin, 6 C. 371.

Accrued arrears of ground rent are a lien of themselves.

City *v.* Dyer, 5 Wr. 470.
Makinson's Appeal, 8 Phila. 381.

J. Eugene Spink, for Whitaker, administrator.

C. A. V.

Feb. 23, 1878. THE COURT. As the ground landlord by his deed had a right of re-entry, he had also a lien for the arrears of rent due at the time the proceedings were had in this case. (Bantleon *v.* Smith, 2 Binn. 146; Pancoast's Appeal, 8 W. & S. 381; Dougherty's Estate, 9 W. & S. 189; Ter-Hoven *v.* Kerns, 2 Barr, 96; Mather *v.* McMichael, 1 H. 301.) And as a ground rent is not apportioned by taking a part of the lot out of which it is reserved for a public highway (Workman *et al. v.* Mifflin, 6 C. 362), the landlord would be defenceless if he could not in some way be protected by the Courts. The method in which this may be done is clearly pointed out in the case last above cited. Says STRONG, J.: "The owner is a trustee for the lien holders, and the Courts will protect his rights."

As road damages are to be applied to the discharge of liens upon the land occupied by the road (Reese *v.* Addams, 16 S. & R. 40), and as these arrears of rent are largely in excess of the damages awarded, we are of the opinion that the landlord, having priority of lien, is entitled to them.

Nothing need be said of the claim of the administrator, for the above opinion, by giving the landlord his rent, disposes of the case.

Judgment for defendant.

Opinion by LUDLOW, P. J.

C. P. No. 4. March 9, 1878.

Gordon v. Stilz.

Affidavit of defence—Promissory note—Allegation of fraud by a holder of note immediately preceding the plaintiff, sufficient to put the plaintiff to proof of consideration.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit on a promissory note, by the holder against the payee. The note became due Decem-

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ber 20, 1877. The affidavit of defence set forth that the note was endorsed by the defendant to one Turner, of Cincinnati, for the purchase of certain articles under contract. "That subsequently, on the 23d of November, 1877, defendant made another contract with said Turner giving him notes for the sum, and at that time the previous contract was nullified and the note in suit was to have been returned to said deponent and was paid and fully satisfied by the said deponent, and other notes given. That said note, and one other note for the sum of $500, by the terms of the contract having been paid, were to have been returned to said deponent, and he had made demand for the return of the note in suit, which, as deponent had every reason to believe, was then in the possession of the said Turner, and that said note was passed away to the plaintiff above named in fraud of the rights of the said deponent."

A. P. Douglass showed cause.

An affidavit which puts the plaintiff on proof of any matter dehors the instrument sued on is sufficient to prevent judgment.

Jas. H. Wolfe, for the rule.

The information relied on is insufficient to justify his belief. He ought to show that the holder knew of the fraud alleged.

Boston Nat. Bank *v.* Bartholomew, 2 WEEKLY NOTES, 445.
Salter *v.* Askin, 1 Id. 388.

Rule discharged.

Orphans' Court.

Jan. 22, 1878.

Colgate's Estate.

Will—Demand for issue—Appeal from register—Practice—Testamentary incapacity—Insane delusions—Undue influence—Inofficious testament—What testimony sufficient to authorize issue—Act of March 15, 1832—Practice.

Sur appeal from Register and demand for an issue.

Rebecca Colgate died December, 1876. Decedent's only sister and sole heir asked for an issue to try the validity of her alleged will. The Register refused the issue, and upon appeal certified the record to this Court.

The testatrix left one dollar and a quarter to the contestant, the same amount to a niece, and bequeathed the balance in bank, some six hundred dollars, to a male friend, a stranger in blood, to whom also she devised her real estate for life. It appeared, from the testimony of contestant's witnesses, that the decedent was reputed to be "queer;" that she had been failing in mind for some years prior to the execution of the alleged will, although she attended to household duties, and managed her property. Her physician testified that her mind was impaired from excesses, and that she was subject to delusions, and mentioned instances of peculiar and capricious conduct. It also appeared that the principal beneficiary was constantly at the decedent's house, sometimes remaining all night. That the testatrix appeared to fear him, and be under his control. Other testimony showed that an improper intimacy existed between them. On the other side these allegations were contradicted, and the principal legatee asserted to be a man of good character and an intimate friend of the testatrix.

Charles Chauncey and *John T. Spencer*, for the contestant.

There are material facts in dispute, and the case ought to go to a jury.

Cozzen's Will, 11 Smith, 196.

The will is unreasonable, and requires an explanation from those who claim under it.

1 Redfield on Wills, 516.

The influence of an unlawful relation, as it respects testamentary dispositions, is jealously watched by the law.

Dean and Wife *v.* Negley & Cuthbert, 5 Wr. 312.
Boyd *v.* Boyd, 16 Sm. 283.
Pidcock *v.* Potter, 18 Sm. 342.
Mintzer's Will, 5 Phila. 206.
Bitner *v.* Bitner, 15 Sm. 347.

John H. Seltzer and *Thomas J. Ashton*, contra.

Feb. 23, 1878. THE COURT. The Act of March 15th, 1832 (Purdon, 1256, pl. 22), provides that "whenever a dispute upon a matter of fact arises before any Register's Court, the said Court shall, at the request of either party, direct a precept for an issue to the Court of Common Pleas of the county for the trial thereof." And it is held that the demand for an issue is of right when material facts are in dispute. (Cozzen's Will, 11 P. F. Smith, 196; Graham's Appeal, Idem, 43.) But it must be supported by sufficient evidence.

It is alleged by the contestant that the decedent was of unsound mind at the date of the execution of the paper purporting to be her last will and testament, and that the same was procured by fraud, imposition, and undue influence. These allegations are denied by the proponent, and testimony has been taken both in support of and against the validity of the alleged will. A dispute upon a matter of fact thus arises. But as the *trial* of the questions of fact involved is exclusively within the jurisdiction of another tribu-

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nal, it is our duty merely to ascertain whether sufficient evidence has been presented to entitle the appellant to the issue. And the rule appears to be that where the evidence is such as, if believed by the jury, their verdict against the validity of the will would be sustained, the demand for an issue should be granted. But, on the contrary, if the evidence would not justify the jury in finding a verdict in favor of the contestants, the issue should be refused.

The decedent died December 13th, 1876, having executed the paper purporting to be her last will and testament on February 10th, 1876, in the presence of two subscribing witnesses. The testimony shows that during a period of five years prior to its execution, decedent had been under the treatment of a physician, the principal disease with which she was afflicted being over-excitability of the brain; that the symptoms disclosing this condition of the brain continued to develop, aggravated by the inordinate use of snuff, intoxicating liquor, and other excesses, and culminated in the disease which occasioned her death. And this, from the testimony of the medical expert, was "softening of the brain, induced by repeated attacks of mania." He also testified, that from the condition of mind of the decedent, produced by frequently recurring attacks of excitement of the brain, she was rendered weak intellectually, liable to be easily influenced and imposed upon, subject to delusions and insane fancies, and that at the date of the alleged will she was mentally incompetent to make a will.

While it cannot be doubted that the right of every testator to dispose of his estate as he deems proper should be protected, and, as remarked by PAXSON, Justice, in Cauffman *v.* Long (1 Norris, 72), "a man's prejudices are a part of his liberty. He has a right to them; he may be unjust to his children or relatives; he is entitled to the control of his property while living, and by will to direct its use after his death, subject only to such restrictions as are imposed by law;" yet where he makes what is termed an inofficious testament, entirely overlooks those who are his nearest of kin, and without apparent cause, and contrary to repeated declarations as to the disposition of his estate, bequeaths to the heir but a pittance, while the enjoyment of the bulk of the estate is devised to a stranger; these facts, when accompanied by evidence of unsoundness of mind of the testator, sufficient to overcome the well-settled presumption of sanity, and cast the burden of proof upon the proponent of the will, should have weight in determining the application for an issue. The testatrix in this case bequeaths to her sister, the contestant, the sum of one dollar and twenty-five cents, and after directing the payment of other legacies of a trifling character, she bequeaths the balance of a deposit in a saving fund to a stranger, to whom she devises her real estate for life, and in addition bequeaths to his daughter a legacy of one hundred dollars. This devisee is a married man, and contestant alleges he was a paramour of decedent, and exerted such a control and influence over her, as to induce and procure the execution of the will by which he is so largely benefited. The testimony shows the decedent and the devisee to have been upon the most intimate terms. He visited her residence by day and night, at times remaining all night, and upon other occasions until a late hour, alone with decedent; that indelicate familiarities were indulged in in the presence of witnesses; that decedent and the devisee had maintained unlawful relations towards each other during a period of at least a year prior to the execution of the alleged will, and until her last illness, and that she was, in other respects, subject to his influence and direction.

In view of the entire testimony, the truth of which, as has been said, we are not to determine, we think sufficient evidence appears of the mental incapacity of the testatrix, and of the influence and control exercised over her by the beneficiary to the largest extent under her will, to make it incumbent upon those who claim under the will to prove that it was executed under circumstances untainted by suspicion, and that it is the voluntary act of the testatrix, free from improper bias and undue influence. The contestant is therefore entitled to the issue.

But we would state, however, that the counsel for appellant have overlooked the practice to be observed in cases of appeal from the Register, where an appeal is desired. (See Hoge's Will, 2 Brewster, 451; Will of Ellen De B. Shaw, 1 WEEKLY NOTES, 332; Will of Margaret Mealey, 3 Id. 370.) Here we have nothing before us but the appeal, which brings up the record of the Register alone and the testimony. There is no petition, setting forth the grounds of the appeal and the form of the issues. This should always be presented, otherwise the Court will be unable to determine whether the issues are, in form, issues of fact, and proper to be granted. Leave is given to the appellant to file the proper application, *nunc pro tunc*.

Appeal sustained, and issue awarded.

Opinion by HANNA, J.

[See Collins's Estate, 3 WEEKLY NOTES, 434; Wainwright's Estate, Id. 458; Dushane's Appeal, 4 Id. 78; Main *v.* Ryder, Id. 173.]

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U. S. Circuit Court—Equity.

Jan. 15, 1878.

Kemble v. The Wilmington and Northern Railroad Co.

Injunction—Railroad—Act of 8 April, 1861—Corporation restrained in equity from securing its stockholders the value of their stock by bonds and mortgages, no valid debt existing.

Hearing sur bill and answer.

Bill in equity, filed by the complainant, a citizen of the State of New York, on behalf of himself and other stockholders of the corporation defendant, for an injunction to restrain the defendant from executing a certain mortgage to its stockholders.

The bill and answer disclosed the following facts: The property and franchises of the Wilmington and Reading Railroad Co. had been sold under a decree of foreclosure of this Court. Pending the proceedings the first mortgage bondholders, for their mutual protection, entered into an agreement by which they were to deposit the bonds they held, together with fifty cents on each hundred dollars worth of bonds, to be used in purchasing the mortgaged premises. Certain parties were appointed attorneys-in-fact to buy the property, receive the conveyance in trust, and to distribute a bond or certificate of stock of the new corporation, to be organized upon said purchase, for each bond of the old corporation. The new bonds (thus agreed to be issued to the stockholders of the new corporation), were to be secured by a mortgage of the property of the new corporation. Under the agreement $1,203,100 of bonds were deposited, and $80,000 in cash. The property of the old corporation was bought by the attorneys-in-fact for $100,000, they taking the deed as individuals. The new corporation (defendant in this suit), was thereupon duly organized under the general Act of Assembly of April 8, 1861 (Corporations), and under a special Act obtained in Delaware for that purpose, and the new corporations in the two States were then merged, and the capital fixed at $1,500,000. Of the $100,000 purchase-money the attorneys-in-fact received the greater proportion as holders of the bonds of the old corporation which had been deposited. The balance of this sum, after satisfying the valid debts of that corporation, they paid to the defendant, and also executed to the latter a deed of the property in consideration of the agreement entered into among the bondholders, that a mortgage on the franchises and property of the new corporation should be made to the Fidelity Trust Co. as trustees of the bondholders of said corporation.

G. M. Dallas, for complainant.

No motive appears why this mortgage should be given but to cut out future indebtedness; a mere denial of the motive is insufficient. Whatever the power of a corporation to execute a mortgage, it is clearly *ultra vires* when there is no debt and no consideration. The deed to the stockholders and the payment of the dividend on the stock deposited were only an execution of the trust which the Court would have enforced, and were in no sense a consideration. Whether the complainant be one of the parties to the agreement or not, he is not estopped from contesting an unlawful act. The question is simply whether an act can be done *ultra vires*. The stockholders are already owners of the stock by the Act of April 8th, 1861 (Purd. Dig. 290), and now propose by their own act to duplicate their property.

Commonwealth *v.* Central Passenger Railway Co., 2 Smith, 506.

Mackason's Appeal, 6 Wr. 330.

Lewis Waln Smith, for defendant.

There was a consideration for the mortgage both in the payment of the amount received on the bonds deposited, which the original bondholders and the stockholders of the new corporation would otherwise have received, and in the conveyance of the property to the said stockholders. Whatever may be the effect of the Act of Assembly as to creating a corporation, certainly there was no corporation in Delaware until a special Act had been passed, and previous to that the attorneys owned the road in Delaware, which they transferred as has been said. Furthermore, the attorneys-in-fact took the property in trust with certain duties to be performed, and a Court of Equity compels the performance of such duties, and when they transferred the property the assignee took subject to the terms which bound the assignors. The property is held under a pledge to issue the mortgage. The stock was issued because the law does not permit mortgages to be given beyond the value of the stock issued.

Jan. 17, 1878. THE COURT. The Act of April 8th, 1861, under which the corporation defendant was organized, authorized the issue of bonds to an amount not exceeding the capital, secured by mortgage of the property and franchises. The Act does not authorize the issue of such bonds otherwise than for a new, adequate, valuable consideration increasing the available funds of the corporation. The bonds and mortgage which it is proposed to execute would not have this effect, but would be for a different intended purpose. The injunction prayed for is therefore decreed.

Oral opinion by CADWALADER, J.

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WEEKLY NOTES OF CASES.

VOL. V.] *THURSDAY, MARCH* 28, 1878. [No. 9.

Supreme Court.

Jan. '76, 116. Feb. 7, 1878.

Girard Life Ins. Co., Adm'rs of Magarge, v. Mutual Life Ins. Co. of New York.

Life Insurance — Forfeiture — Non-payment of premiums — Waiver of — Custom to receive overdue premiums — Effect of custom upon express terms of policy — Dividends — Tender, when unnecessary.

A foreign mutual life insurance company doing business in Pennsylvania, whose custom it was (following the general practice of such companies) to send to policy holders notices of the falling due of premiums, and to receive premiums at any time within thirty days after the same fell due, cannot, by omitting to send such a notice, and by refusing to accept a premium a few days overdue (the insured being in good health) enforce the forfeiture stipulated for in the policy, especially where the insured was entitled to a balance of dividends, in the possession of the company, exceeding the amount of the premium overdue.

Where a policy of life insurance has been declared forfeited by the company, it is not incumbent upon the insured to make tender of subsequently accruing premiums, and his failure so to do cannot be taken advantage of by the company.

Semble, that where a general dividend upon policies has been declared by a life insurance company sufficient in amount to cover an accruing premium, the company cannot enforce a forfeiture of the policy for a non-payment of the premium in cash, even though the exact amount of such dividend to be apportioned to each policy had not been ascertained at the time of the default.

Error to the Common Pleas No. 3, of Philadelphia County.

Case, by the Girard Life Insurance Company, administrators of Edward Magarge, against The Mutual Life Insurance Company of New York, upon a policy of life insurance issued by the defendant upon the life of the plaintiffs' intestate on April 14, 1863, for $10,000. The policy provided for a quarterly "premium of $51 to be paid on or before the 14th days of April, July, October, and January in every year during the continuance of the policy," and contained, *inter alia*, the following condition:—

"If the said premiums shall not be paid on or before the days above mentioned for the payment thereof at the office of the company, . . . then in every such case the said company shall not be liable for the payment of the sum assured, or any part thereof, and this policy shall cease and determine.

"It is also agreed that in every case when this policy shall cease and determine, or become and be null and void, all payment thereon shall be forfeited to this company."

Upon the trial (before LYND, J.) the plaintiffs produced receipts for the premiums from the inception of the policy up to and including that due on October 14, 1870. It appeared that Magarge neglected to pay the premium which fell due on January 14, 1871, on that day (which was Saturday), but on the following Monday his clerk, Rees, tendered it to the Company, who refused to receive it and declared the policy forfeited.

It was shown that the Company were in the habit of sending to the insured a notice of accruing premiums in the following form:—

"The premium on your policy No.— $—— will be due on the —— day of —— 187–.

(Signed) "F. W. VANUXEM, Agent.

"*N. B.* The office will not be responsible for any omission or miscarriage of notices, but they will be sent as regularly as possible, and solely as a matter of courtesy to the policy holders."

On the back of this notice was the following:—

"The Commissioner of Internal Revenue has decided that life insurance policies are subject to a stamp tax if the premium be paid after it is due."

No notice was received by Magarge of this accruing premium. There was also evidence that upon two previous occasions, to wit, on October 14, 1867, and on April 14, 1870, Magarge had failed to pay the premium upon the day it fell due; that it was tendered to the Company within two or three days afterwards by his clerk, and upon an affirmative answer being given by the latter to the question, "Is Mr. Magarge in his usual health?" it was accepted.

There was also testimony produced by the plaintiffs that it was a general practice among life insurance companies doing business in Philadelphia, to receive premiums if tendered within thirty days after falling due, provided the insured was in his usual health, or unless there was some good reason to the contrary, and that this practice was not as a simple act of grace or privilege to the insured, but was looked upon as a practice beneficial to the companies.

The Company defendant is a mutual company, and on the 1st of January, 1871, as was their custom, had declared out of the surplus of the preceding year a dividend upon policies then in force. Although on January 14, 1871, the amount of this dividend apportioned to Magarge's policy had not been ascertained, it was subsequently found to be $67.70. These apportionments of dividends were not usually completed until about the middle of February. On January 14, 1871, Magarge was in his usual health. In February, 1872, he died. No tender was ever made to the Company of the premiums

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accruing between January 14, 1871, and his death.

The foregoing facts having appeared in the plaintiff's testimony, defendant moved for a non-suit, which was granted, and a motion to take it off was subsequently refused by the Court in banc. The plaintiff took this writ, assigning as error, *inter alia*, the refusal to take off the non-suit.

John J. Ridgway and *Daniel Dougherty*, for plaintiff in error.

The testimony of the custom of serving notices and giving time for the payment of premiums, if believed by the jury, would have been sufficient to have supported a verdict for the plaintiff. The assured had the right to expect the same treatment in the future as he had received in the past. It was the manner in which the Company defendant had elected to treat the contract while it was for their own benefit, and they will not be permitted to change their course to the damage of the other party to the contract. Equity abhors a forfeiture, and will only enforce one in a clear case.

Maynes *v.* Ins. Co., 4 Bigelow's Life & Accident, 62.
Helme *v.* Ins. Co., 11 Sm. 107.

When the policy had once been declared forfeited, any future tender of premiums would be entirely unnecessary.

Bird *v.* Ins. Co., 2 WEEKLY NOTES, 410.

The accumulated dividend due on the policy was more than sufficient to have paid the premium, and should have been so applied or credited. A dividend is not a mere gratuity from the Company to its policy holders, nor is it a surplus of earnings, the fruit of careful management by the Company. It is a proportion of the premium charged to meet extraordinary losses, which is returned to the policy holder when not needed by the Company. The precise question has never been fairly met, but was noticed in—

Ins. Co. *v.* Gugsby, 2 Central L. J. (Ky.) 123.

We contend, however, that the ordinary principle of appropriation of payments governs, and the law will make the most equitable appropriation.

U. S. *v.* Kirkpatrick, 9 Wheat. 720.
U. S. *v.* Wardwell, 5 Mason, 82.
Postmaster Gen'l *v.* Faber, 4 Id. 333.
Gafs *v.* Stinson, 3 Sumner, 99.
Harker *v.* Conrad, 12 S. & R. 301.

A compulsory non-suit should only be entered in cases of the clearest right. Although the doctrine of a *scintilla* of evidence is exploded, testimony, however weak, from which a jury might fairly draw an inference favorable to the plaintiff, will entitle him to a jury trial.

Baker *v.* Lewis, 9 C. 301.
P. & S. R. R. Co. *v.* Gazzam, 8 Id. 340.
Smyth *v.* Craig, 3 W. & S. 18.

Wm. A. Porter (*Henry J. McCarthy* with him), for defendant in error.

The payment of premiums on the day when due is not only a condition precedent to the continuance of the policy, but it is a necessary means of self-preservation to the Company. There is no contract by the assured to pay; his agreement is to forfeit his policy if he does not. It could not be pretended that a company would have a right of action against a defaulting policy holder, and if the power to declare a forfeiture for non-payment of a premium upon the very day it falls due be denied, all control over his liability is taken away. The tendency of the decisions has been to hold parties to the terms of their bargain.

Robert *v.* Ins. Co., 1 Disney, 355.
Ins. Co. *v.* French, 4 Bigelow Life & Accident, 369.
Diehl *v.* Ins. Co., 8 Sm. 452.

The testimony of waiver of this condition in former instances was not sufficiently clear to have justified a verdict for the plaintiff.

Bouton *v.* Ins. Co., 25 Conn. 542.
Mentz *v.* Lancaster Ins. Co., 29 Sm. 475.

In the light of the authorities, then, the Court was not in error in holding that the plaintiff had violated a condition precedent, and had thus failed to make out a case sufficient for the consideration of the jury.

Feb. 25, 1878. THE COURT. The only assignment considered well-founded is the seventh, which charges error in entering the non-suit. It has not been alleged that the plaintiffs' case was defective in proof on any point other than evidence to relieve from the effect of non-payment of premiums. In determining the rightfulness of a non-suit for want of sufficient evidence of the claim, all that was received must be taken as true, and every inference of fact which the jury might draw from it in favor of the plaintiff is admitted. (Smyth *v.* Craig, 3 W. & S. 18.)

The defendants were a foreign insurance company doing business in Pennsylvania under her laws relative to such companies. Their licensed agent, by provision of the statute, has full power and authority to transact their business, either in person or by any subordinate agent or agents appointed by him. His office was in Philadelphia, and his dealings with the assured within the scope of his authority, and the customs of that place relating to life insurance affect and bind the Company as if their principal office were in that city.

The policy is dated April 14, 1863, and contains a condition that if the premium of $51 shall not be paid on the 14th days of April, July, October, and January of each year the Company shall not be liable to pay any part of the sum assured, the policy shall be void, and all payments thereon shall be forfeited to the Company. Every premium was paid up to and including the one due October 14, 1870. The agent usually sent

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notices to Magarge of the time payments would be due, and stated therein that they were sent only as a courtesy. Rees usually paid the premiums for Magarge, and on January 16, 1871, at the office of the agent, tendered the money for the premium which had become due on the 14th of that month. The money was refused and answer made that the policy was forfeited for non-payment of premium. Before that, on October 16, 1867, and April 16, 1870, he had paid overdue premiums to the agent, who, on an affirmative answer to his inquiry if Magarge was well, took the money and handed over the receipts. Magarge was in his usual health in January, 1871.

The memorandum furnished by the Company shows that the dividend due to Magarge for each of the four years preceding 1870 was ascertained in February of such year, and for 1870 in January. It also shows that the first payment of premium out of dividend was in 1868; that no dividend was used in such payment in October, 1867, nor in April, 1870; that the dividend due Magarge on October 16, 1867, amounted to $226.66, and on April 16, 1870, to $92.81. From Lambert's testimony the general dividends were declared at the end of each year, but the sum due to each policy could not be ascertained till several weeks thereafter. It is manifest that if the Company did not know the exact sum due on January 14, 1871, as dividend, they knew it exceeded the premium due at that date.

Upon the verity of the testimony of Mr. Ashbrook the jury would have been warranted in finding that it is a custom among life insurance companies to receive premiums, if tendered at any time within thirty days of the time they fall due, provided the insured is in usual health, and that this custom includes policies stipulating for forfeiture in case of non-payment of premium on the day.

In Helme *v.* Philadelphia Life Insurance Company (11 P. F. Smith, 107) it was ruled that such a custom curtails the generality of the clause, and shows that forfeiture was not demandable at the day, nor at all, if paid within the thirty days. The extension of time by the custom was likened to days of grace on commercial paper, and to the right of a tenant after the term named in his lease, to harvest and take his share of the way-going crop.

No vestige of reason is discoverable for refusing the premium tendered the second day after it became due. The Company had twice before taken it under precisely similar circumstances and in entire accord with the general practice. The second was just nine months before the declaration of forfeiture. If the notices were courtesies with forfeit-warning prods, other acts of the Company were opiates. If it be said that when the overdue premiums were received dividends to greater amount were due the assured, so they were at the date of refusal.

In the midst of a general usage to receive premiums after the stipulated day when the assured was in usual health, the Company should not deal with the assured as if recognizing the general practice, nor give him a notice with one hand and lull him to sleep with the other.

It was urged on behalf of defendants that payment of the premiums due on January 14, 1871, was a condition precedent, and, also, payment of the premiums after that date falling due before his death on February, 1872, and that equity will not relieve against losses resulting from non-performance of such condition through neglect alone of the sufferer. Be it so. The non-performance was because of defendant's refusal to take the premium when tendered. They declared the policy forfeited on January 16, 1871, and from that date persisted in treating it as a nullity. On another policy they had given to Magarge they gave notice, as was their custom, of the falling due of premiums, but none in reference to this. They still say it became void, and that no life was left in it. The assured lost nothing by omitting the farcical act of a formal tender every quarter, while the Company insisted the policy was dead.

It was not his neglect but their fault that the premiums were unpaid. When their evidence is heard, the case may present a different aspect.

Judgment reversed and *procedendo* awarded.

Opinion by TRUNKEY, J. PAXSON, J. dissents. WOODWARD, J. absent.

Jan. '77, 76. Jan. 21, 1877.

Yard's Appeal.

Will—Bequest, whether in joint tenancy or tenancy in common — Conjoint legacy—Lapsed legacy—Act of 31 March, 1812.

A bequest of a gross sum to A. and B., who were not of the kin of the testatrix, in consideration of services rendered and kindness shown by them to her during her life, though no words of severance are used, is a legacy to them as tenants in common, by virtue of the Act of 31 March, 1812, "concerning joint tenants"; and if one legatee die in the lifetime of the testatrix his moiety will not go to the survivor, but will lapse.

The Act of 31 March, 1812, abolishing survivorship in joint tenancy applies to legacies as well as devises.

Appeal from the Orphans' Court of Philadelphia County.

This was an appeal by Charles Yard from a decree dismissing his exceptions and confirming the report of the auditor in the estate of Mary P. Loxley, deceased.

Mary P. Loxley having by her will made various

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individual bequests and devises to John Yard, Jr., and to Charles Yard, six years afterwards executed the following codicil:—

"Whereas, I have given unto my friends, John Yard, Jr., and Charles Yard, certain bequests, now in addition to the same and in consideration of the long and faithful services by them both as agents and friends, and from the care and attention bestowed on my estate, increasing the same, and their attention to my bodily comfort, I desire to give them a more substantial compensation and evidence of my regard for them and their services. I do, therefore, give, devise, and bequeath unto said John Yard, Jr., and Charles Yard, all the city of Philadelphia loans of every description now standing in my name, amounting in all to the sum of one hundred and sixteen thousand three hundred dollars, or the equivalent of the same in money, should I dispose of the same, or any part thereof, during my lifetime; this bequest to be free and clear of collateral inheritance tax, and in addition to what I have in my said will devised to them and to be received by them, in addition to their usual compensation or commissions as executors for settling my estate."

These legatees, who transacted a real estate and collection business under the name of John Yard, Jr., & Son, and were known to the testratrix as a firm, had for a number of years prior to her decease been the collectors of her income and her general business managers.

John Yard, Jr., died a few days before the testratrix. Under these circumstances, Charles Yard, the other legatee, claimed that the whole bequest survived to him, as such was the evident intent of the testatrix.

The auditor (John M. Collins) reported, that, assuming the legacy to be to joint tenants at the common law, yet that rule was changed by the Act of 31 March, 1812 (Purd. Dig. 815), as interpreted in Kennedy's Appeal (10 Smith, 511), and accordingly awarded a moiety of the city loan to the residuary legatees. Exceptions filed to this report were dismissed by the Court and the report confirmed (reported 3 WEEKLY NOTES, 306), whereupon Charles Yard took this appeal, assigning for error the action and decree of the Court.

J. Cooke Longstreth (with him *H. S. Hagert*), for the appellant.

At every point in this case the appellant has been met by the auditor and Court below with questions of tenure. The vice of the auditor's argument, then, consists in applying to a question of testamentary intention, a rule applicable to vested estates only. The legacy in this case is clearly specific.

Barton *v.* Cooke, 5 Vesey, 461.
Blackstone *v.* Blackstone, 3 Watts, 335.
Ludlam's Estate, 1 Harris, 188.

The legacy should take effect as a gift of the whole thing specifically described. There are no words of severance or distribution, and the testatrix intended that the whole should pass, so that the question is not whether the bequest is to the legatees named as joint tenants, for they never took jointly, but whether the legacy is a conjoint legacy. The civil law provides that a legacy shall be deemed conjoint when it is by one and the same disposition and the testator has not assigned the part of each of the co-legatees in the thing bequeathed, and further, that accretion shall take place in such legacies.

Mackie *v.* Story, 3 Otto, 589.

At the common law survivorship in this case would have taken place.

Morley *v.* Bird, 3 Vesey, Sr. 628.
Webster *v.* Webster, 2 P. Wms. 347.
Whitmore *v.* Trelawny, 6 Vesey, Jr. 130.

The Act of 1812 was only intended to abolish the incident of survivorship as an incident to joint tenancy, and does not prevent that incident from being made a principal by apt words. It does not therefore abolish all joint tenancies.

But it is supposed that Kennedy's Appeal (10 Sm. 511) rules the case. But we contend that it does not. The subject matter there was a *devise of land*. The will as to the devise spoke from its date, and vested an interest in the deceased devisee from the date of the will. There was an estate, then, on which the Act of 1812, which applies only to vested estates, could operate.

A second ground on which the appellant may claim the whole legacy is that it is really a bequest to a class. In the original will the testatrix makes separate provisions for these legatees, but in the codicil the bequest is to them together. The consideration of her last bounty is the services of her agents, and their attention to her estate. These services were rendered by them as a *firm* or *class* of collectors and agents. It can hardly admit of a doubt that a bequest to a partnership is a bequest to a class. We submit that it has been shown that there is no rule of law standing in the way of carrying out the plain intent of the testatrix.

L. C. Massey and *Jos. B. Townsend* (with them *U. C. Smith* and *E. Spencer Miller*), contra.

The argument which attempts to create a distinction between a conjoint legacy in the civil law, and a legacy to several as joint tenants, is unsound. The reason that a legacy to joint tenants at the common law goes to the survivor, if one legatee die before the testator, is that the title to the whole is given to each; they will be possessed *per my et per tout*. Therefore, if one die before it vests, the enjoyment only is affected and not the title, and accordingly the survivor takes the whole. What distinction can be made between that case and the case of a conjoint legacy as defined by the appellant? A conjoint legacy at the civil law and a legacy to two as joint tenants at the common law are the same thing; and whether a legacy be to them as joint tenants or not depends upon the answer to the question

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whether the legatees would have taken a joint tenancy or not, had both survived and the legacy vested. Clearly it would have vested in tenants in common.

It is at least very doubtful whether the language of the codicil would have created a joint tenancy even at the common law of this State. No presumption exists in England against such estates, but the Pennsylvania Courts will grasp any construction by which they can make estates tenancies in common.

McPherson *v.* McPherson, Addison, 327.

A large part of the consideration of this gift was the services rendered by the legatees "as friends," and for attention to the bodily comfort of the testatrix. Such services could only be rendered as individuals. And why should the survivor take the compensation intended for the services of the legatee who is dead? He has compensation for his own, and can claim no more. Be that as it may, however, the Act of 1812 has settled the question beyond a doubt that the legatees would have taken a tenancy in common.

Seely *v.* Seely, 8 Wright, 437.

And that the Act applies in cases where one of the co-legatees dies before the testator, is equally well settled by the decision in Kennedy's Appeal (10 Sm. 511). The ground of that decision was, not that the will spoke from its date, and an interest had vested in the dead devisee, but (following Beeson *v.* Miller, 15 Pitts. Leg. Jour. 184) that the estate which would have vested would have been a tenancy in common. The reasoning applies to the present case. The Act extends by its terms to personal estate. Under the North Carolina statute, which is similar to ours, the Courts have sustained the view taken by the appellees.

Sawyer *v.* Trueblood's Exrs., 1 Murph. 190.
Coley *v.* Ballance, 1 Winst. Eq. 89.

Having established that the legacy is to tenants in common, it follows, by the familiar rule, that one half thereof fell into the residuary estate.

Jan. 28, 1878. THE COURT. We have but a single question in this case, whether a bequest to John Yard, Jr., and Charles Yard, of "all the city of Philadelphia loans of every description now standing in my name, amounting in all to the sum of one hundred and sixteen thousand three hundred dollars, or the equivalent of the same in money, should I dispose of the same or any part thereof during my lifetime," contained in the will of Mary P. Loxley, survived to Charles Yard on the death of John Yard, Jr., before the death of the testatrix, or whether John Yard's share lapsed.

This question is really settled by the decision in Kennedy's Appeal (10 P. F. Smith, 511). It is true the subject of discussion in that case was a devise of real estate, while that before us is a bequest of personalty. But Kennedy's case was not rested on any difference between realty and personalty, or a difference between the effect of a devise and a testament. The case was ruled upon the effect of the Act of 31 March, 1812, abolishing the right of survivorship as an effect of joint tenancy. This Act relates to personal as well as to real estate, and the policy which dictated its enactment seems to be equally applicable to each. The reasons, therefore, given in the opinion in Kennedy's Appeal apply with equal force to the bequest in this case. The Act of 1812 has become a rule of property, and as such it is better that its interpretation should be uniform, thereby producing certainty in the interpretation of wills, instead of giving a diversity of effect to the law, and thereby uncertainty and confusion in interpreting wills. Referring, therefore, to Kennedy's Appeal for the reasons there given, further discussion is unnecessary.

It is proper before closing to say that we give no opinion on the question whether the lapsed legacy to John Yard, Jr. fell into the residue. The parties representing that question are not before us.

Decree affirmed with costs to be paid by the appellants and the appeal is dismissed.

Opinion by AGNEW, C. J.

Oct. & Nov. '77, 232. Nov. 13, 1877.

Commonwealth v. Bartilson et al.

Criminal law—Conspiracy—Overt acts—Statute of limitations—Doctrine of continuing offences—Evidence—Practice—Bill of particulars—Effect of—Jurisdiction—Discharge of prisoners pending a writ of error is discretionary with the Court, and not assignable for error—When an injudicious exercise of discretion.

An indictment found May 21st, 1877, charged the defendants, in the first count, with a conspiracy to cheat and defraud the prosecutor, entered into December 20, 1874. By proper averments it charged, further, the commission by the defendants of a series of fraudulent acts alleged to have been done "in pursuance and as a renewal of such conspiracy, confederacy, and agreement," some of the said fraudulent acts being laid within two years of the finding of the bill:

Held (affirming the judgment of the Court below), that the prosecution of the offence charged was barred by the statute of limitations.

Gise *v.* Commonwealth (31 Sm., 428; S. C., 2 WEEKLY NOTES, 589) explained.

The second count of the indictment charged that the defendants on May 21st, 1877, did "falsely, fraudulently, and maliciously combine, conspire, etc., to obtain from the prosecutor divers large sums of money, etc." A bill of particulars was filed under this count setting forth divers overt acts of conspiracy—being, for the most part, the same.

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acts as were charged in the first count and there alleged to have been done in pursuance of the original conspiracy of December 20, 1874. The Court below, being of opinion that said acts would not be admissible in evidence under the second count, and that the result of a trial could only be the acquittal of defendants, quashed the said count.

Held, to be error; that the purpose of the bill of particulars was merely to give defendants notice of the acts relied on by the Commonwealth to establish the conspiracy, and that it could have been altered or supplied to meet the exigencies of the case. The statute of limitations affects the crime, not the proof it.

Per PAXSON, J. While as a general rule in criminal cases the *venue* must be laid in the county in which the offence was committed, yet in conspiracy it may be laid in any county in which an overt act has been done by any one of the conspirators, upon the principle that the overt act is evidence of a conspiracy existing at the time and place when the overt act was committed.

An indictment having been quashed, the District Attorney gave notice of his intention to remove the case to the Supreme Court, and moved the Court to order the defendants to renew their recognizances to abide the issue; this the Court refused to do:

Held, that it was within the discretion of the Court either to hold the defendants to bail pending the certiorari or writ of error, or to hold them in their own recognizance, or to discharge them without day, and such action was therefore not reviewable by writ of error, except, perhaps, for a gross abuse of discretion.

Per PAXSON, J. We feel constrained to say, however, that in our judgment the discharge of the defendants under the circumstances was not a judicious exercise of discretion and that it would have been the safer course to have held the defendants to bail.

Error to the Quarter Sessions of Washington County.

This was an indictment, found May 22, 1877, against T. A. Bartilson, John Hanen, Joseph Hanen, and John H. Little, charged on the oath of O. H. P. McCoy with a conspiracy to cheat and defraud complainant of his property and estate.

The indictment contained two counts. The first charged defendant with a conspiracy to cheat and defraud the prosecutor, entered into December 20, 1874; and then proceeded to state a series of overt acts alleged to have been done "in pursuance and as a renewal of said conspiracy, combination, confederacy, etc." Two of these acts were laid within two years of the finding of the bill.

The second count of the indictment charged, in substance, that the said defendants, "being evil disposed persons, on the 21st of May, 1877, falsely, fraudulently, and maliciously did contrive, conspire, etc. . . . . to obtain and acquire to themselves from one O. H. P. McCoy divers large sums of money, and to cheat and defraud him thereof, and did then and there do divers dishonest, malicious, and unlawful acts, to the great damage of said McCoy."

On petition of defendants a bill of particulars was furnished under this count wherein notification was given that the Commonwealth expected to prove that the defendants were engaged in an unlawful conspiracy to cheat and defraud said McCoy at the date laid in said count, viz., May 21, 1877. The bill of particulars then proceeded to state the different overt acts in regard to which the Commonwealth would offer proof; which overt acts were the same as were set forth in the first count, with one additional averment charging a fraudulent transfer of real estate made September 21, 1875.

Defendants moved to quash the indictment, assigning, *inter alia*, the following reasons: (1) The prosecution of the offence charged in the first count is barred by the 77th section of the Act of March 31st, 1860 (Purd. Dig. 934, pl. 36). (2) The Commonwealth, by the particulars furnished with respect to the second count, is precluded from offering any testimony in support of the said count other than such as would tend to prove a conspiracy entered into at a date so long prior to the finding of the bill as to be within the provisions of the Act aforesaid.

The Court (HART, P. J.) granted the motion to quash the indictment, and discharged the defendants, holding that the prosecution of the offence, charged in the first count, was barred by the statute, and that although the second count charged the conspiracy to have been entered into on the 21st of May, 1877, yet the bill of particulars filed of record showed that the conspiracy was the same as that charged in the first count, and that it originated about the month of November, 1874, and was evidenced by the same overt acts set forth in the first count, with the addition of one other. That it would be, therefore, a vain thing to put the defendants to trial on this second count, with the knowledge beforehand that all the evidence which the Commonwealth could offer must be ruled out as inadmissible.

After the quashing of the indictment, and before the discharge of the defendants, the district attorney gave notice of his intention to remove the cause to the Supreme Court by certiorari, and moved the Court to order the defendants to renew their recognizances to abide the issue in the Supreme Court. This motion was refused.

The Commonwealth thereupon took this writ, assigning for error the action of the Court in quashing the indictment, and in refusing to order the defendants to renew their recognizances.

Crumrine (with him *J. A. McIlvaine*, district attorney, *Murdock*, *Aiken*, and *A. W. & M. C. Acheson*), for the Commonwealth.

It is admitted that the crime of conspiracy consists in the agreement to do an unlawful act, but we maintain that an overt act, done in pursuance of the original agreement, is a renewal or continuance of the conspiracy. The illegal agreement is carried into every such act, and the par-

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ties may be truly said to "conspire, combine, confederate, and agree together" whenever they attempt to execute their common design. The statute would not begin to run until the last act was done in furtherance of the illegal design, and the indictment charging the defendant with a renewed or continued conspiracy in June and July, 1875, would not be barred in May, 1877.

People *v.* Mather, 4 Wendell, 230.
Commonwealth *v.* Delany, 1 Grant, 225.
1 Bishop's Criminal Law, sections 437, 440.
Commonwealth *v.* Wishart, 8 Legal Gazette, 137.

The question in regard to the second count was, whether there was a fatal defect on the face of the indictment as it came from the hands of the grand jury. The bill of particulars was no part of the indictment, and could not be interpolated into the second count so as to bring it within the bar of the statute.

Commonwealth *v.* Church, 1 Barr, 105.

The defendants should have been held to bail. If this case goes back for trial, and defendants cannot be found, the object of the Commonwealth in bringing the case here will be defeated, and great wrong may accrue to the public.

People *v.* Stager, 10 Wend. 434.
Keefhaver *v.* Commonwealth, 2 P. & W. 244.
Mishler *v.* Commonwealth, 12 Sm. 56.
State *v.* Stout, 6 Halst. 133.

Dougan and *D. F. Patterson* (with them *D. S. Wilson* and *Todd*), contra.

The gist of a conspiracy is an unlawful confederacy to do an unlawful act. The offence is complete when the confederacy is entered into, whether any acts be done in pursuance of it or not.

Hazen *v.* Commonwealth, 11 Harris, 363.
Commonwealth *v.* Curren, 3 Pitts. Rep. 145.
Twitchell *et al. v.* Commonwealth, 9 Barr, 212.
Commonwealth *v.* McKisson, 8 S. & R. 420.
Collins *et al. v.* Commonwealth, 3 S. & R. 222.
Rex *v.* Best, 1 Salkeld, 174.
Benford *v.* Sanner, 4 Wr. 15.
Commonwealth *v.* Hunt, 4 Metcalf (Mass.), 125.

An offence cannot be revived or renewed so as to toll the bar of the statute of limitations. The doctrine of continuing offences has been expressly repudiated by this Court.

Gise *v.* Commonwealth, 2 WEEKLY NOTES, 589.
People *v.* Mather, 4 Wendell, 229.
1 Wharton's Criminal Law, 7th ed., sec. 444.
Commonwealth *v.* Ruffner, 4 Casey, 259.
Commonwealth *ex rel. v.* Sheriff, 3 Brewster, 394.

The Court below, having decided that the offence cited in the first count was barred by the statute, and learning from the bill of particulars that the two counts were intended to charge the same offence, was led to quash the second also. The conclusion reached is warranted by high authority.

Bishop's Criminal Law, sec. 448 (ed. 1866).
Commonwealth *v.* Haas, 7 Sm. 443.

The Court below would not have been warranted in holding the defendant to await the action of this Court. It could not be asked to stultify itself, by telling the defendants in one breath that there was no charge against them, and in the next to tell them that they would be held, that it might be ascertained if the Court was right.

Jan. 7, 1878. THE COURT. The first assignment alleges error in quashing the first count of the indictment. Said count charged the defendants with a conspiracy to cheat and defraud one O. H. P. McCoy of his moneys, goods, chattels, and property and estate. The conspiracy is averred to have been formed on the 20th of December, 1874. This was more than two years prior to the finding of the bill, and upon this ground the Court below quashed the count. It was strongly urged, however, that inasmuch as it was averred in said count that the defendants had, in "pursuance and renewal of said conspiracy," committed divers overt acts specifically described in said count, the date of one of which at least was within the statutory period, there was a continuance and renewal of the conspiracy from time to time, and the statute was thereby tolled. This is plausible, but unsound. The offence charged was the conspiracy. According to all the authorities the conspiring is the essence of the charge, and if that be proved, the defendants may be convicted. (Collins *v.* The Com., 3 S. & R. 220; Com. *v.* McKisson, 8 S. & R. 420; Com. *v.* Judd, 2 Mass. 329; Com. *v.* Tibbetts, Id. 536; Com. *v.* Warren, 6 Mass. 74; State *v.* Rickey, 4 Halstead, 293; State *v.* Buchanan, 5 Harr. & Johns. 317; People *v.* Mather, 4 Wendell, 229.) According to the first count the offence was complete on the 20th of December, 1874. The overt acts set forth do not constitute the offence. They are the evidence of it, and are sometimes said to be the aggravation of it. An overt act may or may not be unlawful *per se*. It is because of its relation to an unlawful combination that it becomes obnoxious to the criminal law. The averment that the conspiracy was "renewed" from time to time does not meet the difficulty. If it proves anything, it proves too much. The "renewal" of a conspiracy means to begin it again; to re-commence it; to repeat it. From this it is apparent that each renewal is a new offence; a repetition, it is true, of a former one, but still an offence for which an indictment would lie. If, therefore, the overt acts were done or committed in renewal of the conspiracy of December 20th, 1874, as charged in the count, they aver distinct offences. It is a well-settled rule of criminal pleading that distinct offences cannot be joined in the same count. This principle is too familiar to need the citation of authority; we will only refer to the latest case. (Hutchinson *v.* The Com., 1 Norris, 472.) The

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difficulty in regard to this count arises merely from a mistake in pleading. The date of the conspiracy should have been laid within the statutory period. The Commonwealth must allege and prove a conspiracy within two years. If this cannot be done, the Commonwealth has no case. The pleader evidently felt the strain of this part of his case when he introduced the averment that the overt acts were in "renewal" of the original conspiracy. It was practically laying an offence with a *continuando;* it was an attempt to prove the existence of a crime within the statutory period, by showing its commission outside of such period, and that it had been continued down to a time within it. In a recent case in which I delivered the judgment of the Court (Gise *v.* The Com., 31 P. F. S. 428), the doctrine was asserted that there is no such thing as a continuing offence; that it is wholly unknown to the criminal law. This language has been somewhat criticized, in view of which I have reconsidered it carefully with a view to withdraw or qualify it if found erroneous. Next to being right, nothing would afford me more pleasure than to correct an error. In order to interpret its true meaning, the passage must be considered in its connection. The question before us was whether a man who had been indicted in 1876 for bigamy committed in 1868, could be convicted by showing that he had continued the offence, during the intervening years, by cohabitation with the second woman. It was held that he could not, and that there was no such thing as continuing a completed offence so as to toll the statute. It was not intended to assert the absurd proposition that a man might not repeat an offence from day to day, as in the case of maintaining a nuisance, and other familiar instances which might be referred to. This may be done daily for any indefinite period. But a man could not be convicted of maintaining a nuisance charged to have been committed ten years prior to the finding of the bill of indictment, by proving that he had continued the nuisance day by day to a time within the statutory period. In the sense, therefore, of tolling the statute, it cannot be said that a completed offence can be continued. It may be repeated from day to day, but the statute runs from the close of each day, and the indictment must charge the offence to have been committed within the statutory period. This is all that was intended to be said in Gise *v.* The Com.; it is all that the language referred to implies, when read in connection with the subject-matter to which it refers. In this sense the doctrine of that case is reasserted.

We think the learned Judge of the Court below was right in quashing the first count. This brings us to the second assignment, which alleges error in quashing the second count. This count charged a conspiracy within two years, and was in proper form. It sets out no overt acts, being what is sometimes called in criminal pleading the common count. That such a count is sufficient, has been repeatedly decided. (Hazen *v.* The Com., 11 H. 363; Twitchell *v.* The Com., 9 Barr, 211; Com. *v.* McKisson, 8 S. & R. 420; Rex *v.* Hamilton, 7 C. & P. 448; Wharton's Precedents, 351.) The Court below quashed it, not because of any defect apparent upon its face, but for reasons *dehors* the record; in other words, for defect in proof. The district attorney had filed a bill of particulars under the second count, which, as before observed, was general in its nature, setting forth divers overt acts of conspiracy, being, for the most part, the same acts as were charged in the first count, and which were admitted by the district attorney to have been done in pursuance of the original conspiracy of December 20th, 1874. The Court, being of opinion that they would not be admissible in evidence under the second count, and that the result of a trial could only be the acquittal of the defendants, quashed the said count. We do not deny the power of the Court to quash an indictment for matters not appearing upon its face. This is sometimes done for defects in the process for drawing and summoning the grand jury, or irregularities connected with the jury wheel, and where an indictment is found pending a writ of habeas corpus. It is a power, however, that should be exercised with caution, especially where it is done for defect of proof. This may and sometimes is supplied at the last moment. The purpose of the bill of particulars filed in this case was merely to give the defendants notice of the particular acts relied upon by the Commonwealth to establish the conspiracy. It could have been altered or supplied to meet the exigencies of the case, always, of course, upon sufficient notice to the defendants. We think the Court below erred in its view of the evidence. The fact that a conspiracy existed on the 21st day of May, 1877, or upon any other day within two years of the exhibiting of the bill of indictment, may be shown by the previous acts, conduct, or declarations of the parties. The Statute of Limitations affects the crime, not the proof of it. It is rare that a conspiracy can be established by direct proof. As a general rule conspirators do not publish their intentions. Hence it is that their object, and the conspiracy itself, must usually be shown by their acts. It is said in Roscoe on Criminal Evidence, at page 415: "If, on a charge of conspiracy, it appears that two persons by their acts are pursuing the same object and offence by the same means, the one performing part of an act, and the other completing it, for the attainment of the object, the jury may draw

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the conclusion that there is a conspiracy." All the leading text-writers assert this doctrine, and it is sustained by numerous decisions, which it is not necessary to refer to. Acts and declarations of the parties prior to the statutory period may be given in evidence, provided they tend to show a conspiracy existing at the time charged in the indictment. It is true they would not be admissible for the purpose of proving a distinct crime barred by the Statute. But where in conspiracy an overt act is done within two years, and said act is but one of a series of acts committed by the parties, evidently in pursuance of a common design, and to carry out a common purpose, such acts would be evidence, provided they tend to show that the last act was a part of the series, and the result of an unlawful combination; and such evidence may satisfy a jury of the existence of a conspiracy at the later period. And this, though some of the prior acts may have occurred at a time when as an independent conspiracy it would have been barred by the Statute. For, as before said, the overt acts are the evidence from which a conspiracy may be inferred. Hence it is that while, as a general rule in criminal cases, the venue must be laid in the county in which the offence was committed, yet, in conspiracy, it may be laid in any county in which an overt act has been done by any one of the conspirators. This rule is well settled. (Wharton's C. L., 2350; Arch. C. P. 6; Rex *v.* Scott, 4 East, 164; The People *v.* Mather, 4 Wendell, 230.) This rests upon the principle that the overt act is evidence of a conspiracy existing at the time and place where the overt act was committed. Of course the overt act must be such as to tend to show that it was the result of conspiracy. As is said in Arch. C. P. 1056: "Every overt act, to be evidence, must have at least a tendency to prove, either the general nature of the conspiracy, or that one or more of the defendants were operating towards effecting that which is charged in the indictment as being the object of conspiracy." But if the overt act charged in the indictment, or proved to have been done within two years, is sufficient to satisfy the jury of the existence of a conspiracy at that time, it is wholly immaterial when the parties thereto first formed the unlawful combination in their minds, or gave effect to it by concert of action. If it has been renewed from time to time, and overt acts committed through a series of years, and one of said acts has taken place within two years, each renewal constitutes a fresh conspiracy for which an indictment will lie. It has been held that where a conspiracy had been formed outside of the jurisdiction of the Court, an overt act committed within the jurisdiction is evidence of a conspiracy there (Rex *v.* Scott, *supra*), and all who accede to a conspiracy after it is formed become conspirators (People *v.* Mather, *supra*). For the reasons given, we think the Court below erred in quashing the second count.

The third assignment alleged that the Court erred in refusing to hold the defendants to bail pending the determination of the issue in this Court. It appears that when the indictment was quashed, the district attorney gave notice of his intention to remove the case to this Court by certiorari, and at the same time moved the Court to require the defendants to renew their recognizances. This the Court declined to do. This action of the Court is not assignable for error. It was in the sound discretion of the Court either to hold the defendants to bail pending the certiorari or writ of error, to hold them in their own recognizance, or to discharge them without day; and such action is not reviewable here, except, perhaps, for a gross abuse of discretion. We feel constrained to say, however, that, in our judgment, the discharge of the defendants under the circumstances was not a judicious exercise of discretion. In a case in which it clearly appears that an indictment must be quashed, and that no subsequent proceedings can be had, it may be very proper to discharge a defendant. But where there is at least a serious doubt, and the district attorney announces upon his official responsibility his intention of removing the record to this Court for review, it would certainly be the safer course to hold the defendants to bail pending such removal.

The judgment quashing the second count of the indictment is reversed, and a *procedendo* awarded.

Opinion by PAXSON, J.

Oct. & Nov. '77, 171. Oct. 24, 1877.

Ruff v. Ruff.

Attachment execution—Judgment in favor of garnishee no bar to a future action by the defendant against him—Doctrine of res adjudicata.

A judgment in an attachment suit in favor of the garnishee is not a bar to a recovery in a future action upon the same subject matter, wherein defendant in the former action is plaintiff and the garnishee defendant.

The defendant as to his rights against the garnishee being excluded from participation in the trial of an attachment suit cannot be precluded by judgment therein.

Error to the Common Pleas of Westmoreland County.

Debt on a bond with warrant of attorney attached, by C. P. Ruff for the use of William Hillis against Michael Ruff.

After judgment had been entered by virtue of the warrant of attorney, and a rule to open judgment made absolute, the plaintiff filed a narr set-

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ting forth the assignment to the equitable plaintiff on February 20, 1874, and the defendant filed the following special plea:—

And now, to wit, July 5, 1875, the defendant pleads that the said plaintiff ought not to have and maintain his action against him, because that at No. 277, May Term, 1870, by attachment execution issued out of the Court of Common Pleas of Westmoreland County, wherein Thomas J. Barclay is plaintiff, and C. P. Ruff and E. J. Keenan are defendants, with notice to the defendant as garnishee, the debt secured by the note upon which this suit is brought was, *inter alia*, attached on 22d March, 1870, and it was so proceeded upon that on the 9th September, 1874, the said Court directed a feigned issue to try and determine whether the said Michael Ruff, the defendant, was indebted to the said C. P. Ruff, the plaintiff, on 22d March, 1870, and directed that Thomas J. Barclay should be plaintiff, and the said Michael Ruff, defendant; which issue, in pursuance of said order, was made up by the parties, on the 25th September, 1874; and, whereas, also at the said Court of Common Pleas of November Term, 1874, the said issue came on for trial, and was so proceeded upon; that on the 28th November, 1874, there was a verdict and judgment for the defendant, Michael Ruff—that he was not indebted in any manner to the said C. P. Ruff—at the time aforesaid, to wit, on 22d March, 1870; to wit, after the date of the note in suit. Whereupon he prays judgment whether the said plaintiff ought to have and maintain his said action against him.

Plaintiff demurred.

The Court below (LOGAN, P. J.), holding the judgment in the attachment execution between Barclay and Michael Ruff to be a bar to the present action, overruled the demurrer, and entered judgment for the defendant.

Plaintiff took this writ, assigning as error the action of the Court.

Henry D. Foster, for plaintiff in error.

The plaintiff in this action, being neither a party nor a privy, could not be heard in the feigned issue of Barclay *v.* Michael Ruff, and therefore is not concluded by the judgment therein.

Breading *v.* Siegworth, 5 C. 396.
Tams *v.* Bullitt, 11 Id. 311.

To make a verdict in a former suit conclusive it must be between the same parties.

Hart's Appeal, 8 B. 37.
Hamm *v.* Beaver, 7 C. 58.
Childs *v.* Digby, 12 H. 26.
Tams *v.* Lewis, 6 Wr. 402.

Edgar Cowan (*H. C.* and *J. A. Marchand* with him), for defendant in error.

The plaintiff having been a party to the attachment execution was barred by the verdict and judgment in favor of Michael Ruff, the garnishee, because in that trial the subject-matter in dispute was legally determined against him, and he having no right to assign it to Hillis, the latter took nothing by the assignment. Here the judgment on the attachment execution was by a Court of competent jurisdiction on the same subject-matter between the same parties and for the same purpose. The plea is therefore good.

Aspden *v.* Nixon, 4 Howard, 467.

Jan. 7, 1878. THE COURT. William Hillis having taken the assignment of the judgment note, executed by Michael Ruff in favor of C. P. Ruff, after the issuing of the attachment by Barclay, can have no other or better standing in this controversy than his assignor. We may treat the matter, therefore, as between the original parties to the note. It appears from the statement we have before us, that Thomas J. Barclay, to May Term, 1870, issued an attachment upon a judgment he then had against C. P. Ruff and others, with notice to Michael Ruff, the defendant in the case now trying, as garnishee. Upon this attachment the Court directed an issue with Barclay as plaintiff, and the garnishee as defendant. A trial was had in due course, which resulted in a verdict and judgment for the defendant.

This established conclusively, as to the parties to the issue and their privies, that Michael Ruff had, in his hands, no money, goods, or effects of any kind, belonging to C. P. Ruff. The one question for us to resolve is. was C. P. Ruff, by reason of his having been served with the writ of attachment, such a party or privy to this issue as would make the judgment therein binding on him? If he is so bound, the demurrer to the defendant's plea in bar was well ruled by the Court below; if not that ruling was erroneous. But if he was such a party, then should he have been included in the issue, and the jury should also have been sworn as to him; this, however, was not done; and why not? The answer is because he had no standing as a party against the garnishee, and was therefore properly excluded from a participation in the trial. If he had aught to say against the judgment, upon which the attachment issued, he might have pleaded and had issue; it is that he might have such opportunity that the Act of Assembly directs that notice be given the debtor, if he is in the country. With such trial, however, the garnishee has no concern, neither is it requisite to a trial against him. (McCormic *v.* Hancock, 2 Barr, 310.) It is thus apparent that the two issues are quite distinct, and that whilst in the latter the garnishee has no interest, in the former the debtor has none and so may not intervene, either to direct or control it. So completely do his interests antagonize those of both the contending parties that, even before the Act of 1869, he might have been a witness for either. (Gemmill *v.* Butler, 4 Barr, 232.) Again, it is not correct to assume that the attaching creditor stands, in all respects, in the place of the debtor as to the goods and credits attached; for if such were the case, then would a judgment for or against the garnishee be conclusive, not only as to the debtor, but also as to his creditors. Such, however, is not the case as to creditors or trustees in insolvency. (Breading *v.* Siegworth, 5 C. 396; Tams *v.* Bullitt, 11 C. 308.)

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What shall we say then; that the debtor is concluded by the result of an issue in which he has no interest; from which by legal rule he is excluded; in which he cannot be heard, except as a witness, and which does not conclude his creditors? This proposition contains in itself its own answer. If one is to be concluded by a judgment he must have his day in Court; some say in and control over the trial. But C. P. Ruff had neither control nor say in the issue between Barclay and the garnishee. Barclay might have permitted the case to go by default; he might have discontinued, or he and the garnishee might have compromised, and C. P. Ruff could not have intervened to prevent either. He was literally barred out of the case, and for the sufficient reason that he was no party to it; hence, by all rule, he is not concluded by the judgment resulting from its trial.

The judgment of the Court below is reversed, and it is ordered that judgment be entered on the demurrer, for the plaintiff, for the amount of the original judgment with interest to this date (January 7th, 1878), to be liquidated by the prothonotary of the Court of Common Pleas of Westmoreland County.

Opinion by GORDON, J. AGNEW, C. J., and SHARSWOOD, J., absent.

July, '77, 54. Jan. 29, 1878.

Lehman v. Jaquett.

Affidavit of defence — When insufficient — What particularity required — Vague allegations of mistake, etc., insufficient to contradict written instrument.

In an action upon a written agreement to pay the debt, interest, and costs in a certain suit, in consideration of the plaintiff's stay of his writ of *vend. ex.*, until a certain day following, the defendant filed an affidavit of defence, setting forth that he had signed the instrument sued on with the understanding that he would be liable only in case he should accept an assignment of the debtor's property; that he had not accepted the said assignment; and further, that he had signed the instrument through mistake of its purpose and character:

Held, that the affidavit was evasive, and made out no case for reforming the written agreement.

Error to the Common Pleas No. 1, of Philadelphia County.

Case, by Jaquett against Lehman on the following written agreement, of which a copy was filed by the plaintiff:—

Jaquett, Assignee, v. Chas. Stokes.	O. D. C. Sept. Term, 1873. No. 944. D. S. B.

In consideration of the said D. M. Jaquett withholding his writ of *vend. ex.* in above case until the 21st day of March next, I hereby promise and agree to pay the debt, interest, and costs in the above case on or before the 21st day of March next.

R. J. LEHMAN.

Philadelphia, Feb. 24, 1876.

The plaintiff filed with the copy of this instrument a declaration that the judgment referred to therein amounted to $4462.50, and that the writ of *vend. ex.* did not issue till after March 21, 1876. The defendant filed an affidavit of defence, setting forth that the instrument sued on was given in contemplation of an assignment to the deponent by Charles Stokes for the benefit of the latter's creditors; that the sale of the said Stokes's property, under the plaintiff's judgment, was postponed, in order to give the deponent an opportunity to examine into Stokes's affairs; that if, in the opinion of the deponent, there was sufficient value in Stokes's property to warrant the acceptance of the assignment, he might accept it, and raise money for the payment of the Jaquett judgment, but that otherwise the sale was to proceed, and the deponent not to be liable in any manner for any act of his in the premises. The affidavit further alleged that the deponent, having examined Stokes's property, declined to accept the assignment, so that the consideration upon which the instrument sued on rested had wholly failed; that he had signed the instrument under mistake and misapprehension of its real purport, and that had he been aware of its character he would not have signed it.

The Court having made absolute the plaintiff's rule for judgment for want of a sufficient affidavit of defence, the defendant took this writ, assigning for error the said entry of judgment.

L. R. Fletcher (*N. Penrose* with him), presented no brief of argument, but contended that there was no reason why Lehman should be held responsible, he not having accepted an assignment from Stokes, and therefore the contingency on which he promised not having arisen; and that there was evidence of mistake of fact sufficient to go to a jury.

E. S. Dixon, contra.

The suggestions of mistake in the affidavit are too vague. It is to be presumed that the deponent in an affidavit of defence will say as much as he can in his own favor.

Marsh *v.* Marshall, 3 Sm. 396.

Averments that the deponent's acceptance was procured out of the usual course of business, without consideration, and by false statements and misrepresentations, have been held too general.

Matthews *v.* Long, 3 WEEKLY NOTES, 512.

Affidavits of defence should distinctly aver every fact necessary to constitute a defence.

Peck *v.* Jones, 20 Sm. 83, *et passim.*

Forbearance is a good consideration for a promise to pay the debt of a third person.

Silvis *v.* Ely, 3 W. & S. 420.

Feb. 11, 1878. THE COURT. The defendant in his affidavit did not deny the writing to pay the debt, interest, and costs in consideration of

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the plaintiff's stay of his writ of *vend. exp.*, until the 21st day of March following. Nor does he allege fraud, misrepresentation, or any wrongful suppression of the alleged parol agreement when the writing was entered into. In short, he makes out no case for reforming the written agreement, and his affidavit is evasive.

PER CURIAM. Judgment affirmed.

Oct. & Nov. '77, No. 284. Oct. 17, 1877.

Reynolds's Appeal.

Scire facias—Lien of judgment—Abandonment of scire facias to revive—Voluntary appearance by defendant.

A plaintiff will not be presumed to have waived a voluntary appearance of a defendant in the absence of some act clearly indicating his intention so to do.

A judgment was entered Jan. 27, 1868, against two defendants. On Sept. 26, 1872, a scire facias to revive was issued but was never returned. A voluntary appearance was, however, entered for one defendant. On October 8, 1874, another scire facias was issued and served upon both defendants. It was called an *alias:*

Held, that the mere form of the *alias* was not sufficient to raise a presumption of abandonment of the original scire facias, and that the lien of the judgment against the defendant who had appeared was preserved.

Hatch *v.* Stitt (16 Sm. 264), approved.

Appeal by M. R. Reynolds from a decree of the Court of Common Pleas of Jefferson County confirming the distribution by an auditor of the money arising from a sheriff's sale. The facts were as follows:—

On the 27th of January, 1868, Carroll obtained a judgment in the Common Pleas of Jefferson County against Fox and Kyle. On September 26, 1872, a scire facias was issued against the defendants and delivered to the sheriff, which was never returned, and there is no evidence that it was ever served on either of the defendants. The sheriff is since dead, but a memorandum of the writ appeared on his docket. An appearance was entered for Kyle at or about the time the writ should have been returned, at Dec. Term, 1872. No further proceedings were had thereon.

On the 8th day of October, 1874, another scire facias was issued returnable to Dec. Term, 1874, against both defendants, and in the præcipe it was called an *alias*, which was served on Kyle personally on the 20th of October, 1874, and on Fox on the 24th of the same month. This scire facias was docketed in the same case as the first, and both appeared by the docket to have been entered or issued from the same original case.

On the 5th of March, 1875, judgment was entered against both the defendants for want of affidavits of defence in favor of Carroll for $974.05.

On the 4th of October, 1874, M. R. Reynolds entered a judgment to No. 476 of May Term, 1874, in the Common Pleas of Jefferson County against Kyle and Clements for the sum of $4699.27.

A part of the real estate of Kyle was sold on execution against James Kyle *et al.* on the 8th day of May, 1876, for $1000. Carroll and Reynolds each claimed the fund as the first lien creditor of Kyle.

The auditor appointed to distribute the fund reported: "That the intention was to revive and continue the lien of the original judgment, is evident, from the fact that the scire facias was issued within the five years. The *alias* scire facias was not necessary, so far as Kyle was concerned, and no doubt the issuing of it was to bring in Fox, but surely the mere issuing of it against both would be little if any evidence of an intention to abandon the first scire facias. It may not be a correct practice, but it is frequently done, and we do not see that any person would have the right to complain, other than Kyle, and he only as to the additional costs." That the issuing of the *alias* was not an abandonment of the original scire facias; and he therefore awarded the fund to Carroll on the judgment entered March 5, 1875, against Kyle and Fox. Exceptions filed on behalf of Reynolds were overruled by the Court, and the report confirmed. Reynolds then took this appeal, assigning for error the action of the Court.

Jenks and *Clark* (with whom was *R. Arthurs*), for appellant.

The issuing of a scire facias to revive a judgment when one has issued at a preceding term, which has been served, is an abandonment of the first; and if the five years had elapsed in the intermediate time the lien of the judgment is lost.

Meason's Estate, 4 W. 341.
Vitry *v.* Dauci, 3 R. 9.
Davidson *v.* Thornton, 7 B. 128.
Westmoreland Bank *v.* Rainey, 1 W. 26.

The case of Silverthorn *v.* Townsend (1 Wr. 263) is distinguishable from the present case. The original scire facias was not served, and the issuing of an *alias* could in no sense be an abandonment. The case was expressly ruled on this point.

In cases of a voluntary appearance the plaintiff may accept or decline it.

Davidson *v.* Thornton, *supra.*

If he decline, the appearance is a nullity as to him. In this case we contend that the issuing of the *alias* was evidence of an intention to abandon the voluntary appearance.

John Conrad, for appellee.

The presumption of intention to abandon the first scire facias is rebutted by calling the second

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an *alias*. Meason's Estate (*supra*) is distinguishable from the present case because the second scire facias was not called an *alias*. It ignored the first, and hence was an abandonment.

Nov. 7, 1877. THE COURT. The original scire facias in the case of J. T. Carroll *v.* John A. Fox and James Kyle was issued within five years, and an appearance to it for Jas. Kyle entered by attorneys. This saved the lien as to Kyle. The *alias* scire facias was issued too late as to John A. Fox, but it was no abandonment of the first scire facias as to Kyle, as to whom there was neither a withdrawal of the appearance, nor a non-suit or discontinuance. Properly the *alias* scire facias should have issued against Fox alone, keeping up the continuances, reciting the former scire facias, and return, and commanding service to be made on Fox. Another practice, not quite so regular, is sometimes pursued—to issue the *alias* against both and direct service on the one not before served. But the *alias* scire facias was amendable to conform to the facts. Looking at the state of the record, and irregularities so common in practice, we are not justified in presuming an abandonment after an appearance for Kyle, from the mere form of the *alias* scire facias. The effect of an appearance by attorney is discussed in Hatch *v.* Stitt (16 P. F. Smith, 264). Without a withdrawal of the appearance, or some act clearly indicating a waiver by the plaintiff, we ought not to hold the form of the *alias* to be conclusive.

Decree affirmed with costs of the appeal to be paid by the appellants and the appeal dismissed.

PER CURIAM.

Jan. '78, 70. Jan. 30, 1878.

Wilson v. The Philadelphia and Reading Railroad Company.

Railroad—Trespass quare clausum fregit—Right of railroad company to erect small watch-houses upon the public streets near their tracks—Power of city councils to authorize such erections—When owner of the soil cannot maintain an action.

Error to Common Pleas No. 2, of Philadelphia County.

Trespass *quare clausum fregit* by Patrick Wilson against the Philadelphia and Reading Railroad Company.

The *narr.* set forth that the company defendant had erected a flagman's box upon the plaintiff's property on the southerly corner of Penn Street and Cresson Street, in the Twenty-first Ward of the city of Philadelphia, without the consent of the plaintiff, and to his great inconvenience and damage.

A special plea was filed by the defendants, setting forth that, by their Act of Incorporation, the Philadelphia, Germantown, and Norristown Railroad Company had been authorized to lay down and fix such a route as they should deem expedient, from Norristown to Philadelphia, to establish double tracks, and all such works, edifices, etc., as should be deemed necessary; that by virtue of this authority, the route of the railroad was fixed along a certain highway called Cresson Street, which consisted of two sidewalks, five feet wide each, and a roadway forty feet wide, passing through, over, and along the said close of the plaintiff, and then a double track was laid down; that subsequently the defendants, having leased the said railroad, and deeming it expedient for the safe passage of trains, and the protection of travellers crossing the said railroad at Penn Street, and also being so required to do by an ordinance of the city of Philadelphia, stationed a flagman at the crossing of Cresson Street and Penn Street; that also by authority of an ordinance of the councils of the city of Philadelphia, approved Jan. 5, 1866, they erected a small frame house for the use of the flagman, not more than five feet square, near the crossing of Penn Street, entirely within the limits of Cresson Street, and that this is the trespass complained of by the plaintiff.

Plaintiff demurred thereto, on the ground that the councils of the city of Philadelphia had no right or power to authorize the defendants to come upon or use the close of the plaintiff, and that the plea filed was, in other respects, informal and insufficient.

After argument upon the demurrer, the Court entered judgment for the defendants. The plaintiff took this writ, assigning for error the judgment of the Court below.

John Dolman, for the plaintiff in error.

If a highway is used by any one for an unlawful purpose, the owner of the soil may maintain trespass. A railroad company having a road along a public highway acquires merely an easement or right of way.

Lewis *v.* Jones, 1 Barr, 336.
Hasson *v.* Railroad, 8 Phila. 556.

Councils cannot deprive the owner of the use of his land without compensation.

Thomas Hart, Jr., contra. The railroad company had the right to occupy Cresson Street for all railway purposes, including the erection o watch-houses.

Phila. and Trenton R. R. Co.'s Case, 6 Wh. 25.
Commonwealth *v.* E. & R. E. Railroad, 3 Cas. 339.
Mayor of Pittsburgh *v.* Penna. Railroad, 12 Wr. 355.
C. & P. Railroad *v.* Speer, 6 Sm. 325.
P. W. & B. Railroad *v.* Williams, 4 Sm. 103.

Councils may prescribe what are and what are not nuisances. The regulation and control of the streets is vested in them; if they authorize the erection of a small watch-house, the property owners cannot complain.

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February 11, 1878. THE COURT. Under the circumstances of this case, and the location of the watch-house at the intersection of the streets and on the roadway near to the pavement, we think the power to put the watch-house there existed, and was properly exercised.

We see no error in the record.

PER CURIAM. Judgment affirmed

Jan. '78, 73. Jan. 17, 1878.

Smith v. Bunting.

Affidavit of defence law—Sale of collaterals by creditor—Fiduciary relationship.

S. purchased at sheriff's sale for $17,000 real estate sold under foreclosure of mortgages held by him as security for B.'s note of $30,000. To a suit by S. for the debt, offering credit for $17,000, B. filed an affidavit of defence, averring that the mortgages represented on their face $42,000; that the plaintiff had acted as absolute owner thereof, sued them out, and purchased the property without notice to him; and that the property, by careful management, would have realized much more than it did. The Court discharged a rule for judgment for want of a sufficient affidavit of defence:

Held, that the affidavit was insufficient, and that the plaintiff was entitled to judgment, either for the balance claimed, or, if still a trustee holding securities changed from mortgages to land, then for the entire amount of the debt; and the record was remitted to the Court below to enter such judgment as might be just and right.

Error to the Common Pleas No. 2, of Philadelphia County.

Assumpsit on a promissory note for $30,000, by Charles E. Smith, payee, against Samuel C. Bunting, Jr., maker.

The note was a renewal of a former similar note. The plaintiff offered credit for $17,000 realized on the foreclosure of mortgages held by him as collateral security for the note. The defendant filed an affidavit and supplemental affidavit of defence, averring, substantially: That at the time of the original loan he assigned to the plaintiff bonds and mortgages of the face value of $42,500, as collateral security, to be returned when said loan was paid; that the plaintiff caused the assignment of mortgages to be recorded, brought suit upon said mortgages in his own name, recovered judgment, issued execution, bought the property, receipted to the sheriff for the purchase-money, and thus assumed to act as absolute owner of the mortgages, without notice to the defendant; that at the time of the creation of said mortgages, the property was conveyed for $30,500; that at the time of the sheriff's sale, real estate was much depreciated; that the plaintiff by careful management could have realized much more than he did; and that the property was then, and now is, worth more than $17,000.

The Court discharged a rule for judgment for want of a sufficient affidavit of defence.

The plaintiff took this writ, assigning for error the discharge of his rule, and the refusal of the Court to give judgment for $18,835, being the balance claimed on the note with interest.

J. Cooke Longstreth, for plaintiff in error.

A chose in action given or transferred as collateral security is put under the dominion of the creditor, and it is his right to sue it out and collect it, or as much of it as he can by process of law.

Lishy *v.* O'Brien, 4 Watts, 141.
Insurance Co. *v.* Smith, 1 Jones, 120.
Hannah *v.* Holton, 28 Sm. 334.

The holder of a mortgage assigned as collateral security has the right to sue it out and purchase the mortgaged premises at the sheriff's sale, and hold them as his own, without any liability to the original debtor, except to credit him with the amount realized at said sale. He is not a trustee of the land or its proceeds on a subsequent sale, for his debtor, and, *a fortiori*, he cannot be held liable to account for any supposed excess in value of the property over the amount of his bid.

Campbell *v.* Ins. Co., 2 Wh. 53.

Even had the plaintiff been technically a trustee, his purchase at sheriff's sale would not have been void, but merely voidable at the election of his *cestui que trust*. There is no contract obligation on the part of the creditor to delay the collection of his security, and the alleged reasons for nursing the security have no place in a defence to the original debt. The debtor had given the creditor the right and power to make the most that he could out of the collateral, at his own time and option.

Alfred I. Phillips, for the defendant in error.

A fiduciary relation was created between the parties. The confidence was reposed that the security will not be disposed of for less than its real value, and that the creditor will not attempt to make any profit out of it for himself.

4 Kent's Com. 307.
Moses *v.* Murgatroyd, 1 Johns. Ch. 119.
Diller *v.* Brubaker, 2 Sm. 505.

The rule that any one standing in a fiduciary position cannot purchase at his own sale, has been extended to the holder of collateral security.

Story on Bailments, sec. 319.
Edwards on Bailments, 260.
Fox *v.* Mackreth, 1 L. C. Eq. 211, and note.
Hestonville R. R. Co. *v.* Shields, 3 Brews. 257.
Middlesex Bank *v.* Minot, 4 Met. 325.
Hoyt *v.* Martense, 16 N. Y. 231.
Slee *v.* Manhattan Co., 1 Paige, 48.
Campbell *v.* McLain, 1 Sm. 203.
Chronister *v.* Bushey, 7 W. & S. 153.
Shuman's App., 3 C. 65.
Bartholomew *v.* Leach, 7 W. 472.

The *cestui que trust* is not bound by the sale, and may ask for a re-sale.

Fox *v.* Mackreth, *supra*.
Campbell *v.* Ins. Co., 2 Wh. 53.

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The plaintiff has, therefore, but a mortgage still; for where the title to land may be defeated and a conveyance demanded upon the payment of money, nothing but a mortgage exists.

Kerr *v.* Gilmore, 6 W. 407.
Rhines *v.* Baird, 5 Wr. 256.
Kellum *v.* Smith, 9 C. 158.
Wilson *v.* Shoenberger, 7 Id. 295.
Jaques *v.* Weeks, 7 W. 261.
Harper's App., 14 Sm. 315.
Fessler's App., 25 Id. 483.
Luch's App., 8 Wr. 519.
Colwell *v.* Woods, 3 W. 188.
Brown *v.* Nickle, 6 B. 390.
Manufacturers' Bank *v.* Bank of Penna., 7 W. & S. 335.

The plaintiff's remedy is not to appropriate the land; and if he does appropriate, he is liable for any subsequent rise in value.

Sitgreaves *v.* Bank, 13 Wr. 359.
Diller *v.* Brubaker, 2 Sm. 505.
Conyngham's App., 7 Sm. 474.

The plaintiff's remedy is to proceed to another sale by *scire facias*, which will be upon an unrecorded mortgage.

Tryon *v.* Munson, 27 Sm. 250.

February 11, 1878. THE COURT. The defendant alleges in his affidavit of defence, that, as security for the note in suit, he assigned to the plaintiff certain mortgages with their *bonds*, representing some $42,508.33; that he, the plaintiff, caused these mortgages to be recorded and then brought suit thereon in his own name as absolute owner; that, having obtained judgments, he caused the mortgaged premises to be sold in due course by the sheriff without notice to the affiant, and that he bought in said premises for himself, at the same time receipting to the said sheriff for the sum of $17,708.20, as purchase-money; that the consideration agreed to be paid for these premises at the time when the mortgages were executed was $30,508.33; and finally that the affiant believes that, by careful management of these collaterals, the plaintiff might have realized much more than he did, the property still being worth more than $17,708.20.

This affidavit necessarily results in one of two conclusions: First, the plaintiff properly realized on his collaterals the aforesaid sum of $17,708.20, and for this amount the defendant may have credit; second, if the defendant's theory be correct, that the plaintiff, by bidding in the property and causing the sheriff's deed to be made to himself, without notice to or having the assent of the defendant, thereby constituted himself a trustee for the defendant, and so now holds the land only as he held the mortgages, as collateral security for the payment of the $30,000 note, then, and in that case, the defendant may compel a reconveyance to himself on tender to the plaintiff of the whole amount of his claim. In either case, however, the plaintiff is entitled to judgment; in the first, to the balance due upon his note after deducting $17,708.20; in the second, to the whole amount of that note, since, according to the defendant's theory, the collaterals have not yet been realized; but have only been changed from mortgages to the premises formerly bound thereby, which premises are still held for his use.

It is now ordered, that the records in this case be remitted to the Court below, and the said Court is hereby directed to enter judgment against the defendant, as may be just and right, unless other legal or equitable cause be shown to the Court why such judgment should not be entered.

Opinion by GORDON, J.

July, '75, 129. Feb. 6, 1878.

Lawrance v. Borm.

Constitutional law—Affidavit of defence law—Constitutionality of.

The Acts of Assembly authorizing judgment to be entered for want of an affidavit of defence, are not in conflict with the provision of the Constitution securing the right of trial by jury.

Error to the Common Pleas No. 1, of Philadelphia County.

Assumpsit, by Borm, indorsee, against Lawrance, maker, on two promissory notes. A copy of the notes having been filed, the defendant in his affidavit averred, that since the reorganization of the Courts under the new Constitution, there was no power in the Court to enter judgment against him for want of an affidavit of defence. The Court, holding the affidavit insufficient, entered judgment, and the defendant took this writ, assigning for error the entry of judgment.

Edward S. Lawrance, P.P., for the plaintiff in error.

This is a conflict between the fundamental law of forty millions of people on the one side and special legislation for the city of Philadelphia on the other. The right of trial by jury is guaranteed to the citizen by the Constitution of the United States and by every Constitution which has been formed within the limits of the government. It is insisted that the affidavit of defence law abridges the right of trial by jury.

(The plaintiff in error, in his paper-book, presented a review of the history of trial by jury, and an exhaustive *resumé* of the provisions of the Constitutions of all the States relating to that subject, from the earliest times to the present.)

H. C. Terry, contra, did not appear, and presented no paper-book.

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Feb. 18, 1878. THE COURT. The elaborate and exhaustive argument of the plaintiff in error certainly establishes the right of trial by jury as one of the inestimable privileges of the citizens of this free State. Coming down to us from the Proprietary himself, brought by him from England, and preserved in all the forms of government under which the freemen of Pennsylvania have lived, and made by them a fundamental article in their declaration of rights, it becomes us to see that it is not impaired. But while the sacredness of this reserved right cannot be impaired by the Legislature, we are unable to see that the law in question does impair it. Clearly, if a defendant in an action presents no defence to be tried by a jury, he cannot claim that his privilege is denied him. What is the affidavit of defence, but a special plea made under oath. By this means the defendant presents the facts of his case for the consideration of the Court. Now at no time in the history of civil proceedings has it ever been held that the trial by jury involves the right of the jury to decide the law of the case. A plea in abatement, a plea *puis darrein* continuance, and other cases provided for by the rules which the Courts are authorized to establish to govern the practice before them, must be put in under oath.

So rules governing the evidence to be submitted to a jury often require an oath in support or denial of the matter alleged. There cannot be an objection, therefore, to the fact that the party is obliged to state his plea or his defence under oath. This is but a means to prevent delay by falsehood or fraud. Nor can it be objected that, when all the facts have been stated by a defendant, which he either knows or is informed of, believes and expects to be able to prove, the Court decides the law arising upon the facts thus stated. This is no more than the Court always does upon a demurrer or special verdict, a nonsuit, or an issue in equity. And when a case is tried before a jury, the Court must decide upon the law governing the evidence or the case itself. It is a misconception, therefore, of the right of trial by jury to suppose that it draws the pleadings, no matter what their form, from the Court to the jury. A jury tries only issues of fact, and the Court must govern the making up of the issue. The affidavit of defence is only a modern but valuable mode of making up the issue for the jury. And when, on a statement of all the facts, a defendant can conscientiously swear to, the Court finds that the law upon these facts is against him, clearly he has no right to go before a jury. The Court has then done no more than it would have a right to do, by instruction to the jury, when all the evidence is in, with this advantage to the defendant, that by his affidavit he has made the evidence to support his own case.

We cannot perceive any collision between the Affidavit-of-defence law and the right of trial by jury.

PER CURIAM. Judgment affirmed.

[See note to Detmold & Cox *v.* Gate Vein Coal Co., 3 WEEKLY NOTES, 567.]

July, '77, 66. Feb. 6, 1878.

Hermann v. Ramsey.

Affidavit of defence—When insufficient—Necessary averments, where defence stated on information and belief.

An averment in an affidavit of defence that the defendant "is informed and believes" that the facts stated are true, is not sufficient. He must add that he expects to be able to prove them on the trial of the cause.

Black *v.* Halstead (3 Wr. 64) followed.

Error to the Common Pleas No. 2, of Philadelphia County.

Assumpsit, by Ramsey, indorsee, against Herman, indorser, on a promissory note for $300, drawn by one Weisgerber to the order of the defendant.

The defendant in his affidavit of defence averred that he was simply an accommodation indorser on said note for the maker, and had received no consideration therefor; that he was informed and believed that said note had been eight times renewed, and that he had indorsed the note eight times; that it was originally given to one Boyd, in whose hands it was renewed four times, and that the deponent was informed and believed that the maker paid to said Boyd $42 usurious interest for said renewals, that Boyd transferred his interest therein to Thompson & Co., one of whose members, the deponent was informed and believes, had full knowledge of said usurious transactions; that the note had been four times renewed with Thompson & Co., and that the maker had paid $42 usurious interest upon it to Thompson & Co., making in all $84 usurious interest. That "deponent is also informed and believes" that said note had been transferred since maturity by Thompson & Co. to the plaintiff, and that suit had been brought in his name with the intent to defeat any defence to a recovery on the note, and that it was still the property of Thompson & Co.

The Court below entered judgment for want of a sufficient affidavit of defence. The defendant took this writ, assigning for error the refusal of the Court to allow him a credit for the amount of the usurious interest.

J. M. Moyer, for the plaintiff in error, submitted his paper-book without oral argument. As to the defendant's right to deduct the amount of the usury, it cited—

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Campbell *v.* Sloan, 12 Sm. 481.
Brown *v.* The Bank, 22 Ibid. 209.
Jackson *v.* Hart, 11 Wendell, 343.
Morse *v.* Hovey, 9 Paige, 197.

S. B. Huey, contra.

The affidavit is based upon alleged information and belief. This is not sufficient. The defendant must aver that he *expects to be able to prove* his statements, or set out the sources of his information.

Black *v.* Halstead, 3 Wright, 64.
Thompson *v.* Clark, 6 Sm. 33.
Reznor *v.* Supplee, 31 Ibid. 181; 2 WEEKLY NOTES, 401.
Moeck *v.* Littell, 1 Norris, 354; 3 WEEKLY NOTES, 341.

Feb. 18, 1878. THE COURT. This case falls within the ruling in Black *v.* Halstead (3 Wright, 64). The defendant avers information and belief, but not that he expects to be able to prove the facts alleged.

PER CURIAM. Judgment affirmed.

Common Pleas—Equity.

C. P. No. 3. Dec. 10, 1877.

Wood v. Cunningham et al.

Partnership—Articles of Agreement—Contribution by solvent partners toward a debt owed the firm by an insolvent partner—Purchase by a partner at sheriff's sale of real estate in New Jersey belonging to the firm which remained subject to the lien of taxes and municipal claims—Firm debts.

Sur exception to Master's report.

In February, 1872, the plaintiff filed a bill in equity, alleging a partnership between himself and the defendants, and its dissolution about May 1st, 1871. He prayed an account. The matter was referred to a Master, who found the facts as follows: The firm in which the plaintiff and the defendants were partners consisted of four members, and was engaged in the manufacture of iron near Jersey City under the name of Christman & Co. By the articles of copartnership it was stipulated that the capital should consist of $20,000, to be contributed by the partners in the following proportions: William T. Cunningham $7000, George R. Wood $5000, John B. Christman $5000, and Edward Samuel $3000. The articles further provided, that "the interest of said partners in the profits and liabilities of the concern shall be in proportion to their respective shares." Wood, who was insolvent, had a credit balance of $8968.44, Samuel a credit of $1490.50, Cunningham a debit of $2218.84, and Christman, who was bankrupt, a debit of $8240.06. The two remaining partners, Cunningham and Samuel, were solvent, and liable for the partnership debts. The Master further found that the only assets of the firm were in New Jersey, and consisted of real estate, which, upon a judicial sale, was purchased by Samuel, one of the solvent partners, for a sum less than the amount of the mortgage on it. The Master also found as a fact that, at the time of this sale, taxes were due on the property, and, by the laws of New Jersey, taxes and municipal claims remain liens on property sold at sheriff's sale, and are not paid out of the purchase-money.

The indebtedness of the firm, beyond the amount due, as above stated, to the individual partners, Wood and Samuel, including the balance upon the bond and mortgage, was $10,263.84. Upon a statement of the accounts, it appeared that the proportion of the firm indebtedness due from Christman, the bankrupt partner, was $12,942.12, and for this sum the Master held that the other partners were liable *pro rata*, according to their respective interests in the firm, saying: "The doctrine of contribution in equity among co-sureties is founded upon the equitable principle of distributing a common burden equally among those who are able to bear it, and contribution among sureties is not founded on contract, but on the general equity of equality of burden and benefit. But in the matter in hand, the parties agreed to divide the profits in unequal proportions, and in the same proportions to bear the burden. I think the agreement is conclusive in the subject."

The Master further disallowed the claim of Edward Samuel for the amount of the taxes and municipal claims remaining a lien on the real estate at the time of his purchase, holding that he knew, or was presumed to know, that these liens existed, and that part of the consideration was the assumption of their payment.

To this report Cunningham filed exceptions, because the solvent partners were required to contribute to pay the firm debts in proportion to their respective interests, and were required to contribute to pay the debt due by Christman to the firm in the same proportions.

Samuel also filed exceptions, because of the disallowance of his claim for the taxes and municipal claims remaining a lien on the real estate.

Edward L. Perkins (with whom was *E. Spencer Miller*), for the exceptant Cunningham.

The liability of a partner to make good losses

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of the others is a creature of equity, and equity will divide the responsibility.

This agreement of copartnership is an agreement made between solvent partners supposed to continue solvent. It was not in contemplation when the agreement was made that one or more of the partners would fail.

John Samuel, for Samuel.

This is not a question of Samuel's personal liability for the taxes, but whether the firm of Christman & Co. is exonerated from the payment of this debt. The only ground of such exoneration is held to be that Samuel knew when he bought that the lien continued—but that might well be, and he expect to recover it from the former owners.

Mere knowledge in a vendee of an existing encumbrance will not exonerate those by whom the encumbrance was created, and the vendee may recover it.

Wolbert *v.* Lucas, 10 Barr, 73.

Unpaid taxes may be deducted.

Fulweiler *v.* Baugher, 15 S. & R. 53.
Caldwell *v.* Moore, 1 Jones, 58.

The contract of partnership is specific, and fixes the proportion in which the partners should pay the debts. If the doctrine of contribution among sureties applies here, the result is the same. That doctrine is not that equality is always equity, but that it is equity where the burden and benefit are common.

1 Lead. C. in Eq., Hare and Wallace's Notes, 156.
Breckenbridge *v.* Taylor, 5 Dana, 110.
Mills *v.* Hyde, 19 Vermont, 60.

C. A. V.

Dec. 12, 1877. THE COURT (per YERKES, J.) filed a decree dismissing the exceptions, and confirming the report.

Common Pleas—Law.

C. P. No. 3. Dec. 19, 1877.

Mulhair et al. v. West Phila. Passenger Railway Co.

Nonsuit—Action against railway company for injuries to pedestrian—Evidence of negligence to go to the jury.

Motion to take off non-suit.

Action on the case for damages by the widow and children of Neal Mulhair against the West Phila. Pass. R. W. Co.

The declaration averred that Neil Mulhair died in consequence of injuries received on November 3, 1876, by being run over by a car of the defendant negligently driven by its servant.

Plea, "not guilty."

On the trial (before FINLETTER, J.) it appeared that the north side of Market Street, between the bridge and Thirtieth Street, is partly bounded by the embankment wall of the Penna. R. R.; that about where the accident happened the wall curved towards the northwest, and that from that point the northern line of Market Street is continued by a curb, and a few feet further by a pavement fronting a coal yard.

Jennie Farnell, a witness for the plaintiffs, testified: that a few minutes after 6 o'clock in the evening she was walking on the pavement on the south side of Market Street, down the declivity from the western end of Market Street Bridge, and had reached a point about twenty feet above Keen Street, which intersects Market Street between the bridge and Thirtieth Street, when her attention was attracted by a car opposite her, bound in the same direction with her; that upon looking up she saw a man standing on the line, and instantaneously saw him struck down by the horses and run over; that the car was going very swift, and that it had just come off the bridge and was taking a brisk pace. On cross-examination she testified: "I know the car was going very swift, because they generally go down at a brisk pace, and because I heard the bells on the horses; I saw the car before I came down, and the car got ahead of me; I saw it in the bridge; I saw it when it was running down; I was walking in the same direction with the car and turned suddenly to look at it; when I turned I was at the point where I saw the man, and just as the horses' heads touched him the car and man were then directly opposite me."

Howard D. Appleton, another witness for the plaintiff, testified that he was on the front platform of the car when it ran over Mulhair; that he was looking at a locomotive on the railroad embankment when the car jolted; that he thought a stone had caused the jolt, until the bell rang and the car stopped within less than a hundred feet of the place of the accident, which was some feet above the Keen Street crossing.

The rules of the Company requiring the drivers not to drive faster than six miles an hour, to brake up on approaching a down grade, and to pass crossings on a walk or slow trot, were put in evidence.

Upon this testimony the plaintiffs were nonsuited, and afterwards made this motion.

John J. Ridgway (*W. R. McAdam* with him), for the motion.

The testimony of Jennie Farnell showed that the defendants' servants drove the car rapidly

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down the declivity. The driver of the car either saw the man standing on the track or did not see him; if the former, he was culpable in running him down; if the latter, he was certainly negligent. The legal inference from the accident is that he was negligent.

[FINLETTER, J. The presumption is that the driver was doing his duty until you prove the contrary.]

The facts in the case raise at least a presumption of negligence, and the case should have been given to the jury. It is the province of the judge to determine whether any facts have been established by evidence from which negligence may be inferred. It is for the jury to say whether such negligence ought to be inferred.

Girard Pass. R. W. Co. *v.* Middleton, 3 WEEKLY NOTES, 486.
McKee *v.* Bidwell, 24 Sm. 218.
Howard Express Co. *v.* Wile, 14 Id. 201.

C. Stuart Patterson (*T. De Witt Cuyler* with him), contra.

The law does not presume negligence as against railway corporations in favor of any one except passengers, but it requires the alleged act of negligence to be affirmatively proved.

L. S. N. R. R. & C. Co. *v.* Norton, 12 H. 468.
P. & R. R. R. Co. *v.* Hummell, 8 Wr. 377.
P. & T. R. R. Co. *v.* Hagan, 11 Id. 246.
Weger *v.* R. R. Co., 5 Sm. 461.
Allen *v.* Willard, 7 Id. 279.
Penna. R. R. Co. *v.* Goodman, 12 Id. 338.

There is no affirmative proof of negligence in this case. The assertions of the only witness as to the rapid driving of the car were completely broken down on cross-examination, and it clearly appears that the car was not seen by the witness from the time when she saw it on the bridge until when the accident occurred.

C. A. V.

Jan. 5, 1878. Rule absolute. (FINLETTER, J., dissented.)

C. P. No. 3. March 14, 1878.

Rhoads and Shryock, Assignees etc., v. The Bank.

Costs—Witness fees—Plaintiff is not entitled to witness fees and mileage for his own attendance at Court though su.ng as assignee.

Sur appeal from taxation of costs.

In the plaintiffs' bill of costs the prothonotary taxed and allowed two items of witness fees and mileage, amounting to $60. An appeal was taken by the defendant, on the ground that the items so claimed were for Shryock, one of the plaintiffs.

T. Horace Tharp, for the defendant.

The right to costs is strictly statutory, and the party claiming them must therefore show his right under some statute.

Brightly on Costs, p. 15.
Curtis *v.* Buzzard, 15 Serg. & R. 21.
Warren *v.* Weaver, 1 WEEKLY NOTES, 107.
Salada *v.* Seltzer, 4 Leg. Gaz. 130.

Edward D. McLoughlin, contra.

It is not necessary for the purpose of this case to contend that if the plaintiff had sued in his own right he could recover costs for himself. But in this case he sued as assignee. He had no personal interest in the suit. He attended the trial of the cause solely as a witness. He came a great distance several times, and was obliged each time to remain in the city two days. It is unjust that he should bear his expenses for attending court in a matter in which he had no direct concern whatever.

C. A. V.

March 6, 1878. Appeal sustained.

C. P. No. 3. Dec. 15, 1877.

Fidelity Co., Administrator of Warnick, v. Miller.

Affidavit of defence law—Instrument not within the Act—Mortgage unaccompanied by bond—Transfer of title to a steamboat as security for the payment of money.

Rule for judgment for want of a sufficient affidavit of defence.

This was an action of debt. The copy filed was an indenture of mortgage of a steamboat, dated July 6, 1857, reciting as follows:—

"Whereas the said Henry W. Miller is *justly and truly indebted* to the said Charles W. Warnick. . . . Now this indenture witnesseth that the said Henry W. Miller, for and in consideration of the aforesaid debt, and for the better securing the payment of the same unto the said Charles W. Warnick, his executors, administrators, and assigns, and in consideration of the further sum of one dollar . . . hath granted [then follows a conveyance of the steamboat]. Provided, however, nevertheless, that if the said Henry W. Miller, his executors, etc., do and shall well and truly pay or cause to be paid, etc., then this *obligation* shall cease, and determine and become void anything hereinbefore contained to the contrary notwithstanding."

The affidavit of defence suggested: (1) That defendant's personal liability, if any, is barred by the statute of limitations; (2) that the instrument filed being a mortgage of a boat, the United States Courts have exclusive jurisdiction; (3) that defendant is not in any way personally liable on the instrument filed, it being merely security for a debt, no other evidence of indebtedness being filed.

Albert B. Guilbert (with him *Alexander D. Campbell*), for the rule.

This is not a proceeding *in rem* upon a mortgage of a steamboat. The instrument filed is a *specialty* importing a personal liability. Generally parties are estopped by recitals.

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Price on Limitations, 200.
2 Parsons on Contracts (ed. 1873), *511.
Esp. Nisi Prius, *268.

Every mortgage implies a loan, and every loan a debt. The paper filed clearly sets forth a transaction creating a personal liability which the defendant is not permitted to deny.

Conway *v.* Alexander, 7 Cr. 218.
Chitty on Pleading (ed. 1876), 214, note t.

It is true, that, when a mortgage deed unaccompanied by a bond makes no mention of any indebtedness, but is simply a conveyance with a naked proviso to be void upon the payment of a certain sum, there is no implied covenant for its payment. But when the mortgage deed, as here, expressly acknowledges the indebtedness, and declares its purpose to be the better securing the payment of the debt therein confessed, then there is an implied covenant to pay, and an action of debt lies upon it.

Esp. Nisi Prius, *268.
Meynell *v.* Howard, Prec. Ch. 61.
King *v.* King, 3 P. W. 358.
Howel *v.* Price, 1 P. W. 290.
Elder *v.* Rouse, 15 Wend. 218.
Hart *v.* Burton, 7 J. J. Marsh. 322.

In Scott *v.* Fields (7 Watts, 360) the deed recited a bond, and evidence was admitted to show that the bond was not lost, but had in fact never existed. In that case, there could be no implied covenant, since it contained an express one. The deed neither directly nor indirectly confessed a debt. The syllabus is incorrect.

The principle contended for is so well-established that in other States enactments have been made to change it.

N. Y. Rev. Stat. vol. ii. p. 22, § 139, 3d ed
Indiana Rev. Stat. 1843, ch. 29, § 31.

The words of the deed are that if payment is made, this "obligation" is to be void. These are the ordinary words of a bond.

Charles H. Downing, contra.

An action of debt will not lie upon a mortgage without express covenant to pay.

Scott *v.* Fields, 7 Watts, 360.

C. A. V.

THE COURT. The instrument upon which the plaintiff asks us to grant a judgment for want of an affidavit of defence is simply a transfer of title as security for the payment of money with no absolute condition for the payment thereof. This is not a stronger case than the only one we have been able to find touching the subject in Pennsylvania. In Scott *v.* Fields (7 Watts, 360), the case to which we refer, a bond was acknowledged, and that was an instrument for the payment of money; here there is simply and merely an acknowledgement of a debt. We are not informed what the original instrument was, if any, creating the debt secured by this paper. Whatever it was, it could not have been stronger than the bond, acknowledged (as is said by the Court) "for the payment of a sum of money by instalments," and as in that instance it was held that "no contract of borrowing or loan can be implied in law from a mortgage as the foundation of the action when the contract is express and formal;" so here in this instrument, where there is a mere recital of an obligation, a paper in the nature of a mortgage, no judgment ought to be granted because the instrument does not appear to be an instrument for the payment of money, and is not, therefore, within the original affidavit of defence law or any of its supplements.

Rule discharged.

Opinion by LUDLOW, P. J.

C. P. No. 3. March 4, 1878.

Dickson v. Buchanan.

Affidavit of defence law—Instrument within the act—Averment of amount due.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit on the following instrument in writing:—

PHILADELPHIA, Dec. 5, 1877.

I hereby acknowledge that at the time I engaged the services of Wm. L. Dickson, the agreement between us was that he should receive a salary of eleven hundred dollars ($1100) per annum, and draw $20 each week until the end of the year, when he should take the balance in one sum.

J. R. BUCHANAN & Co.

The following account was also filed:—

J. R. Buchanan & Co. to Wm. L. Dickson, Dr.

Dec. 31, 1877. To salary as salesman for one year ending this date,		$1100
Plaintiff acknowledges cash and m'dse,	$815 99	
Board,	95 00	

Claims judg't for bal., with int. from Jan. 1, '78,

The affidavit of defence suggested that the above copy of instrument and account filed were not sufficient to entitle the plaintiff to judgment for want of an affidavit of defence.

McKinlay, for the rule, cited—

Strauch *v.* Royal Land Company, 35 Leg. Int. 78.

Caven, contra. The instrument in this case is only a possible or conditional liability. There is no promise even to pay.

LUDLOW, P. J. This case is clearly to be distinguished from the one cited by plaintiff's counsel. In that there was a specific agreement, while here we have simply an acknowledgment which may or may not be for a specific amount.

Rule discharged.

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WEEKLY NOTES OF CASES.

VOL. V.] *THURSDAY, APRIL* 4, 1878. [NO. 10.

Supreme Court.

Oct. & Nov. '77, 174. Nov. 3, 1877.

The Safe Deposit Company of Pittsburgh v. Pollock.

Bailment—Negligence—What evidence of negligence sufficient to charge the bailee and shift the burden of proof—When question of negligence to be left to the jury.

The Safe Deposit Company of Pittsburgh, being engaged in the business of receiving valuables for safe keeping, rented to the plaintiff a small safe in their vault, to which the plaintiff alone held the keys, the company having no access thereto, nor information as to the contents thereof; their liability being by express agreement limited to the keeping of a constant and adequate guard upon the safe, the prevention of access of any other renter, and to protection against dishonesty by any of the Company's employés.

In an action against the Company for negligence, by the renter of a safe, the plaintiff testified that he deposited certain bonds therein; that he was in the habit of opening the safe from time to time to cut off coupons, etc., and that on a certain occasion he discovered that a portion of the bonds were missing, the other bonds and contents of the safe being untouched. The lock showed no indication of having been tampered with, and the evidence on the part of the Company tended to show that a diligent guard had been kept over the plaintiff's safe, and that the plaintiff alone had had access thereto:

Held, That the mere loss of the plaintiff's bonds was of itself sufficient evidence of negligence to charge the defendants, and to compel them to give some explanation of the loss.

Held further, That the disappearance of the plaintiff's bonds created a presumption of want of ordinary care, and that all the evidence calculated to rebut that presumption was properly left to the jury.

Error to the Common Pleas No. 1, of Allegheny County.

Case, by Pollock against the Safe Deposit Company of Pittsburgh, to recover the value of four United States coupon bonds, deposited by the plaintiff in a small safe rented by him from the defendant company, and alleged to have been lost or stolen by reason of the negligence of the defendants. Plea, not guilty.

On the trial (before COLLIER, J.), the following facts appeared in evidence:—

The Safe Deposit Company of Pittsburgh is a corporation organized for the purpose of providing a place of safe keeping for articles of value. They have a large fire-proof building, provided with a fire and burglar proof safe, which is at all times under the surveillance of employés of the company.

Two classes of deposits are taken by the company: one class comprising articles taken at so-called guarantee rates, for the safe keeping of which the company agrees to become absolutely responsible in consideration of an advanced rate to be paid by the depositor; the other class comprising articles left in small safes, or subdivisions of the larger safes. These small safes each contain a tin box, in which the articles left for deposit are to be placed, each safe having a peculiar lock for which two keys only are made, both of which are given to the renter of the safe. The renters of these smaller safes are allowed to deposit therein and remove therefrom at pleasure, and the company professes to be ignorant of the contents, and to have no access thereto.

On Sept. 29, 1869, the plaintiff, A. M. Pollock, rented one of the safes of the company, and held it, renewing the rent annually, until Sept. 29, 1875. The contract between the parties was evidenced by a receipt, given by the company to the plaintiff, as follows:—

"Received, Pittsburgh, Sept. 29, 1869, from Dr. A. M. Pollock, fifteen dollars for rent of a No. 7 safe in the vault of this company, from Sept. 29, 1869, to Sept. 29, 1870, subject to the rules and regulation of the company.

S. F. VON BONHORST, *Treasurer*."

The plaintiff accepted the safe subject to the rules and regulations of the company, which are as follows:—

"Whenever a party rents a safe, and deposits therein at his pleasure, contents not being made known to the company, its liability is limited: (1) To the keeping of a constant and adequate guard and watch over and upon the burglar proof safe; (2) To the prevention of access to any other renter; (3) To the protection of safes and contents from any dishonesty on the part of any of the company's own employés."

The plaintiff testified, on his own behalf, substantially as follows: That he rented the small safe September 29, 1869, and renewed the rental annually thereafter until 1875; that he deposited bonds and other valuable papers and articles in it and removed the same from time to time; that on first renting the safe he deposited therein, among other things, United States bonds amounting to $16,000, of which $10,000 were registered, and $6000 coupon bonds. Of the latter $3000 were '65s, comprising two bonds of $1000 each and two of $500 each, and $3000 were '67s, comprising three bonds of $1000 each; that all these Government bonds were inclosed in one envelope, which was placed in a tin box which exactly fitted in the small safe, sliding in the manner of a drawer and removable from the safe; that he was in the habit of visiting the safe from time to time for the purpose of putting in and taking out valuables, and to cut off the coupons.

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from the United States bonds as the same matured; that on such occasions his habit was to take the tin box from the safe to a counter or desk in an adjoining apartment outside the vault, where there were conveniences for cutting off the coupons, and having cut them off, to return the bonds to the envelope, the envelope to the box, and the box to the safe, which he then locked; that on the occasion when he cut off the coupons which matured July 1, 1874—on some date between that time and September 4, 1874, when he sold the coupons, precisely when he could not remember—the bonds were all right; that he visited the safe again on November 30, 1874, for the purpose of removing certain Alleghany Valley Railroad bonds, which he took to Philadelphia and sold a few days afterwards; that these railroad bonds were loose in the box, and he did not at that time remove or examine the contents of the envelope containing the Government bonds.

The plaintiff further testified that the next time that he remembered to have visited his safe was on January 27, 1875, when, on taking out the envelope for the purpose of cutting off the coupons of the $6000 coupon bonds, he found $3000 of said coupon bonds missing—being the two bonds of $1000 each and two of $500 each of the '65s—the other $3000 coupon bonds of '67, and all the registered bonds being intact in the envelope. Nothing else was missed from the safe. On this occasion the plaintiff found his safe locked, and had no difficulty in unlocking it, and neither the vault nor the safe bore any indication that they had been tampered with. The plaintiff stated that he had never used but one of his duplicate keys to the small safe, having kept the other locked up in another safe at his residence, the key of which latter remained always and exclusively in his possession.

On cross-examination, the plaintiff, in answer to a question whether on any occasion when he took his bonds out to cut off coupons, and particularly when he cut off the July, '74, coupons, he did not by accident leave the missing bonds on the table, replied: "Not to my knowledge. I can't think I did. That is a question no man can be positive on, but to the best of my knowledge and belief I did not, and one thing that confirms me in my belief is the fact that they were in an envelope, and those that were left were in the envelope; I don't think I would have left out $3000 and put the others carefully away. I can't be positive; that might be a possibility."

A motion for a non-suit having been overruled by the Court, the defendant proceeded to call every officer and employé of the defendant company, and proved by them that none of them had taken the plaintiff's bonds; that they knew nothing of the contents of the plaintiff's safe; and that each and every one of them had exercised due care and diligence in keeping guard over the plaintiff's safe. The defendants also introduced expert testimony tending to prove that the safes, locks, and other appliances of the company's vault were constructed in a good and workmanlike manner.

The Court, in the general charge, instructed the jury as follows: "The defendant can only be held liable for want of ordinary care, and if you think, from all the evidence in the case, that the defendant exercised such care as ordinarily vigilant prudent people would exercise under the same or similar circumstances about their own affairs, then they have done all that the law required under the contract in this case . . . . . [So, gentlemen, we instruct you, first, that if you believe that the bonds were not in the box, that the plaintiff is honestly mistaken, that he might have dropped them on the counter when he was examining them, or carried them away and forgotten them, or in any other way they were kept out of the box, then the plaintiff is not entitled to recover. But, gentlemen, if the bonds were in the box, as alleged, if the plaintiff is not mistaken, if the bonds were in the box, and they were missing under the circumstances as detailed by the plaintiff, he had a right, then, to call on the defendants for an explanation."]

The defendants requested the Court to charge the jury, *inter alia:* [That the burden of proving the negligence which the plaintiff charges against the defendant is upon the plaintiff;] and the evidence that, upon Jan. 27, 1875, the plaintiff, upon unlocking the safe rented and used by him in the burglar-proof vault of the defendant, and examining its contents, discovered that part of his bonds were missing therefrom, does not of itself establish such negligence in the defendant, although the defendant is unable to account for the alleged loss, or how it happened. *Answer.* The part in brackets is affirmed. The rest is refused. Exception, and bill sealed for defendant.

Verdict for the plaintiff for $4154.12, and judgment thereon. The defendant took this writ, assigning for error the answer of the Court to the defendant's point, and the portion of the general charge above quoted within brackets.

W. W. Acheson (*J. S. & A. P. Morrison* with him), for the plaintiff in error.

The Court charged the jury that the plaintiff's bare testimony that he had placed certain bonds in his safe, and had one day discovered that they had disappeared, was of itself sufficient evidence of negligence on the part of the company to oblige the defendant to negative the charge of negligence. But how could this be done? Such a ruling places the company at the mercy of any one of its renters, since he alone knows what is contained in his safe, and he alone has access to it. The company did not undertake to become

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an insurer of the plaintiff's valuables; such undertakings constitute a distinct class of risks for which an additional rate is charged and paid. The company's contract was limited to "the keeping of a constant and adequate guard and watch over and upon the burglar-proof safe;" and we proved, on the trial, that this had been done. But the charge of the Court makes our contract one of absolute guaranty; something which was not in the contemplation of the parties at the time of entering into the agreement. The Court demanded that we should furnish an explanation of the loss of a thing, of the very existence of which we were never aware. The most probable explanation, in the absence of any direct evidence of the manner in which the bonds were lost, is, that the plaintiff himself, on a former occasion, when visiting the safe and taking out the bonds to cut off the coupons, omitted to put the missing ones back, and either carried them away himself inadvertently or left them on the desk, whence some other renter carried them off. Such negligence on the part of renters is not uncommon, this company alone having returned to renters over $75,000 of securities so left on desks or counters.

In the case of Finucane *v.* Small (1 Esp. Rep. 315), the circumstances being precisely like those of the present case, Lord KENYON said: "To support an action of this nature, positive negligence must be proved. It has appeared in evidence that the goods were lodged in a place of security, and where things of much greater value were kept. This is all that is incumbent on the defendant to do."

The mere fact that a bailee cannot produce goods when called for is not conclusive evidence of negligence. Excepting the cases of inn-keepers and common carriers, the burden of proving negligence is on the bailor; mere proof of loss is not sufficient to put the bailee on his defence.

Farnham *v.* Camden and Amboy R. R. Co., 5 Sm. 53.

Wharton on Negligence, sec. 477.

Negligence is the gist of the action here and must be affirmatively proved.

Shearman and Redfield on Negligence, 2d ed. sec. 12.

But, at all events, we showed a compliance with the terms of our contract, and since the plaintiff failed to prove negligence on our part, we were entitled to a non-suit, or a binding instruction in our favor.

Patterson *v.* Clyde, 17 Sm. 506.

Christopher Magee and *Thos. M. Marshall* (*John H. Bailey* with them), for the defendant in error.

The whole question of negligence was one of fact to be left with the jury, and the finding in our favor is our best argument.

The case of Finucane *v.* Small, cited on the other side, is not like the present, for there no express contract was shown.

Jan. 17, 1878. THE COURT. This action was brought against the plaintiff in error to recover for the loss of some government bonds. Its general business is indicated by its name. It took two classes of risk. In one class it became the absolute guarantor of the safety of the deposit. In the other its liability was qualified and restricted. The present case arose under the latter class. The defendant in error rented a safe in the burglar proof of the company, subject, *inter alia*, to its following rules and regulations:—

"Whenever a party rents a safe, and deposits therein at pleasure, contents not being made known to the company, its liability is limited—

(1) To the keeping of a constant and adequate guard and watch over, and upon, the burglar-proof safe.

(2) To the prevention of access by any renter to the safe of any other renter.

(3) To the protection of safes and contents from any dishonesty on the part of any of the company's employés."

He renewed the lease annually several times, and paid the required rent. The safe is closed by an iron door to which a lock is attached. The valuables are placed in a tin box made to fit into the safe like a drawer. In this box and safe he placed several thousand dollars in government bonds, and had the exclusive possession of the keys to the safe. As the interest fell due on the bonds he took them out, cut the coupons therefrom, and replaced them in the safe, and locked it again. Finally, on taking out the envelope containing the bonds, for the same purpose, he discovered that four bonds, two of $1000 each, and two of $500 each, had disappeared therefrom. The jury have found that he put them in the safe, and did not remove them therefrom. There was no evidence that the vault or the safe had been broken, or that the lock had been tampered with.

These facts being unquestioned, and the bonds having been taken from the safe, it necessarily follows that it had been opened with a key suited to the lock. In order to get access to the safe a person would be obliged to step into the vault. If he entered during business hours one key would enable him to procure the bonds. If at other hours, it would require two keys to reach them from the office.

The fact that the bonds were taken under these circumstances, was certainly some evidence that the company had not kept "a constant and adequate guard and watch over and upon the safe," as by its agreement it was bound to do. It further agreed to prevent the access of any other renter to the safe of the defendant in error, and to protect his safe and its contents from any dishonesty of the company's employés. If any third persons were given access to the vault under

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circumstances that would have enabled them to unlock the safe and remove the bonds, and they had so done, although a contingency not provided for in the agreement, yet it cannot be pretended that it would not be evidence of a want of ordinary care. So if the bonds were purloined by either renter or employé, it was certainly evidence to go to the jury of an omission on the part of the company to exercise that ordinary care and vigilance which men ordinarily exercise, and ought to exercise, under such circumstances, in the protection of their own property. The vault and the safe were in the possession and under the protection of the company. The manner in which the bonds were most probably taken, shifted the burden of proof. It threw upon the company the necessity of making some explanation to rebut its *prima facie* negligence. The case is not like Finucane *v.* Small (1 Espinasse Rep. 315), in which there was no express agreement as to the care to be exercised. Nor is it like Farnham *v.* Camden and Amboy R. R. Co. (5 P. F. Smith, 53), where it was held that proof merely of loss was not sufficient to put the bailee on his defence. The evidence in the present case of the defendant in error did not stop with merely showing the loss. It showed the bonds had been abstracted by some one entering the vault, and opening the safe by means of a key. The presumption of want of ordinary care was thereby created. All the evidence calculated to rebut that presumption was fairly left to the jury by the learned judge.

The other assignments have no merit, and were not urged in the argument.

Judgment affirmed.

Opinion by MERCUR, J.

PAXSON, J., absent.

On Jan. 14, 1878, the counsel for plaintiff in error moved the Court for a reargument of this case, assigning the following reasons:—

(1) It is respectfully submitted that the learned Justice (MERCUR) who delivered the opinion of this Court fell into serious mistake as to the facts, as appears from the following portion of the opinion, to wit: "The evidence in the present case of the defendant in error did not stop with merely showing the loss. *It showed the bonds had been abstracted by some one entering the vault and opening the safe by means of a key.* The presumption of want of ordinary care was thereby created."

(2) The only evidence of the alleged loss of the bonds in question from the safe was the testimony of the plaintiff himself, who admitted that he might be mistaken as to his having replaced the bonds in his safe when he last took them therefrom to cut off his coupons.

(3) The court below ruled that the plaintiff's testimony alone, as to the alleged loss, was sufficient to put the deposit company upon its exculpation.

THE COURT. Motion refused.

Jan. '78, 136. Feb. 18, 1878.

Donohugh's Appeal.
Donohugh v. The Library Company of Philadelphia.

Constitutional law—Taxes and taxation—Exemption of public libraries and library buildings from—Article IX., Sec. 1, of Constitution construed — "Institutions of purely public charity," how confined by the word "purely" —Act of May 14, 1874.

Article IX., Sec. 1, of the Constitution, which provides that the Legislature may exempt from taxation "institutions of purely public charity," is not to be restricted in its application to institutions solely controlled and administered by the State, but extends to private institutions organized for purposes of purely public charity, and not administered for gain.

The Act of 14 May, 1874, which provides that "All hospitals, universities, ... and institutions of learning, benevolence, or charity, with the grounds thereto annexed and necessary for the occupancy and enjoyment of the same, founded, endowed, or maintained by public or private charity, shall be exempt from taxation," is not unconstitutional.

The books of the Library Company of Philadelphia have at all times since its organization, in 1731, been freely open to the public for gratuitous use within the building; stockholders of the company and subscribers are given the additional privilege of taking books from the building. The entire income of the company, after the payment of necessary expenses, is devoted to the purchase of new books. The Board of Revision of Taxes having declared the property of the company to be exempt from taxation under the provisions of the Act of 14 May, 1874, the Collector of Delinquent Taxes distrained upon the property of the company for the amount of the taxes of 1876. Upon an application by the Library Company an injunction was granted by the Common Pleas restraining the Collector from further proceedings:

Held, that the Library Company of Philadelphia was a charity, under Art. IX., Sec. 1, of the Constitution, and the Act of May 14, 1874 (P. L. 158), and that the injunction was, therefore, properly awarded.

Appeal from the Common Pleas No. 2, of Philadelphia County.

Bill in equity, filed June 14, 1877, by the Library Company of Philadelphia against William J. Donohugh, Collector of Delinquent Taxes of the City of Philadelphia, for an injunction to restrain the defendant from proceeding to levy and collect a sum equivalent to the legal tax-rate for the year 1876 upon the library and library building of the complainants.

The bill averred that the corporation com-

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plainant, then an association, was founded July 1, 1731, by Benjamin Franklin, James Logan, and others, as an institution for the advancement of learning and the more useful dissemination of knowledge; that the company complainant was incorporated under its present name March 25, 1742, by John, Thomas, and Richard Penn, then proprietaries of Pennsylvania by letters patent, reciting that Benjamin Franklin and others had, at a great expense, purchased a large and valuable collection of useful books, in order to erect a library for the advancement of knowledge and literature in the city of Philadelphia; that they were trustees, under the will of James Logan, of certain real estate, and of a collection of books known as the Loganian Library, one of the most valuable of its kind in the United States, which now exceeds 10,000 volumes, and was absolutely free to the public; that additions had been made to the library by association, under Act of March 13, 1769, with the Union Library Company of Philadelphia, in 1771, with the Associated Library Company and the Amicable Company, by a bequest in 1804 by John Bleakley and Rev. Samuel Preston, by the bequest in 1827 of the Mackenzie Library, and by numerous other gifts and bequests of books from time to time, forming a valuable collection of books now exceeding 100,000 volumes, and which had for nearly 150 years been freely open to the citizens of Philadelphia; that the corporation was maintained by the annual contributions of its members, by the income from bequests of property, and by fees paid for the use of books by persons not members; that all the profits and income of the corporation, after deducting necessary expenses of maintenance, were applied to the purchase of books; that the institution was managed by twelve directors, annually chosen, who received no compensation for their services; that the use of the books was given (1) without charge to all persons using them within the building; (2) to all members, with limitations on the number of volumes to be taken for use outside of the building; (3) to all persons, for a small charge, who desire to use the books without the building upon giving security for their return; that the original purpose of its creation was that of a circulating library, it being the first of its kind in this country; that its members derived no pecuniary benefit from its revenues; that from its first organization down to the present time it had never been considered a proper subject of taxation, and that the building on Fifth Street, which was used exclusively for the purposes of the library, had been specially exempted by the Board of Revision of Taxes for the city of Philadelphia, which decision, not having been appealed from, was conclusive upon the defendant.

The bill prayed (1) for a declaration that the corporation was a purely public charity, as well as an institution of learning, benevolence, or charity; or, in the alternative, that the exemption of the Board of Revision was conclusive upon the defendant; (2) an injunction; (3) general relief.

The bill was fortified by the affidavit of Lloyd P. Smith, the present librarian, and by a copy of the memorial of the corporation to the Board of Revision of Taxes, upon which they decided that the library building of the complainants was exempt. There was in evidence a copy of the rules of the library, by agreement treated as an affidavit. There was also in evidence the copy of a letter of the counsel of the complainants in reply to a letter of the City Solicitor, setting forth that the number of shares was 960; that the actual cost of the original share or right of commutation was $40, of which the market value was $25 and upwards, and that the annual revenue from the shareholders was $7800.

The respondents filed no answer.

The Court awarded a special injunction, MITCHELL, J., delivering the following opinion:—

. . . . Article IX., section 1, of the new Constitution of Pennsylvania, declares: "All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws; but the General Assembly may, by general laws, exempt from taxation public property used for public purposes, actual places of religious worship, places of burial not used or held for private or corporate profit, and institutions of purely public charity."

The Act of May 14, 1874 (P. L. 158), passed to carry into effect this constitutional provision, provides that "all churches, meeting-houses, or other regular places of stated worship, with the grounds thereto annexed necessary for the occupancy and enjoyment of the same; all burial-grounds not used or held for private or corporate profit; all hospitals, universities, colleges, seminaries, academies, associations, and institutions of learning, benevolence, or charity, with the grounds thereto annexed, and necessary for the occupancy and enjoyment of the same, founded, endowed, and maintained by public or private charity," together with public school-houses, court-houses, jails, etc., are hereby exempted from all and every county, city, borough, road, and school tax, with a proviso that the exemption shall not extend to property not in actual use for the purposes specified, and from which any income or revenue is derived.

This is the legislation, constitutional and statutory, by which this case must be decided. The Constitution does not, of itself, exempt any property; it merely permits the Legislature to do so within certain limits. The first question, there-

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fore, is whether the complainant's case is within the Act of 1874; and this we think so clear that it may be considered and dismissed briefly. The complainant is an "association or institution of learning." The educational influence of great libraries has been recognized by all civilized people in all ages. They have been the refuge and preservers of knowledge in the darkest times of ignorance and superstition; the source and rallying point of awakened interest in philosophy and science, wherever the human mind has aroused itself to a new search for intellectual light; and the glory and pride of nations, in exact proportion as they have attained a higher plane of enlightened and progressive civilization. It is the concurrent and universal opinion of scholars that no single event in recorded history has been so great a misfortune to the interests of pure learning as the destruction of the Alexandrine Library.

The complainant was founded in 1731, by Benjamin Franklin, James Logan, and others, not only as an institution of learning, but undoubtedly as a charity, within the long settled and clearly defined legal meaning of that term. In 1742, it was incorporated by letters patent from the proprietaries of Pennsylvania, who recited in their patent that the founders had, "at a great expense, purchased a large and valuable collection of useful books, in order to erect a library for the *advancement of knowledge and literature in the City of Philadelphia.*" This library subsequently received the accession of the library of James Logan, in its time, and for many years afterwards, the most valuable collection of books in America, and has, from time to time, been added to and endowed by gifts, bequests, and accumulations from various sources, including subscriptions and annual payments by members of the corporation. We do not think it admits of doubt that it is not only an institution of learning, but that it is also founded, endowed, and maintained by charity within the meaning of the Act of 1874.

But there remains the further and more important question, whether the Act of 1874 is constitutional. It is conceded that the Legislature cannot go outside of the class of cases in which the Constitution permits exemption from taxation, but it is to be remembered that the provision of the Constitution is not a grant of power to the Legislature which belongs elsewhere, and is therefore to be strictly construed as in derogation of the people's right. On the contrary, it is a restriction upon a legislative power which would otherwise be unlimited and unquestionable. It is a tying up of the legislative hand, and therefore to be construed in a liberal spirit to remedy the mischief at which it was aimed, and not further unnecessarily to fetter the proper governmental powers of the people's representatives.

The power of a Court to set aside the legislative will is unknown, except in American jurisprudence. The authority of an Act of Parliament is supreme and unquestionable in the country from which we derive our laws and the fundamental principles of our political liberty; and in the early days of the Republic, it was not without grave doubts and serious opposition, that the judicial power was carried to this extent even here. And though it is now firmly settled that the Courts are the ultimate interpreters of the Constitution, and that all acts or legislation which are forbidden by the Constitution are to be declared void, yet it is equally well settled that this power can only be exercised where there is a clear and undoubted infringement of the Constitution. In all cases the presumption is in favor of the validity of the legislative act, and where there is room for doubt, this presumption must prevail. Especially is great respect due to the legislative construction of a constitutional provision where, as in the present case, it is a question, not of private right, but of public policy. For the preservation of individual rights, whether as between man and man, or between the citizens and the public, or the government, the Courts are the natural guardians, with special advantages of training and modes of procedure for the attainment of justice; but for the preservation, as well as for the determination in the first instance, of matters of State policy, the proper tribunal is the Legislature; and its construction of a constitutional mandate upon this subject must be held binding and conclusive until shown clearly and beyond all question to be in violation of the intention of the people in their sovereign expression of their will through the Constitution.

These principles are trite; but the haste and crudity of much recent legislation has required such frequent exercise of the judicial power to keep it within constitutional bounds, that the delicacy and exceptional nature of the power is too commonly lost sight of, and I have thought it proper to recall its true limits, familiar as they are, because of the tone of argument for the defendant in the present case, which assumes that as exemption from taxation is a special privilege, it must be clearly shown, and that it is, therefore, sufficient for the defendant to show a doubt to defeat the complainant's case. Such, certainly, is the rule in determining whether or not exemption has been granted to any particular claimant by an Act of Assembly. The sovereign power of taxation is never to be taken away except by a clear grant. But where the Legislature has clearly intended the exemption, the validity of that act must be assumed like all others, until

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clearly shown to be beyond the legislative authority.

Bearing these principles in mind, let us proceed to the examination of the section of the Constitution upon this subject. As already said, it exempts nothing, but it authorizes the Legislature, by general laws, to exempt, speaking generally: First, public property; second, actual places of religious worship; third, burial places not for profit; and fourth, "institutions of purely public charity." The last is the only class with which we are directly concerned, though, as we shall see, some light can be had from the language used in describing the others.

Looking at this provision in the light of Lord COKE'S rules for the interpretation of statutes—what was the old law, what was the mischief in it which was meant to be remedied, and what was the remedy prescribed, we can have little doubt that this clause was intended to abolish *favoritism*, in the form of special legislative grants of exemption from taxation. The learned counsel for the complainant have collected together a list of the 130 Acts of the State Legislature, passed between 1850 and 1873, exempting private or corporate property from taxation, and they have been summarized as follows:—

1. Institutions of public benevolence for the poor	20
2. Hospitals	16
3. Literary, scientific, and educational institutions	19
4. Religious—churches and parsonages	32
5. Cemeteries or burial places	15
6. Military institutions	6
7. Institutions of private benevolence	13
8. Miscellaneous and doubtful	9
Total	130

Some of these were, at best, only private charities, and some of them, notably in the fifth class—cemeteries—were not charities at all, but mere trading corporations for private and individual profit. The large majority, however, were true charities, both in the legal and popular sense, and were worthy objects of legislative aid, but it was felt to be a hardship that that aid should be rendered as a matter of individual favoritism granted to one and withheld from another, as the views of successive Legislatures might be more or less liberal on the subject. To remedy this evil, the new Constitution provided, first and chiefly, that all exemption from taxation should be by *general laws;* and secondly, that those laws should include only the classes of property named. Bearing in mind that institutions of public benevolence for the poor, hospitals, literary, scientific, and educational institutions, and most of the military institutions in class 6 above (being like the Lincoln Institute and Soldiers' Orphan Schools), are all included under the general class of public charities, it is plain that, tried even by the standard of the present Constitution, the long list of exemptions in the 130 Acts referred to would still be valid, except so far as they include church property not used for public worship, cemeteries for private profit, and institutions of private benevolence. This comparison of the legislation of the last quarter of a century on the subject, with the legislation still permitted under the present Constitution, demonstrates clearly that the primary intent of this constitutional provision, as of so many others in the same instrument, was not so much to limit the scope of exemptions to charities as to destroy the obnoxious feature of favoritism by special legislation; the key-note to the whole clause is in the permission to exempt only by *general laws*.

But though this was certainly the main purpose, it is also equally clear that the provision does go a step further, and put a limit upon the legislative power to exempt, which was before unlimited. It remains, therefore, still to be considered whether the Legislature, in extending the exemption to institutions of learning such as the complainant, has transgressed the limits laid down by the words "institutions of purely public charity."

That the complainant is a charity in the legal sense of the word does not admit of question. It is equally clear that it is also a charity in the somewhat narrower and more popular sense in which we must interpret the words of a popular instrument like the Constitution. The commonest and most familiar meaning of charity is almsgiving, but that narrow definition is not the primary or most important one given in the dictionaries or sanctioned by the usage of English-speaking people. The moment the word is used in connection with the present subject matter of charitable gifts or charitable institutions, the popular as well as legal mind takes in at once its wider scope of good will, benevolence, desire to add to the happiness or improvement of our fellow-beings. It is in this sense that, not to mention the numerous other illustrations, our own local gifts of Elliot Cresson, for the planting of shade trees in the streets of Philadelphia (Cresson's Appeal, 6 Casey, 437), and a gift to a volunteer fire company for the protection of the property of the citizens (Thomas *v.* Ellmaker, 1 Parsons, 98), have been recognized as charities, both in the legal and in the popular estimation.

But is the complainant a *public* charity? To answer this question we must look to the facts of the case.

By the original rules of Franklin and the other founders the librarian was required to permit "any civil gentleman to peruse the books of the library in the library-room;" and in the same spirit the charter, which is the fundamental law of the corporation, and the by-laws made under it, permit the use of the library: (1) By *all persons* within the library building free of charge or

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fee of any kind. (2) By *all persons* who desire to take out books, and for that privilege pay a small hire, and leave a deposit as security for the return of the books. (3) By members or commutors, who pay an annual sum instead of a separate hire for each time of taking out a book.

The essential feature of a public use is that it is not confined to privileged individuals, but is open to the indefinite public. It is this *indefinite* or unrestricted quality that gives it its public character. The smallest street in the smallest village is a public highway of the Commonwealth, and none the less so because a vast majority of the citizens will certainly never derive any benefit from its use. It is enough that they may do so if they choose. So there is no charity conceivable which will not, in its practical operation, exclude a large part of mankind, and there are few which do not do so in express terms, or by the restrictive force of the description of the persons for whose benefit they are intended. Thus, Girard College excludes, by a single word, half the public, by requiring that only *male* children shall be received; the great Pennsylvania Hospital closes its gates to all but *recent* injuries, yet no one questions that they are public charities in the widest and most exacting sense.

Tried by this standard it would seem clear that the Philadelphia Library is public so far, at least, as regards the use of the books within the building; that is free to all alike without charge. Is its public character destroyed by any special privileges to members or other individuals? We cannot see that it is. Some system of government, some regulations of administration, are necessary in all large bodies; provided they be reasonable and not repugnant to the general purpose, they are valid and do not affect the character of the institution. The general privilege of reading the books within the building, and under the supervision of the librarian, being conceded freely to all, the further privilege is sought of taking books away to be read at home, and this we find is also conceded to all persons alike on the condition that a deposit shall be made of the value of the book to insure its return, and a sum paid for its hire or loan. A step further brings us to the third and last privilege, that of members who instead of paying the hire of each book from time to time as they take it out, pay a single annual sum as an equivalent. The priniple of commutation is familiar. It is as old as the history of tithing in England, as universal as the convenience and the necessities of business everywhere. The law prohibits a common carrier from discriminating between persons, it requires him to carry all men the same journey for the same price; yet there is probably no railroad in the country that does not issue season or mileage tickets, or commutation in some form or other to its local customers, and this has never been held to impair or infringe upon its public character as a common carrier. Such regulations, within reasonable limits, are mere administrative details, necessary in all but the most insignificant business, and not in any way affecting the general character of the institution.

One other privilege of the members, besides this commutation of book hires, may also be included in the same class of administrative details —the privilege of voting for the managers who conduct the affairs of the Library. Some form of government is necessary. The managers are trustees, and some mode must be provided for their appointment. The particular mode selected is a matter for the founders or the State in granting a charter; but having been adopted, it does not in any way affect the public character of the corporation.

Next, and last, we have to consider the force to be given to the word "purely" in the constitutional phrase, "purely public charity." In this connection, and in its ordinary sense, the word purely means completely, entirely, unqualifiedly, and this is the meaning we must presume the people to have intended in adopting it in their Constitution. Plainly, then, the charities authorized to be exempted are those that are completely and entirely public. The phrase is intended to exclude those charities which are private or only *quasi* public, such as many religious aid societies, and also those which, though public to some extent or for some purposes, have, like Masonic lodges and similar charities, some mixture of private with their public character. The true test is to be found in the objects of the institution. Are they entirely for the accomplishment of the public purpose, or have they some intermixture of private or individual gain? We get a clear and strong light on this subject from the words of the same clause of the Constitution descriptive of burial places which may be exempted, to wit, those "not used or held *for private or corporate profit.*" Such places are unquestionably public charities, and the specification of them might have been omitted without impairing the force of the provision. But, as we have seen, the exemption of cemeteries had been recently abused by including some that were wholly for private profit, and the Constitution was made to emphasize its prohibition of such acts by specifically naming those burial places which alone might be exempted. Having done this, it passed on to name concisely and collectively all other institutions of purely public charity. The phrase might have been expressed, "places of burial and other institutions of public charity, *not for private or corporate profit.*" The language used, taken as a consistent and consecutive whole, shows that this is its plain meaning.

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Is the complainant within this description? The Library is a trust, and while it is the property of the corporation, and therefore in a certain sense of the corporate stockholders, yet it is not their property in any full legal or commercial sense. They cannot sell it and divide the proceeds among themselves as individuals—that would be a violation of the trust, which a court of equity would be bound at once to restrain. Being then a trust, its purpose and scope must be looked for in the grant. It is not a question of how the revenue is derived, but to what purpose and with what intent is it devoted. The purpose of the trust is clearly set forth in the charter; it is "to erect a library for the advancement of knowledge and literature in the city of Philadelphia," and we fail to discover in it any taint of private profit.

I have already discussed the members' privilege of commutation by annual payment for the hire of books, and it is said in the charter that this payment shall be "for the increase and preservation of said library." I have endeavored to show that this privilege, almost the only one in which any distinction is made between the members and the general public, is not an undue privilege or justly obnoxious to the charge of being a private profit. But even this privilege is a regulation—not a part of the fundamental law of the corporation; and if it were held to be an undue privilege, repugnant to the public character of the charity, the result would be not that the charity would become less purely public, but that the privilege would be void.

I have not thought it necessary to notice in detail the authorities cited by the learned counsel on either side. Some of them are very close and decisive upon the points made in the case; but the subject is extensive, and this opinion has already reached a very great length, and I have therefore preferred to rest the case upon general principles, which I believe to be unquestionable.

It results from the foregoing that we hold that the complainant is exempted from taxation as an institution of learning, by the Act of May 14, 1874, and that as to such exemption the Act is within the terms of the Constitution, and is valid and binding upon the taxing power of the city of Philadelphia.

The injunction prayed for is awarded.

(HARE, P. J., being a director of the Library Company, did not sit or take any part in this case.)

The defendant took this appeal, assigning for error the award of the special injunction.

J. Howard Gendell, assistant city solicitor, and *Wm. Nelson West*, city solicitor, for the appellant.

The Acts of March 14, 1865 (P. L. 320), Feb. 2, 1867 (P. L. 137), and April 12, 1873 (P. L. 715), confine the powers of the Board of Revision of Taxes to valuation, revision, and equalization of assessments. No power of exemption is conferred. All the acts of exemption were repealed upon the adoption of the new Constitution.

The Township of Londonderry *v.* Berger, 7 Leg. Gaz., 231.

The Act of May 14, 1874 (P. L. 158), is an enabling act, and is to be construed strictly against exemption.

The Academy of Fine Arts *v.* Philada. County, 10 Harris, 496.

The evil intended to be remedied by the Act of May 14, 1874, was that of exemptions, which had become so numerous as to produce great inequality in the public burden of taxation. In the city of Philadelphia, owners of $60,000,000 of property claimed exemption. The word "charity," as defined by the old Acts, was capable of too wide a construction. The remedy was to confine charities to those "purely public." That this is not an institution of "purely public charity," and within the class exempted by Art. IX., sect. 1, of the Constitution, and by the Act of May 14, 1874, is clear, because (1) it is endowed by the sale of stock, and maintained by annual subscriptions; (2) because a profit or revenue is derived from the hire of books. That is not a "purely public charity" whose benefits are confined to its members, and although this library is partially for the advantage of the public, and to that extent a charity, yet as the stockholders, members, and subscribers have privileges not enjoyed by the public, it is, *quoad hoc*, for private advantage.

School District of Upper Darby *v.* The Rector, etc., of St. Stephen's Church, 34 Leg. Int. 291.

Swift *v.* Easton Beneficial Society, 23 Sm. 362,

Academy of Fine Arts *v.* Phila. County, 10 Harris, 496.

Carne *v.* Long, 2 De Gex, Fisher & Jones, 75.

Is it made a charity by the fact that it is willing to open its doors and permit the public to read at its table? Or is it a charity because it hires to the public the use of books outside the building? Is not the latter a purely business transaction? It is admitted that it is a circulating library, an association confessedly for the mutual benefit of the shareholders. Not every one can become a member. The stock is bought subject to the approval of the board of directors, and, were the latter to object, it is doubtful whether a bill in equity would lie to enforce a transfer. The corporation is private, and not exclusively for the public benefit.

St. Mary's College *v.* Crowl, 10 Kansas, 442.

Cincinnati College *v.* The State, 19 Ohio, 110.

It is not material that there is no cash dividend. In this case the profit is in the increase of the library, and the test is whether the corporation derives a profit.

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There is an obvious distinction between a charitable gift and a charitable institution. The definition of charity given on the other side relates to the gift itself, whereas the recipient of the gift may be anything else than charitable. The original purpose of this institution was the use of books by the members at their homes, as a circulating library. Such a library is not a charity.

Carne *v.* Long, 2 De Gex, Fisher & Jones, 75.

[SHARSWOOD, J. Shareholders have no profit in the Loganian Library; how will they stand on a different footing on Broad Street?]

They will be on the same footing. To entitle them to exemption, there must be no restrictions upon the public. An adverse decision will open the door to a large number of more doubtful cases.

[SHARSWOOD, J. What other institutions are lying back of this?]

The Mercantile Library Company, the Suffolk Library, the Young Men's Christian Association, and others.

Wm. Henry Rawle and *R. C. McMurtrie*, for the appellee.

(1) The appellee is a purely public charity within the provision of the Constitution.

The word charity, in its legal sense, includes not only gifts for the benefit of the poor, but endowments for the advancement of learning, or for any other useful and public purpose which lessens the burdens of government.

Vidal *v.* Girard's Ex'rs, 2 Howard, 128.
President of the United States *v.* Drummond, 7 H. L. C. 141.
Trustees of the British Museum *v.* White, 2 Sim. & Stu. 595.
Jones *v.* Williams, 2 Amb. 652.
Jackson *v.* Phillips, 14 Allen, 539.
American Academy of Fine Arts and Sciences *v.* Harvard College, 12 Gray, 583.
Gerke *v.* Purcell, 25 Ohio, 229.

Gifts to establish libraries are clearly charitable.

Drury *v.* The Inhabitants of Natick, 10 Allen, 169.

(2) The appellee is an institution of learning within the Act of May 14, 1874.

It is not denied that statutes of exemption are to be construed strictly, but a statute passed to interpret and carry out a provision of the Constitution is merely a ministerial act to enforce what has been previously declared to be the policy of the State. The onus is on him who contends that the Legislature has exceeded its powers, to show how and where. Exemption of certain classes of property from taxation is a matter of civilization. It is the recognized duty of a civilized State to provide for the poor, the insane, widows and orphans, to encourage religion, and to educate the children of the State.

The motive of the State is that of enlightened self-interest, to keep the body politic healthy, and avoid resulting evils. If any body of men give large sums of money towards these great ends, they, *quoad hoc*, assume the place of the State, and are entitled to be subrogated to the rights of the State so far as relates to taxation. The object of this constitutional provision in regard to exemption is to bring about uniformity of legislation, and the exclusion of special legislation. The test of a public charity is, whether it is open, to any reasonable extent, to the indefinite public; whether the indefinite public may share the benefit.

Location and means of support are immaterial.

Drury *v.* The Inhabitants of Natick, 10 Allen, 179.
Thomas *v.* Ellmaker, 1 Pars. Eq. 98.
Attorney-General *v.* Heelis, 2 Sim. & Stu. 67.
2 Perry on Trusts, § 207.

Exclusion of part of the indefinite public is immaterial. No charity can be so catholic as to include everybody; a paying class is immaterial.

Miller *v.* Porter, 3 Sm. 292.
Warde *v.* Manchester, 56 N. H. 508.

Constitutions are to be construed from the standpoint of statesmen, not that of lawyers. This Court has, in one instance, adopted the broad construction of the Legislature upon the constitutional provision as to special legislation.

Wheeler *v.* The City of Philadelphia, 27 Sm. 338.

Legislative interpretation of similar provisions in the constitutions of other States of the Union is important. In twelve of these States their Legislatures have enacted that public libraries came within the scope of similar Constitutions.

This question whether the statute is broader than the Constitution was decided in our favor in—

Gerke *v.* Purcell, 25 Ohio, 299.
Act of March 14, 1865, P. L. 320.

The fallacy of the argument on the other side consists in treating the statute of 1874 as if it were a statute exempting this as the private property of private individuals from their share of the public burdens. The statute contains no word that has not been recognized in every country as a function of government. It is State policy to foster these institutions. The limitation of the exemption to the library building is a wise guard against abuse. If these and similar charitable institutions are held to be taxable, they will be liable to confiscation, for their revenue is wholly inadequate to the purpose of taxation. Now, by the acceptance of the charter, the institution became the owner of the property dedicated to it by its former owners; and, were the directors to attempt to divide the revenues or the property among the shareholders, they would be guilty of a breach of trust, because they hold merely for the benefit of the trust, and their charter confers no such powers. In the English cases of foundations of charitable institutions, the founders reserved the right to educate their children, of presentation,

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etc. It has never been contended that such reservation made them any the less public charities. But they say it is no charity because it is endowed. But what was the source of the money creating the endowments? It was the result of an accumulation of gifts of which the institution is a trustee. If annual contributions of subscribers change its nature as a charity, what becomes of the Pennsylvania Hospital? The words "purely public charity" are a direction to the Legislature in respect to an old function of government. The intention was the prohibition of exemption of private property. A notorious abuse was that of exempting property in which nobody was interested but the owners, as in the case of Odd Fellows' Halls. These words are terms of art, and are as technical a definition of a class of property as a freehold, etc. For charitable uses are of an earlier date than the Christian era; they are as early as that of Trajan. The meaning of the *cy pres* doctrine is, that when property is dedicated to uses, it has passed from the donors absolutely; and it is the duty of the Crown or of the State to administer it for the charity. A contrary construction would prohibit the people from giving to charities. The civilians and all the great writers are against the narrow construction contended for by the other side. The ground upon which this charity was granted exemption was that of "being a public beneficial use for the benefit of the community as a community."

[AGNEW, C. J. Is there anything in the debates in the Constitutional Convention in regard to the word "purely?"]

These matters were debated in committee, of which there is no report.

[AGNEW, C. J. Does the word "purely" refer to institutions, such as insane asylums, under the absolute control of the Commonwealth? Art. III., sec. 12, of the Constitution.]

The Legislature aimed at private favoritism. The intention was to limit exemption to cases in which the general public derived a benefit.

(3) The decision of the Board of Revision of Taxes cannot be reversed in a collateral proceeding.

March 4th, 1878. THE COURT. The exemption claimed in this case falls clearly within that clause of the Act of May 14, 1874 (P. L. 158), which exempts from taxation all "associations and institutions of learning, benevolence, or charity, with the grounds thereto annexed, and necessary for the occupancy and enjoyment of the same, founded, endowed, and maintained, by public or private charity." This leaves the true question upon that clause of the 1st section of the 9th article of the new Constitution, which authorizes the General Assembly to exempt "institutions of purely public charity." On this, the pivot of the case, the opinion of the learned Judge of the Common Pleas is so full, clear, and accurate, we deem it unnecessary to add anything to what has been said so well.

One point, perhaps, we should notice. The word "purely" must be interpreted so as to confine its qualification of a "public charity" to those institutions solely controlled and administered by the State herself; or so as to extend it to private institutions for *purposes* of purely public charity, and not administered for private gain. We prefer the latter interpretation as declaring the true meaning of the Constitution, and subserving best the public interest. On this point in its application to the Library Company, the opinion of the learned Judge fully sustains the claim of the company to be an institution of this character.

Decree affirmed, with costs of the appeal, and the record ordered to be remitted for further proceedings.

PER CURIAM. WOODWARD, J., absent.

Jan. '78, 208. Feb. 21, 1878.

Perot's Appeal.
Perot et al. v. Mann.

Constitutional law—Art. V., Sec. 7—Act of March 21, 1876, Sec. 18 (P. L. 13)—Prothonotary of the Courts of Common Pleas of Philadelphia County—Right to retain the fees of the office.

The clauses of Art. V., Sec. 7, of the Constitution, providing respectively that the Prothonotary of the Courts of Common Pleas of Philadelphia shall receive a fixed salary, to be determined by law, and that all fees collected in his office shall be paid into the county treasury, are to be construed together, and the prothonotary will not be compelled to pay the fees into the treasury until a legislative enactment has provided for a fixed salary to be paid to him by th county.

Section 2 of the Schedule, which preserves all laws and rights existing and in force in the Commonwealth at the time of the adoption of the Constitution, is operative in such a case.

The Act of March 21, 1876 (P. L. 13), carried into effect Art. XIV., Sec. 5, of the Constitution, regulating the salaries of county officers:

Held, that the 18th section thereof, which postpones the operation of the Act until the terms of the incumbents then in office shall have expired, is constitutional.

Per AGNEW, C. J. The place of the clause as to fees, in Art. V., Sec. 7, its context and connection, and the reason, intent, and spirit of the provision, all unite in condemning as illogical and unreasonable the view that this clause must be dislocated from its place and connection, and treated as an independent and absolute provision for the immediate payment of the fees of the office into the county treasury, and this conclusion derives force from its relation to other parts of the Constitution and the Schedule.

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Appeal from the Common Pleas No. 3, of Philadelphia County.

Bill in equity, by T. Morris Perot and others, citizens and taxpayers of the city of Philadelphia, against William B. Mann, Prothonotary of the Courts of Common Pleas for the county of Philadelphia.

The bill set forth: That in the 7th section of Article V. of the Constitution, which went into effect January 1st, 1874, it is provided as follows, viz.:—

"For Philadelphia there shall be one prothonotary's office and one prothonotary for all of said courts, to be appointed by the judges of said courts, and to hold office for three years, subject to removal by a majority of said judges.* The said prothonotary shall appoint such assistants as may be necessary and authorized by said courts, and he and his assistants shall receive fixed salaries, to be determined by law and paid by said county.* All fees collected in said office, except such as may be by law due to the Commonwealth, shall be paid by the prothonotary into the county treasury."

That, by the 23d section of the Schedule to said Constitution, it is provided that the Prothonotary of the Courts of Common Pleas of Philadelphia should be first appointed by the Judges, on the first Monday of December, 1875, and that on that day the said Judges appointed the defendant, William B. Mann, prothonotary, who thereupon entered upon the duties of said office.

That on the 21st of March, 1876, an Act was passed entitled, "An Act to carry into effect Section 5 of Article XIV. of the Constitution, relative to the salaries of county officers, and the payment of fees received by them into the State or county treasury in counties containing over one hundred and fifty thousand inhabitants," by which Act it was provided that the annual salary of the prothonotary should be $10,000. That by the 18th section of said Act it was provided that the same should take effect on the expiration of the term of the present incumbents of county offices.

The bill averred that the said 18th section of the Act was wholly inoperative to prevent the payment of fees collected by the prothonotary into the county treasury, and prayed that the said William B. Mann should be restrained by injunction from appropriating to his own use the fees collected by him, and should be required to pay them into the treasury of the city and county of Philadelphia.

The defendant demurred to the bill, on the ground that it failed to show that the defendant collected the fees and applied them to his own use without authority of law, and that by the 18th section of the Act of March 21, 1876, he was expressly excepted from its operation, being in office at the time of its enactment.

The Court entered a decree in favor of the defendant, and refused the injunction (LUDLOW, P. J., and YERKES, J., both giving opinions).

The complainants took this appeal from the decree, assigning it for error.

Thos. H. Speakman and *E. Spencer Miller*, for the appellants.

The clause of Section 7 of Art. V., requiring the prothonotary to pay the fees into the county treasury, is a peremptory command, which required no subsequent legislation to carry it into effect. It is peculiar in form and special in application, being really a constitutional enactment, to be in force immediately upon the adoption of the Constitution by the people.

The Act of 1876 is explicitly made to apply by its title to the 5th section of Art. XIV., and wisely leaves section 7 of Art. V. untouched, showing thereby the opinion of the Legislature that an enactment as to the latter provision was unnecessary.

Commonwealth *v.* Randall, 23 Leg. Int. 456.

But, admitting that the Act of 1876 is applicable to this case, then after its passage the right of the prothonotary to retain the fees certainly ceased; for the 18th section of the Act, postponing its operation until the terms of present incumbents should expire, is clearly contrary to the Constitution itself. The Legislature was merely a machine to carry into effect the behests of the Constitution, and had no right to add restrictions and limitations not contemplated by that instrument.

F. C. Brewster (with whom were *F. C. Brewster, Jr.*, and *Geo. W. Biddle*), contra, were not called on.

Feb. 25, 1878. THE COURT. The question in this case is a very plain and simple one. What is the interpretation to be given to the penultimate clause of the seventh section of the fifth article of the Constitution of 1873, relating to the fees of the prothonotary? The whole section reads thus:—

"For Philadelphia, there shall be one prothonotary's office, and one prothonotary for all said courts, to be appointed by the judges of said courts, and to hold office for three years, subject to removal by a majority of the said judges; the said prothonotary shall appoint such assistants as may be necessary and authorized by said courts; and he and his assistants shall receive fixed salaries, to be determined by law and paid by said county; all fees collected in said office, except such as may be by law due to the Commonwealth, shall be paid by the prothonotary into the county treasury. Each court shall have its separate dockets, except the judgment docket, which shall

* These clauses of Art. V., Sec. 7, relating to salary and to fees, as set forth in the bill, were separated by a period. In the official copy of the Constitution, published at the beginning of the Pamphlet Laws of 1874, they are separated merely by a semicolon.

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contain the judgments and liens of all the said courts, as is or may be directed by law."

The punctuation I have compared with three copies of the Constitution, the most accurate known to me, and it will be seen that the penultimate clause as to fees is a part of the preceding sentence, and closes with a period. The question is, is this clause to be viewed as a distinct, separate, and independent provision, standing alone in its operation, and not affected by the preceding part of the same sentence? To state the proposition is to discover its fallacy. Clearly its interpretation is to be gathered from its place, its preceding context, its intent, and its relation to other facts of the Constitution. It follows immediately, in close connection and dislocated by no period, the clause that "he (the prothonotary) and his assistants shall receive *fixed salaries*, to be determined *by law* and paid by the said *county*." Thus the Constitution itself refers the matter of the fixed salary to the Legislature. As a consequence the second section of the Schedule is operative, for, until the Legislature fix the salary, the law of compensation, to wit, his right to the legal fees, continues; for, until that event, neither the law nor his right is inconsistent with the terms of the Constitution. This second section reads thus: "All *laws* in force in this Commonwealth at the time of the adoption of this Constitution, *not* inconsistent therewith, and all rights, actions, prosecutions, and contracts, shall continue as if this Constitution had not been adopted." This section has been considered heretofore. See Lehigh Iron Co. *v.* Lower Macungie (31 P. F. Smith, 482), and Watson *v.* C. D. River R. R. Co. (2 Norris, 254). Thus both the *law* and the *right* to the fees remain. Another significant fact is found in the context and the clause itself. The salary, when fixed, must be paid *by* the *county*, so the fees are to be paid *to* the *county*. The intent is manifest. The Schedule, which is the transition way from the old to the new form of government, provides for the *status quo* until the laws necessary to give effect to the new shall be passed by the Legislature; and to prevent escape enjoins the duty of passing such laws in the 31st section. Thus: "The General Assembly at its first session, or as soon as may be after the adoption of this Constitution, *shall* pass such laws as may be necessary to carry the same into *full* force and effect." This duty, demanded by the voice of the people themselves, is also enforced by the oath of office. The thought of the section is, therefore, manifest. Legislation is provided for to fix the salaries, and then the *county* must pay them, until that time the Schedule will maintain the *status quo;* and *then*, as the *consideration* for the payment of the salaries *by* the county, the fees of office shall be paid *to* the county. Thus the two clauses, having their natural relation in the same sentence, harmonize with each other. On the other hand, if we disjoint the sentence, insert a period where there is none, and treat the clause as to the fees as independent, absolute, and immediate, so as to carry the fees of office into the treasury at once, we do the public as well as the officer a great wrong. Then we have an office, created by the Constitution, dependent on the mere voluntary service of some one who will accept it without fee or reward until the salary be fixed by a law, become responsible to all his assistants for their compensation, incur the risks of, and liability for, their errors; and give a bond, with securities in a large sum, to be answerable for the performance of the duties and the mishaps of the office. Did the convention intend that the public should be imperilled by the want of officers, or the officers be unpaid for services, until the Legislature might act? Clearly not—the consequences are too grave. Hence they coupled the two clauses that they might run together and have a plain meaning, intending to provide for the meanwhile in the Schedule by preserving the *status quo* until the Legislature should perform the duty enjoined in the 31st section of the Schedule.

But it is argued that the Legislature may fail to pass a law fixing the salaries, and thus suffer the evil to continue, which the provision for payment of fees into the county treasury was intended to remedy. True the time may be delayed, but this was a fact which was in view when the convention committed the subject to the Legislature, and the argument supposes that the members of this body are void of conscience, and willing to violate their oaths of office.

The Constitution cannot be administered on any such supposition. We are bound to concede honesty of purpose to them, as we would ask it to be awarded to ourselves. But the supposition is contradicted by the fact, for we find that the Assembly passed the requisite law on the 31st day of March, 1876 (P. L. 13). Now when we remember the immense number of legislative acts necessary to adjust the affairs of the State to the terms of the New Constitution, we cannot suppose any violation of duty in this respect. In this connection complaint is made of the 18th section, which postpones the operation of the Act until the terms of the then incumbents of county offices should expire. We must believe the Legislature had good reasons for this, some of which we can easily understand. The expiration of existing terms, and the incoming of new officers would enable existing laws to have their well-known effect, and their accounts with the State could be easily adjusted. But break off in the middle of a term, and the old and the new law must have a legal and proper adjustment, both as to the accounts for fees and the *pro rata*

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of salaries. This would require more legislation, and even then complications might arise, with their offspring of litigations. But with the expiration of the term the old law would expire, and with the beginning of the new term the new system would arise, and the old and new would be harmonized.

It is also said the 18th section is unconstitutional. But this is answered by our interpretation of the clause as to fees; for if they are not to go into the county treasury until the salary is fixed, the law and the Constitution are in harmony. They would be in discord only if we give the clause an immediate, independent, and absolute interpretation.

The 29th section of the Schedule as to the compensation of county officers in office at the adoption of the Constitution has no relation to the case before us. Mr. Mann has been since appointed, and his case is necessarily governed by the section under which he was appointed. (§ 7, Art. V.)

So the 5th section of the 14th Article relating to county officers does not touch this case. It is the general provision for the compensation of county officers, while the case before us comes specially under the 7th section of the 5th Article already noticed. But the 5th section of the 14th Article is *in pari materia*, and confirms conclusively the interpretation we have given to the 7th section of the 5th Article. Thus it says: "The compensation of county officers *shall be regulated by law*, and all county officers who are or may be *salaried* shall pay all fees which they may be authorized to receive into the treasury of the county or State as may be directed by law. In counties containing over 150,000 inhabitants all county officers shall be paid by salary, and the salary of any such officer and his clerks, heretofore paid by fees, shall not exceed the aggregate amount of fees earned during his term, and collected by or for him."

Thus the former part of the section so connects the salary and the fees as to show that the regulation of the salary must precede the payment of the fees into the treasury.

The latter part makes payment by salary compulsory in counties having a population over 150,000. Upon the census of 1870 this would apply to Allegheny, Luzerne, and Philadelphia, and be approximated by Lancaster and Schuylkill.

Thus a full consideration of section 7, Art. 5th, of the New Constitution, leads to a clear result.

The place of the clause as to fees, its context and connection, and the reason, intent, and spirit of the provision, all unite in condemning, as illogical and unreasonable, the view that this clause must be dislocated from its place and connection, and treated as an independent and absolute provision for the immediate payment of the fees of the office into the county treasury, and this conclusion derives force from its relation to other parts of the Constitution and the schedule.

Decree affirmed, with costs to be paid by the appellants, and the bill of the plaintiff is finally dismissed.

Opinion by AGNEW, C. J. WOODWARD, J., absent.

Oct. & Nov. '77, 150. Oct. 14, 1877.

Dale v. Pierce.

Partnership—Principal and agent—Participation by agent in profits of business—Effect of.

In a feigned issue to determine the ownership of certain cattle, the plaintiff submitted evidence that he purchased the cattle through another person, as his agent, in the name of the latter, under an agreement that the latter should butcher and sell the meat, and after returning plaintiff the cost, and paying him a quarter of a cent a pound dressed meat, should retain the balance of the proceeds for his services. The Court below entered a non-suit on the ground that the evidence did not show exclusive ownership in the plaintiff:

Held (reversing the judgment), that the evidence should have been submitted to the jury, to determine whether the plaintiff, acting by an agent, purchased the cattle for his own account.

Held, further, that the agreement between the plaintiff and his agent, as above stated, did not constitute a partnership *inter se*, or as to third parties.

Error to the Common Pleas of Washington County.

This was a feigned issue, under the Sheriff's Interpleader Act, to try the right to fourteen head of cattle claimed by George Dale, the plaintiff, as his sole property, and which Joseph Pierce, the defendant, had levied on as the property of George I. New.

At the trial (before HART, P. J.) the plaintiff testified, *inter alia*, that he had entered into an agreement with New, whereby he, the plaintiff, was to furnish cattle which New was to butcher, sell the meat, and out of the proceeds return him the price of the cattle, and one-fourth of a cent per pound dressed meat, and retain the balance for his services; that the cattle in dispute were purchased by New as his agent, in pursuance of this agreement, and with money furnished by the plaintiff. New testified to the same effect, but admitted that he had purchased the cattle, and was carrying on the business in his own name, giving as a reason therefor that he, being a poor man, could more readily refuse credit, make collections, etc., than if his agency were known. It appeared, further, that the debt for which the levy was made was contracted before Dale and New had entered into their agreement.

The plaintiff having rested, the Court granted a compulsory non-suit, and subsequently refused

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a motion to take it off, on the ground (1) that the plaintiff's evidence did not tend to prove a sole and exclusive ownership as claimed, but established a partnership; and (2) that the ownership claimed was fraudulent and void as to creditors.

The plaintiff took this writ, assigning for error the action of the Court.

C. C. Montooth (with whom were *E. A. Montooth* and *John L. Gow*), for plaintiff in error.

The agreement between Dale and New did not make them partners, either *inter se* or as to third parties.

Miller *v.* Bartlet, 15 S. & R. 137.
Dunham *v.* Rogers, 1 Barr, 255.
Benjamin *v.* Porteus, 2 H. Bl. 590.

The agreement was not fraudulent in itself.

McCullough *v.* Porter, 4 W. & S. 177.

And Pierce's debt was not contracted upon the faith of it.

M. C. Acheson (with whom was *A. W. Acheson*), contra.

The arrangement between Dale and New constituted a partnership.

Purviance *v.* McClintee, 6 S. & R. 261.
Dunham *v.* Rogers, *supra*.
Lord *v.* Proctor, 7 Phila. 630.
Edwards *v.* Tracy, 12 Sm. 381.

Jan. 7, 1878. THE COURT. The plaintiff in error, in his notice to the sheriff, as well as in answer to the rule, claimed the absolute ownership of the cattle levied on as the property of New; and it was upon this claim that the issue, which he tendered and undertook to maintain, was awarded. He assumed the *onus* of proving what he asserted, and if he failed to adduce testimony tending to prove that he was the sole owner of the cattle in controversy, the judgment of nonsuit was properly entered. He could not succeed by offering testimony tending to show, or even by proving, a limited or qualified interest in them. (Meyers *v.* Prentzell *et al.*, 9 Casey, 482.) It is claimed, however, that there was testimony which should have been submitted to the jury, and from which they might have found that New was merely the agent of Dale in purchasing the cattle, and that the money used in paying for them was furnished by Dale for that purpose. If this be so, there was error in withdrawing the case from the jury, no matter how strong the evidence may have been to the contrary.

Dale testified, in substance, that New was his agent in the transaction; that he sent him to Young for the purpose of buying the cattle for him on the best terms that he could make; and, after reporting the price at which they could be purchased, he bought twenty-two, amounting to about $875, to be paid for when he took them away. He further testified that he furnished the money to pay for them, viz., $100 about the 4th of September; $176 about the middle of the same month, out of the proceeds of sale; and $600 cash in October. In speaking of the arrangement between them, he says that New was to butcher the cattle, sell the meat, and out of the proceeds give him the price of the cattle, and one-fourth of a cent per pound dressed meat, additional; and that New was to have all that remained. The testimony of New, as to his agency in the purchase of the cattle, and the terms on which he was to butcher them and dispose of the meat, is substantially the same. Upon this and other testimony before the jury, it is claimed that it was a question solely for their determination, whether New was not merely the agent of Dale in the purchase of the cattle, and whether the arrangement as to butchering them was not simply a mode of compensating the former for his services in dressing and disposing of the meat. If the jury had found, as they might have done, that such was the true state of the case, the plaintiff would have been entitled to their verdict. If the cattle were purchased and paid for by Dale, through the agency of New, the latter had no interest in them; and, if he agreed to butcher them, etc., and accept, as compensation for his services, all that might remain after deducting the cost of the cattle, and 25 cents per hundred pounds dressed meat, the transaction did not constitute a partnership *inter se*, or as to third parties. On the other hand, if it had been shown that the transaction was in fact a loan of money by Dale to New for the purpose of buying cattle for himself, and carrying on the business of butchering, the plaintiff would have no claim to the cattle thus acquired by New. Both parties, however, deny that such was their relation to each other. The case should have been submitted to the jury, under proper instructions, to say what was the actual relation of the parties; or rather, whether the cattle were purchased by Dale through the agency of New.

There appears to be nothing in the evidence to justify the conclusion that the transaction was fraudulent in law, and void as to creditors.

Judgment reversed, and a *procedendo* awarded.

Opinion by STERRETT, J.

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Quarter Sessions.

March, 1878.

Commonwealth v. Mulholland.

Forgery—Indictment under Criminal Procedure Act of March 31st, 1860—The instrument alleged to be forged must be such as on its face shows that if genuine it would injure some one, or extrinsic facts must be averred to show that it would do so.

Sur demurrer to indictment.

The indictment alleged that Mulholland having in his custody, care, and possession a certain money and bank account, commonly called the stub of a check-book, the property of one George M. Dallas, which said written instrument is in the words and figures following, that is to say:—

No.——
Sept. 26, 1877.
B. | | | 100 | 00 |

fraudulently altered the same by fraudulently altering the figure 1 and writing in its place the figure 2, which instrument "by reason and means of the said last-mentioned unlawful and fraudulent making, changing, writing over, and altering, did then and there become, import, and signify 200.00, to the prejudice of the right of the said George M. Dallas, and with an intent to defraud."

The defendant demurred because (1) the instrument did not show on its face that the rights of any person could be prejudiced by its alteration; (2) it did not appear in the indictment how such alteration could or did prejudice the rights of any one.

Rufus E. Shapley, for the demurrer.

The indictment must show the forgery of an instrument which appears on its face naturally calculated to have some effect, or extrinsic matter must be averred so that the Court may judicially see its fraudulent character.

Reed *v.* State, 28 Ind. 396.

William W. Ker, Assistant District Attorney, contra, relied on—

Act of March 31, 1860.

Biles *v.* Commonwealth, 8 Casey, 529.

C. A. V.

March 9, 1878. THE COURT. The defendant is charged in this indictment with the crime of forgery, and the forgery is alleged to have consisted in the fraudulent alteration of the figures contained in the stub of a check-book belonging to George M. Dallas, which was in the custody and possession of the defendant. No extrinsic circumstances are set forth in the indictment to show how the alteration of such a writing could prejudice the owner, or in what manner he or any other person could be defrauded thereby. No confidential relationship or employment is alleged to have existed between the owner and the defendant, as in Biles *v.* Com'th, (8 Casey, 529). It is simply said that the check stub was in his possession. For what purpose it was in his possession, or under what circumstances, is not shown. It is not averred that the defendant attempted to make any fraudulent use of the altered writing, nor is any circumstance set forth to show how the alleged alteration did or could injure any person.

The stub of a check-book is a private memorandum of the owner, of the checks which he has drawn, intended for his own use exclusively. It is not a writing which can be ordinarily used to charge or discharge any body. It is not an instrument by which money or other property can be obtained, nor does it tend either to create or discharge a debt. It is a memorandum kept for the private information of the owner alone. Can a defendant be sent to trial upon such a charge without more definite information of the case which he is to be called upon to meet? The 9th section of Article I. of the Constitution declares that in all criminal prosecutions the accused shall have the right "to demand the nature and cause of the accusation against him." But what information of the nature and cause of the accusation is conveyed to the defendant in this indictment beyond the fact that he is charged with having altered the figures of a writing, the alteration of which without other facts could not possibly constitute the offence of forgery? It cannot be pretended that the alteration of such a writing unless attended by other facts showing a fraudulent purpose in the alteration would constitute any offence whatever. It is like a charge of false pretences without setting out what the pretences were.

Now it is an established rule that an indictment for forgery must set forth an instrument which, on being described, appears on its face naturally calculated to work some effect on property, and if it be not of that character, some extrinsic matter must be shown whereby the Court may judicially see its tendency. (2 Arch. Cr. Pl. and Pr. 1565.) Therefore in a case where an indictment charged the false making to have been in the alteration of an order given by the defendant, without charging that the alteration was made after the order was circulated and taken up by him, it was held to be fatally defective. (State *v.* Greenle, 1 Dev. 523.) So where an indictment charged that A. did fraudulently forge a certain writing as follows: "Mr. Bostwick, charge A.'s account to us. B. & C." It was held that the indictment was not valid without charging that A. was indebted to Bostwick, as there could be no fraud unless a debt existed. (State *v.* Humphreys, 10 Humphreys, 442.) In Common-

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wealth *v.* Shissler (9 Philad. Rep. 587), it was decided in this Court by FINLETTER, J., following the decision in Rice *v.* State of Tennessee (1 Yerger, 433), that an indictment for forging a receipt was bad which did not charge that the person to whom the receipt purported to be given was indebted to the person whose name was forged. The very essence of forgery is an intent to defraud, and therefore the mere imitation of another's writing, or the alteration of a written instrument where no person can be injured, does not come within the definition of the offence. Hence the rule, which is too well established to admit of doubt, that the instrument alleged to be forged must be one which if genuine may injure another, and if it does not on its face appear to be of that character, then it must be made to appear by other averments in the bill. (People *v.* Tomlinson, 35 Cal. 503; State *v.* Smith, 8 Yerger, 150; People *v.* Harrison, 8 Barbour, 560; People *v.* Shall, 9 Cowen, 778; State *v.* Wheeler, 19 Minn. 98; Reed *v.* State, 28 Ind. 396; Bynam *v.* State, 17 Ohio St. 142; Comm'th *v.* Ray, 3 Gray, 441; Clarke *v.* State, 8 Ohio St. 630; People *v.* Stearns, 21 Wend. 409; State *v.* Dalton, 2 Murph. 1; Barnum *v.* State, 15 Ohio, 717.) And this rule is recognized and distinctly enunciated by all the leading writers on criminal law in recent times. (2 Wh. Cr. L., sec. 1487, 1492, 1498, 1468; 2 Arch. Cr. Pr. and Pl., *ut supra;* 2 Bishop's Cr. Proc., sec. 369; 2 Bishop's Cr. L. 512, 613; 2 Russell on Crimes, 374.)

The question is not now whether this indictment would be good after verdict, but whether it is good on a demurrer which specially assigns for cause of demurrer the defects to which I have referred, and I am clearly of opinion that it is not. The 11th section of the Act of 31st March, 1860, relating to penal proceedings and pleadings was not intended to prevent a defendant from demurring, for substantial defects in the indictment, but requires him to take advantage of such defects by demurrer, and precludes him if he does not. This is not only apparent from the language of the whole section, but clearly appears also in the report of the commissioners appointed to revise the penal laws of the Commonwealth. The 11th section of the Act, the commissioners say, was intended to remedy certain evils "without depriving the accused of any proper privilege. It leaves him at the outset of his trial to determine whether he will question the relevancy of his accusation or take issue on the merits of the charge, &c." (Report of the Commissioners, p. 40.) This section of the criminal procedure act was not intended to authorize a loose method of criminal pleading by which an accused person might be put upon trial upon general, vague, indefinite and insufficient charges, but only to compel him to make his objections to the indictment before the trial instead of afterwards, and this is the construction which has been put upon it by this Court in Commonwealth *v.* Galbraith (6 Philad. Rep. 281), and by the Supreme Court in Commonwealth *v.* Frey (14 Wright, 249).

Nor is the defect of this indictment aided by the 19th section of the same Act, which declares that "it shall be sufficient in any indictment for forging, offering, disposing of, or putting off any instrument whatever, or for obtaining or attempting to obtain any property by false pretences, to allege that the defendant did the act with intent to defraud, without alleging the intent of the defendant to defraud any particular person." It is sufficient under this section to charge a general intent to defraud instead of charging an intent to defraud a particular person, but the charge must nevertheless contain all the necessary elements of a criminal offence, and must set forth an instrument in its nature and upon its face of a character to injure some one, or must show this by averments of extrinsic facts. It was not intended to say that every indictment charging a forgery, which alleges that the act was done with intent to defraud, should be sufficient. As well might it be said, that, under the language of the same section, every indictment charging the offence of obtaining property by false pretences, which alleges that the act was done with intent to defraud, is sufficient—a proposition which was distinctly repudiated by the Supreme Court in Commonwealth *v.* Frey (14 Wright, 245), where it was expressly ruled that such an indictment in order to be good must set forth particularly what the false pretences were.

Judgment for the defendant upon the demurrer.

Opinion by THAYER, P. J.

Common Pleas—Law.

C. P. No. 1. March 16, 1878.

Schofield v. Asbestos Patent Fibre Co., Limited.

Affidavit of defence — Promissory note — The manager of a company "limited," who is also general superintendent, can bind the company by his indorsement as "gen'l supt."

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit by holder against indorser of a

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promissory note, of which the following is a copy:—

310\frac{65}{100}$. Chicago, Oct. 5th, 1877.

Three months after date we promise to pay to the Asbestos Pat. Fibre Co., Limited, Philada., or order, Three hundred and ten $\frac{65}{100}$ Dollars, at No. 85 Lake St., Chicago.

No. Due Jan. 5–8.

[Signed] LONG, CAMPBELL & CO.

[Indorsed] ASBESTOS PAT. FIBRE CO., LIMITED.
J. S. ROSENTHAL, *Gen'l Supt.*
J. S. ROSENTHAL.

The affidavit of defence, which was by a manager of the company, set forth: That the said J. S. Rosenthal was in fact the general superintendent of said limited partnership association, and was also a member and manager thereof, but that he placed the name of said association upon the back of said note, wholly without the knowledge or authority of any other of the members or managers of said association, and under the following circumstances, viz.: The said association were holders of a certain other note, drawn by Long, Campbell & Co., dated July 2, 1877, at three months, for $310.65. Prior to the maturity of this last-mentioned note, the makers applied to Rosenthal for an extension of time, which he declined, and stated he could not give the company's note, but would give his individual note, in order to help them, and expected them to send him their note in return. Accordingly Rosenthal sent to Long, Campbell & Co., as an accommodation, his individual note for $310.65, and received the note in suit in return, which Rosenthal indorsed with the name of the company defendant over his signature as General Supt., and added his individual indorsement. The affidavit set forth, further, that some time prior to the maturity of the note, Rosenthal had ceased to be a member or manager of the company.

G. M. Dallas, showed cause. This transaction was entirely between Rosenthal and Long, Campbell & Co. The indorsement is irregular; Rosenthal could not bind the company as "gen'l supt.," and it would be *ultra vires* for the company to lend its credit to one of its members.

Act of June 2, 1874, §§ 5 and 7, P. L. 273.

The irregularity of the indorsement was notice to the holder.

Prichard, for the rule. This note was drawn to the order of the company defendant. It is not denied a manager may bind the company, and the fact that Rosenthal was general superintendent does not make him the less a manager. That he was a manager was made public by the company in their articles of association, of record. He cited—

Haldeman & Grubb *v.* Bank, 4 Ca. 440.

Rule absolute.

C. P. No. 1. March 16, 1878.

McCarrol et ux. v. The Western M. E. Church.

Affidavit of defence law—Instrument not within—Certificate of loan which provides that "the principal is redeemable after" a certain date—It is at the option of the debtor when it is to be paid.

Rule for judgment for want of a sufficient affidavit of defence.

Debt on sixteen certificates of loan in the following form:—

"No. 85. These are to certify that Catharine Young is entitled to one share, equal to twenty-five dollars, in the stock created by the Western Methodist Episcopal Church of the city of Philadelphia, for the purpose of paying the claims now existing against the said church, and to aid in furnishing the building for Divine worship. Interest payable half yearly from the first day of January, 1835, and the principal redeemable after the first day of January, 1840. For the payment of the principal and interest the faith and property of this corporation is hereby pledged. Transferable in person or by power of attorney.

Witness the seal of the corporation and signatures of president and secretary of the board of trustees, at Philadelphia, this 22d day of October, 1834.

[SEAL OF THE CORPORATION.]

RICHARD BENSON, *President.*
ROBERT RAY, *Secretary.*

The said Catharine Young afterwards intermarried with the plaintiff, Robert McCarroll.

The affidavit of defence set forth: That the interest on the sixteen several certificates of loan or shares of stock, upon which suit is brought, has been fully paid by the corporation defendant to the plaintiffs up to the first day of January A. D., 1878, and that there is no payment of interest now due or owing on said certificates; that defendant is advised and believes that the principal sums of said certificates are not due or demandable, and cannot be claimed or recovered by plaintiffs without the consent of said defendant, the same being on their face payable at the option of the said corporation defendant, after a certain day therein fixed, to wit, the first day of January, 1840.

H. C. Thompson, for the rule.

The certificates are on their face redeemable; it is not said at whose option, and it is to be presumed they are redeemable at the option of either party. The case is not different from any other contract as to mutuality.

[BIDDLE, J., referred to the case of an irredeemable ground rent.]

This case is not analogous to that of a ground rent, where a time may be fixed, beyond which it is not redeemable; here the principal is expressed to be redeemable after Jan. 1, 1840.

Jas. Gay Gordon, contra. "Redeemable" means recoverable, having a capacity for repurchase. It implies an act to be done by the party

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issuing the evidence of indebtedness, and not enforceable by the holder against the will of the former.

Union Canal Co. *v.* Antillo, 4 W. & S. 553.

Thompson, in reply. In the case cited the principal was expressly made redeemable at the option of the company.

Rule discharged.

C. P. No. 4. March 16, 1878.

McMurdy v. Connecticut General Life Insurance Company of Hartford.

Practice—Commission to take testimony in another State—Interrogatories—Whether irrelevant interrogatories in chief can be stricken off before the commission is issued—When part of the res gestæ, they cannot be stricken off—The proper form of objection is by exceptions.

Rule to strike off an interrogatory in chief in a commission about to issue to Lafayette, Indiana.

Debt on a contract of insurance. One count in the narr. averred that the contract consisted of a certain policy of life insurance, containing an explanation and an agreement as to the meaning of certain portions of the application; and, further, that the defendants' medical examiner was to fully explain the questions to be asked the applicant. The commission was to take the testimony of the medical examiner, and contained, *inter alia*, the following interrogatory: "Is the application to be handed you by the commissioner the original one identified by you? and in what order in point of time did you put the questions in said application to the applicant? which question did you ask first? The question in form 'B. 5,' as to fits or convulsions, or the one in form 'B. 8,' as to malformation, serious illness, personal injury, or if he had undergone any surgical operation?"

A. Sydney Biddle, for the rule.

The interrogatory is irrelevant because it is immaterial at what point of time before the policy was finally accepted by the company the questions or explanations were given. The contract dated from the time of its acceptance by the company, and the contemporaneous explanations forming part of the contract and the answers to the questions must have been accepted at the same time.

Arnold, contra. The materiality of the interrogatory appears from testimony already received under a prior commission which has been returned and opened.

THE COURT. We have no doubt that this is a very proper time to make the objection, but we are clearly of the opinion that the proper form for objection is by exceptions and not by rule. But disregarding the form of the objection, the matter inquired of appears to be part of the *res gestæ*, and we cannot say, therefore, that it is immaterial.

Rule discharged.

Oral opinion by THAYER, P. J.

[See Moelling *v.* Navigation Company, 4 WEEKLY NOTES, 72.]

U. S. Circuit Court—Law.

Oct. 1877.

The Bark Religione e Liberta.

Charter party—Stipulation to sail in ballast to port of lading—Whether complied with by sailing with cargo of salt—Damage.

A clause in a charter that the vessel shall sail without delay, and *in ballast*, to enter upon the charter, is sufficiently performed if the vessel carry a cargo of salt, where no damage is shown to have resulted.

Quære, whether, if damage is shown, the charterer is put to a cross action.

Appeal from the District Court in Admiralty.

The bark was chartered to sail to Philadelphia, and be loaded by the respondents with a cargo of grain for Europe. The charter party contained the following clause:—

"It is understood that the vessel, being already chartered for a previous voyage, has, after completion of the same, to return to Philadelphia without delay, *and in ballast*, to enter upon this charter."

While discharging at Liverpool, under the first charter, the master made another charter with a third party, whereby the bark, which was of the register of 868 tons, was loaded with about 600 tons of salt, which it carried to Philadelphia, and delivered to the consignee (the salt charter stipulating for —— lay days), and about fifteen days were consumed in discharging the salt.

After the discharge of the salt at this port, the master reported to the respondents, who refused to receive the bark. Freights having declined, this action was thereupon brought to recover the difference.

Numerous witnesses, ship-brokers and others, were examined on the question whether salt was considered ballast, the weight of the testimony being that it was not, and that ballast only included an unmerchantable commodity.

The District Court (CADWALADER, J., giving an oral opinion) sustained the libel, and entered a decree in favor of the bark, from which decree respondents took this appeal.

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Ward and *Henry*, for the appellants (respondents).

The manner of freighting vessels for Europe from the United States requires that the charterer should have the option of loading the moment the vessel arrives, so as to have the advantage of a rise in freight. Hence the stipulation to sail in ballast.

Such a stipulation is a condition precedent.

Lowber *v.* Bangs, 2 Wall. 736.
Glaholm *v.* Hays, 2 M. & Gr. 257.
Croockewit *v.* Fletcher, 1 H. & N. 893.
Ollive *v.* Booker, 1 Exch. 416.

It is not a question whether the master could take salt instead of stone for ballast, although this is more than doubtful under the evidence. A cargo of salt must be entered at the custom house, and be discharged at a proper wharf in proper weather. Hence a cause of detention not occurring to a vessel sailing in ballast. Here the master, after chartering to respondents "to sail in ballast," actually *re-chartered* at Liverpool for a cargo of salt, giving the privilege of lay days to the charterer. The Philadelphia charterer was therefore at the mercy of the Liverpool charterer, who could have detained the vessel after arrival, and the Philadelphia charterer might lose the chance of the market.

It is not a question of damages, but whether we were bound to accept.

Flanders, contra.

Any heavy merchandise in quantity sufficient to trim or stiffen the vessel is ballast.

Abbott on Shipping, 4.
Towse *v.* Henderson. 4 Ex. 889.

Even if not so, yet the stipulation to sail in ballast is not a condition precedent, but a mere agreement, a breach of which makes the parties liable in damages, if damage can be shown.

Tarrabochia *v.* Hickie, 1 H. & N. 183.
Dimech *v.* Corbett, 12 Moore P. C. 199.
Davidson *v.* Gwynne, 12 East, 381.
Spee's Abbott, 188.
McAndrew *v.* Chapple, L. R., 1 C. P. 643.
Fothergill *v.* Walton, 8 Taunt. 576.

Jan. 17, 1878. THE COURT. Decree affirmed, with costs.

Feb. 15, 1878.

Mack v. Baker et. al.

Promissory note—Consideration—Holder of note as collateral not a purchaser for value—The general commercial law of the United States in this particular is not inconsistent with the decisions of the Courts of Pennsylvania.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit on a promissory note made by the defendants to the order of one Zahn, and by him endorsed to the plaintiff.

The affidavit of defence alleged that the note in suit was given in renewal of a note, for which the defendant's firm never received any consideration; that the original note was given to Cummings & Co. to be discounted by them for the benefit of defendant's firm, but that Cummings & Co. never had the same discounted, but passed it over to Zahn, to secure the payment of an antecedent debt due him by Cummings & Co.

H. Goodwin, for the rule.

The defence that the note was given to the plaintiff as collateral only, although established, perhaps, in the States of Pennsylvania and New York (Coddington *v.* Bay, 20 Johnson, 637), has been declared invalid by the Supreme Court of the United States in—

Swift *v.* Tyson, 16 Peters, 15. See also—
Byles on Bills, *124, *229–232.

The renewal of a note implies a forbearance, which is a sufficient consideration.

Tull, contra, cited—

Cummings *v.* Boyd, 4 WEEKLY NOTES, 66.*
Royer *v.* The Keystone Bank, Id. 86.

March 26, 1878. THE COURT (CADWALADER, J.). After consideration, I do not doubt the correctness of the decision of the Supreme Court of Pennsylvania in Royer *v.* The Bank, *supra*. There is an extrajudicial remark of Judge STORY in Swift *v.* Tyson (16 Peters, 15), in which he holds that the taking of a note simply as collateral security is a sufficient consideration, and gives the purchaser a better title than the endorser had. But this is no part of the decision, which is that, where the note is taken in payment, the consideration is sufficient.

Where time or indulgence is given, or something is done to change the relations of the parties to the original consideration, the case is different; but here the defence is sufficient, according to Royer *v.* The Bank, *supra*.

The doubt I had of the case was as to the renewal of the note; whether that was not equivalent to giving time. It is so generally, unless the ordinary effect is negatived by peculiar circumstances. Here the time given was on the collateral and not on the original debt, and hence could not suspend the right of action, as has been often decided.

Rule discharged.

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* See additional report of Cummings *v.* Boyd, 4 WEEKLY NOTES, 538.

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WEEKLY NOTES OF CASES.

VOL. V.] *THURSDAY, APRIL* 11, 1878. [NO. 11.

Supreme Court.

June, '77. Oct. 2, 1877.

Hester et al. v. Commonwealth.

Criminal law—Murder—Discharge of prisoner remaining untried after two terms of Court—Entry of a nolle prosequi—Effect of—No bar to a subsequent prosecution for the same offence—Evidence—Competency of witness—Validity of a pardon not impaired by slight irregularities in its form—Conviction in the Court of Quarter Sessions of a crime triable only in the Oyer and Terminer, a nullity—Connection of prisoner with criminal organization—Testimony of accomplice—Must be corroborated in some material part which connects prisoner with the crime—Collateral matter—What constitutes—Answer of a witness thereto conclusive upon the party who asks the question—Res gestæ—Declarations of prisoner relative to his return from flight and surrender, not part of res gestæ—Evidence showing that witness had previously related the same facts to which he testifies—When admissible.

A prisoner, under indictment for murder, pleaded in bar a former arrest and indictment for the same offence and discharge under the statute after remaining untried for two terms of Court. The record showed, that soon after the second term of Court, held subsequent to the prisoner's commitment, had expired, a *nolle prosequi* was entered in his case and on motion he was discharged:

Held (affirming the judgment of the Court below), that the record did not show a discharge under the two term provision of the statute, and the entry of the *nolle prosequi* was not a bar to the second indictment.

Per WOODWARD, J. At common law a *nolle prosequi* may at any time be retracted, and it not only is no bar to a subsequent prosecution on another indictment, but may be so far cancelled as to permit a revival of procedings on the original bill.

A confessed accomplice in a murder, offered as a witness to fasten participation in the crime upon the prisoner, was objected to on the ground that he had been convicted of larceny, sentenced to three years' imprisonment, and the period of his sentence had not yet expired. This objection was met by the production of a pardon granted by the Governor. Against this it was alleged that the rules of the Board of Pardons had not been observed, and that the full sentence of the Court was not recited. The pardon was regular in form, except that it did not set forth, as required, the direction for the restoration of the property stolen, or the payment of its value:

Held (affirming the judgment of the Court below), that the pardon was not thereby avoided, but was controlling and conclusive upon the Court.

The same witness was further objected to on the ground that he had been convicted of highway robbery, sentenced, and after serving a portion of his time was discharged under the Act of May 1, 1861. It was claimed he was incompetent to testify, not having complied with the terms of his sentence. The record of his conviction showed the trial to have been held in the Court of Quarter Sessions:

Held, that the record showing a conviction in the Quarter Sessions for a crime triable only in the Oyer and Terminer, the whole proceeding was a nullity and was properly disregarded by the Court below.

Dougherty *v.* Commonwealth (19 Sm. 286), followed.

In a trial for murder which was preceded by highway robbery, the Commonwealth offered to prove that defendants were members of a secret organization, which had for its object the commission of crimes, chiefly beatings, arsons, robberies, and murders, and the protection of its members from arrest and punishment. The purpose was to show an extensive organization of conspirators, and that the robbery and murder with which defendants were charged were within the general scope of the conspiracy, also as tending to show opportunity, preparation, and disposition to commit the crimes, and to corroborate other testimony and explain the conduct of the prisoners and their associates. The Court admitted the testimony so far as to prove the fact of membership in such an organization, confining the evidence to facts that existed at the time of the murder:

Held, that such evidence was clearly competent to the extent to which it was admitted.

It was shown that on the night preceding the murder the prisoners and others charged with participation in the murder met together at a certain saloon and remained there till nearly daylight:

Held, that evidence was properly admitted to show that this saloon was a common resort of members of the secret organization referred to.

The testimony of an accomplice, before it is accepted as true, should be corroborated by unimpeachable testimony in some material part which affects the prisoner on trial and connects him with the offence. But it is not necessary that the corroboration be by direct testimony. It may be by such circumstances as satisfy the jury of the fact. (Per Elwell, P. J., approved by Supreme Court.)

Defendants proposed to prove that K., the principal witness for the Commonwealth, had been guilty of various crimes; this for the purpose of contradicting K., who on cross-examination had denied these charges:

Held (affirming the judgment of the Court below), that the questions put on cross-examination, being as to matters unconnected with the cause or with the parties, came within the rule of collateral matter, and were not subject to contradiction.

Statements made by prisoner to outside parties relative to his return home and surrender into custody, cannot be made evidence on the principle of *res gestæ*.

When testimony is given tending to discredit the statement of a witness, evidence is admissible to show that he had previously related the same thing to other parties, not to show that his statement is true, but that it is not a fabrication of recent date.

Error to the Oyer and Terminer of Columbia County.

Patrick Hester, Peter McHugh, and Patrick

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Tully were jointly indicted February 7, 1877, for the murder of Alexander W. Rea. McHugh and Tully severally pleaded not guilty.

Hester filed a special plea to the effect that, in December, 1868, he had been arrested for the murder of said Rea, and in February following was indicted by the Grand Jury of Columbia County, and that he remained confined in the jail of said county until May 11, 1869, when he was discharged. That between the time of his commitment and his discharge, two terms of the Court of Oyer and Terminer of said county were held, at one of which defendant might and should have been tried; and he prayed judgment whether he should be again charged with the same felony of which he had already been acquitted and discharged.

The District Attorney filed a replication averring that the time of the Court during February term, 1869, being the first term held after Hester's arrest, was fully occupied in the hearing of other cases; that the next succeeding term was in May, 1869, expiring on the 8th of said month, and was likewise fully occupied in the hearing of other cases; that on the 11th of said month of May the District Attorney by leave of Court entered a *nolle prosequi* as to the said Patrick Hester, and he was on motion discharged from custody. The Court (ELWELL, P. J.) overruled the above special plea, and ordered the defendant to plead over, being of opinion that the record did not show that the prosecution was in fault for two terms in not bringing defendant to trial on the former indictment, nor that the defendant had been discharged under the two term provision of the statute, but by the entry of a *nolle prosequi*, which did not constitute a bar to another prosecution for the offence charged in the then pending indictment. Exception. (First assignment of error.)

Hester then pleaded not guilty, and on February 8, 1877, the case against the defendants came on for trial before ELWELL, P. J. The following facts appeared from the testimony:—

Alexander W. Rea, a prominent citizen and resident of Centralia, Columbia County, left his home in his usual health on the morning of Saturday, Oct. 17, 1868. Not returning in the evening search was made for him, and on the following morning his dead body was found about a mile from Centralia, near what was known as the "Water Barrel" on the public road leading to Mt. Carmel in Northumberland County. His body was lying a short distance from the road, in a cleared spot, with brush all around and a path leading to it, and was pierced by six pistol balls. No watch or money, except a few copper coins, was found on his person.

The Commonwealth offered evidence tending to prove that this Saturday being the general pay day in the coal regions, a party of men had concealed themselves near the road at this point expecting that the deceased, who was superintendent of a coal company, would pass with a large amount of money, and that on his coming up they had stopped him, robbed him, and killed him. Rea was seen to leave Centralia about twenty minutes past nine Saturday morning. Several persons driving along the road by the "Water Barrel" a short time before deceased must have reached there, saw four or five men at the roadside who disappeared at their approach.

The Commonwealth offered as a witness Daniel Kelly, a confessed accomplice in the murder of Rea. He was objected to by defendants' counsel for reasons which are fully set forth and considered in the opinion of the Supreme Court (*post*, p. 219.) Objections overruled and witness admitted to testify. Exceptions. (Second and third assignments of error.)

According to Kelly's testimony the robbery and murder of Rea was planned on the night of the 16th of October, 1868, at the saloon of Thomas Donahue, in Ashland, and was the suggestion of the defendant, Patrick Hester. There were present at the conspiracy ten persons, viz.: Patrick Hester, Peter McHugh, Patrick Tully, Ned Skivengton, Brian Campbell, James Bradley, William Muldowney, Roger Lafferty, Jack Dalton, and the witness, Kelly. Their object was money, Hester informing the others that Rea would go to Mount Carmel the next morning to pay the men, and he said, "There was money in it; that it was a good job if done clean; eighteen or nineteen thousand dollars." They all had pistols. Lafferty provided the powder and ball and loaded the pistols. They stayed at Donahue's saloon drinking till nearly daylight, when all except Lafferty started out for the place where they were to lie in wait for Rea. Before reaching there, first Muldowney, then Hester and Skivengton, for different reasons, separated from the party, Hester giving his pistol to witness, with the remark, "Your pistol is no good; take mine, for I know it is sure." The remaining six went on and arrived at the place known as the "Water barrel" in the early morning, and Dalton, who was the only one of the party who knew Rea, went upon the road to give the signal of his approach, whilst the others concealed themselves in the bushes near by. They waited there a long time, during which several persons passed on the road, and finally Rea drove up in a buggy and stopped at the water barrel to allow his horse to drink, Dalton gave the signal, and they all rushed out with cocked pistols. Rea immediately got out of the buggy, and without saying a word, gave up his watch and money, about seventy dollars. A discussion then arose as to what they would do with Rea, which was terminated by

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McHugh declaring, "I will not be hunted through the world by any living man," and with that the shooting began. Rea ran off the road into the bushes and there fell. McHugh, Tully, and the witness ran after him, and Tully, placing a pistol behind his ear, fired the last shot, and that finished him. They then returned to the mountain, divided the spoil and separated. About a month afterward Thomas Donahue, the saloon keeper, was arrested for this murder. The day after the arrest the witness, Tully, McHugh, and several others of the party went and informed Hester of the fact, who replied: "It is near time that I should clear out," and he left that night. The next night or two afterwards witness, Tully, and McHugh also left for fear of being arrested.

The Commonwealth then offered to prove by Kelly and other witnesses, that at the time of the murder of Rea and for years prior thereto, there existed in the coal regions of Schuylkill, Carbon, Luzerne, Columbia, and Northumberland counties, an organization whose members were bound by obligations to secrecy, and who were known to and communicated with each other by signs and passwords; that such organization was subdivided into divisions; that at the head of each division was an officer called the "body-master;" that at the head of all the divisions for each county was an officer known as the "county delegate;" that this organization was known as the "Ancient Order of Hibernians," and also as "Mollie Maguires;" that it had for its chief and main purposes the commission of crimes, chiefly beatings of others, arsons, robberies, and murders, and also the protection of its members from arrest and punishment for such crimes, by secreting the criminals, aiding their escape, the employment of counsel for their defence, and obtaining false testimony to secure acquittals; that the practice and rules of the organization were, that the body-master selects members of the division of which such body-master is the head to commit crimes, and that such members are bound to obey on penalty of provoking personal violence and oftentimes death upon themselves; that Patrick Hester was the body-master for the division at Locust Gap, and the acting county delegate for Northumberland County at the time of the murder of Rea and for months prior thereto; that at the time of the murder of Rea the ten men engaged in the conspiracy (referred to above) and Thomas Donahue, at whose saloon they met, were members of this organization, and that Tully, McHugh, Bradley, Skivengton, and Lafferty were members of the division of which Hester was body-master. This evidence was offered (1) as showing an extensive organization of conspirators to commit crime, having the robbery and murder of Rea within the general scope of the conspiracy; (2) as tending to show opportunity, means, preparation, and disposition on the part of the prisoners for the commission of the crime in question; (3) as explanatory and corroborative of the testimony of Kelly as to the nature of the consultation and arrangement to rob and murder Rea made at Donahue's saloon on the evening of October 16; (4) as bearing upon the question why so large a number of persons should have engaged in this murder, in daylight, on a much-travelled road, and in a populous neighborhood. These circumstances suggest that the confederates were bound by extraordinary ties, and the existence of this organization explains these extraordinary ties.

Defendants' counsel objected to the admission of this evidence on the grounds, *inter alia*, that as the testimony showed that the Society in question had no agency in the alleged conspiracy, but that the prisoners acted upon their own individual responsibility, that evidence, therefore, as to the nature of the Society and the relations prisoners sustained to it, it was incompetent and irrelevant.

The Court overruled the objections, saying: "I am of opinion that this offer is on the very outer verge of any evidence that has been offered in these trials so far as I can discover. In the other cases they have brought in the action of the society as a society in reference to matters on trial, but I am not prepared to say but what evidence of the character proposed is right and proper, perhaps, as explanatory of some of the evidence given by Kelly, which evidence of course must be corroborated before it is given any weight, and corroborated in the manner in which the law requires. I have come to the conclusion that the Commonwealth may prove the fact of membership on the part of defendants in such an organization as that set forth in the offer, confining the testimony to facts that existed in October, 1868, but it is not permitted to prove specific acts of other members of the Society either before or since that time." Exception. (Fourth assignment.)

The Commonwealth further offered to prove by the witness Kelly, that Donahue's saloon, where the scheme to rob and murder Rea was formed, was a place of meeting of the members of the Society above referred to, the object of the offer being to establish a circumstance, the tendency of which was to show that ten persons meeting casually at one place could enter into a conspiracy to commit a murder, and also as bearing on the credibility of the witness. Objected to. Objection overruled and evidence admitted. Exception. (Fifth assignment.)

On cross-examination of Kelly, defendants' counsel asked witness if he had not once gone to John Cannon and asked him that in case he (the witness) got into trouble at any time if he (Can-

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non) would swear to a lie to help him out, and on the latter's saying no, witness replied, "You are a damn mean man, I would swear to a lie in a minute." Witness denied ever making any such request or having any such conversation. Afterwards the defendants' counsel, for the purpose of impeaching and contradicting Kelly as a witness, offered to prove by John Cannon, that soon after Rea's murder, about the time of Donahue's arrest, Kelly had called on Cannon, and the conversation above recited taken place. Objected to, on the ground that as no inquiry had been made of Kelly connecting this conversation with the Rea murder, it came, therefore, under the head of collateral matter, and the defendants were bound by Kelly's answers. Objection sustained. Exception. (Sixth assignment.)

On the part of the defendants testimony was given contradicting Kelly, and showing that Hester left home on the 16th of November, 1868, being the day before the arrest of Donahue; that the reasons for his leaving were that he was in trouble with his wife about another woman, and was threatened with arrest on that account, and also on the charge of illicit distilling; that he gave as his reason for going away his fear of arrest on account of the discovery of his still, and said he would go away and stay awhile with his brother and sister in Illinois. Defendants' counsel offered to show that Hester, when in Illinois, heard that he was accused of the Rea murder, and that he then said he would go back immediately home, this to be followed by proof that he did so return, sent word to the authorities that he was there, and they not coming for him, drove over to the county seat and surrendered himself into custody. The purpose of the offer being to rebut the evidence with regard to his alleged flight, and to contradict the testimony of Kelly. Objected to. Objection sustained, the Court holding that what Hester said in regard to his return, surrender, and all that was not evidence. Exception. (Seventh assignment.)

Lewis Parr, a policeman, one of the witnesses for the Commonwealth, testified that in 1869, when on duty in the Columbia County jail, he had overheard a conversation between Donahue and Hester, the former saying: "Pat, that was a poor go killing Rea, wasn't it?" to which Hester replied, "It was so, and if I had to get him shot again, I would never do it; but we are all right, I can at any time get from five to five hundred who will swear we were not there at the time."

E. B. Ikeler, late district attorney for Columbia County, was next called on behalf of the Commonwealth, and testified that soon after the time when the above conversation was claimed to have taken place, and before Hester's discharge, Parr had related to witness substantially the same conversation, and said he had overheard it in the prison. Objection was made at the time to the admission of this testimony, but no exception taken. Later in the trial evidence was given on the part of defendants tending to discredit Parr's testimony. Defendants' counsel then moved to strike out Ikeler's testimony as being mere hearsay, and not entitled to be considered by the jury. Motion refused, the Court saying that, though the testimony was, perhaps, not evidence in chief in the first instance, yet as it was given it should not now be stricken out, because evidence was given affecting the testimony of Parr, and Ikeler's testimony was for the purpose of corroboration. Exception. (Eighth assignment.)

Defendants' counsel proposed to prove that Kelly had robbed one John Traverse of money. This for the purpose of contradicting Kelly, who, on cross-examination, had denied this charge; and, also, for explaining his motives in becoming a witness in the case on trial. Objected to, as being irrelevant and immaterial matter as to which defendants were bound by the answers of Kelly. Objection sustained. Exception. (Ninth assignment.)

The Court charged the jury, *inter alia*, as follows: "In this case the Commonwealth has given direct and positive testimony by the oath of an accomplice, that Peter McHugh and Patrick Tully were present at and assisted in the murder of Mr. Rea, and that Patrick Hester devised the plot and furnished, in part, the means for its execution. It is also claimed that the testimony of the accomplice is corroborated by facts and circumstances which entitle his testimony to belief. On the ground of public policy and of necessity, from its being scarcely possible to detect conspiracies and other great crimes without their information, the evidence of accomplices has always been admitted. They are competent witnesses, but the practice has been long settled that no conviction should be had upon the unsupported testimony of an accomplice. In fact his testimony should always be received with great jealousy and caution, for upon his own confession he stands contaminated with guilt. He admits participation in the crime, which, by his evidence, he would fix upon the prisoners. His character is tainted, and he may have strong and unadmitted motives to deceive. The testimony of an accomplice, before it is accepted as true, should be corroborated by unimpeachable testimony in some material part which affects each individual prisoner on trial, and connects him with the crime. But it is not necessary that the corroboration be by direct testimony. It may be by such circumstances as satisfy the jury of the fact."

The prisoners were found guilty of murder in the first degree, and sentence of death was severally pronounced upon them. Defendants took this writ, assigning for error the overruling of the

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special plea and the rulings of the Court on the questions of evidence as given above.

John G. Freeze and *S. P. Wolverton* (with them *John W. Ryon*, *Brockway*, and *Etwell*), for plaintiffs in error.

First Assignment.—The record shows clearly that Hester was entitled to his discharge, and was actually discharged from imprisonment on this same charge under the Act of March 31st, 1860. (Purd. Dig., page 388, pl. 57.)

If the mere fact that the record shows that a *nolle prosequi* was entered by the district attorney after two terms of imprisonment is sufficient to deprive a prisoner of his right to plead a discharge under this Act, the statute becomes a nullity, as the district attorney can at any time prevent its operation. The judgment of discharge here was on a subsequent motion entirely unconnected with the entry of the *nolle prosequi*, and could have been moved for regardless of any such action.

Fourth Assignment.—At the time of this trial public sentiment was greatly excited against the Ancient Order of Hibernians. All that was necessary was to connect the names of prisoners with this order, and conviction was almost sure to follow. This case was entirely different from the so-called Mollie Maguire trials in Schuylkill and Carbon Counties. There a connection was proposed to be shown, and was shown, between certain divisions of the order and the crimes committed. Here there was no testimony showing any connection of the society with the crime. The object of the men here was clearly to obtain money, and the scheme arose out of an accidental meeting of those concerned, with which the society had nothing to do. The admission of the testimony in regard to the Mollie Maguires, was, in effect, to give to the jury all the evidence which had been brought in in other trials in which the society was implicated, and create a prejudice against the defendants. The established rules of evidence require the rejection of such testimony.

American Criminal Law, vol. i. p. 640.
Commonwealth *v.* Miller, 3 Cushing, 251.
Chitty's Criminal Law, vol. i. p. 564.
State *v.* Wisdom, 8 Porter, 511.
Baker *v.* State, 4 Arkansas, 56.
State *v.* Arnold, 13 Iredell's N. C. R. 491.
Dunn *v.* State, 2 Arkansas, 229.
Kinchelon *v.* State, 5 Humph. R. 9.

Fifth Assignment.—The connection of the Society not being shown, it was clearly irrelevant to show that Donahue's saloon was a place of meeting of the Society, much more a place where individual members met. The second purpose of the offer, the corroboration of an accomplice by his own testimony, was still more unreasonable. The law requires that an accomplice be corroborated by other reliable testimony, and his evidence is of no weight unless so corroborated.

People *v.* Whipple, 9 Cowen, 708.
Phillipps on Evidence, p. 111.
King *v.* Farler, 8 C. & P. 106.

Sixth and Ninth Assignments.—A witness may be discredited by showing that on a former occasion he made a statement inconsistent with his statement at the trial, provided such a statement be material to the issue. Was it not material to show that Kelly, under daily fear of arrest, was endeavoring to wring from his companions a promise that they would perjure themselves on his account. He denied making such request. To show that he testified falsely in this, and that in connection with this very offence he had avowed his willingness to commit perjury, was surely relevant, calculated very materially to affect his credibility.

Gaines *v.* Commonwealth, 14 Wright, 327.
Day *v.* Stickney *et al.*, 14 Allen, 257.
Cameron *v.* Montgomery, 13 S. & R. 132.
Ott *et al. v.* Houghton, 6 Casey, 453.
Batdorff *v.* Farmers' Nat. Bank of Reading, 11 Smith, 183.
Chapman *v.* Coffin, 14 Gray, 454.
Tyler *v.* Pomeroy, 8 Allen, 480.
Starks *v.* People, 5 Denio, 108.
Newton *v.* Harris, 6 New York, 346.

Seventh Assignment.—The surrender of a prisoner charged with crime has always been considered in favor of the prisoner's innocence. What Hester said when he first learned that suspicion rested on him, his voluntary return and surrender were certainly evidence to rebut the argument that he fled on account of this murder. It is an established rule of evidence that all the surrounding facts of a transaction, the *res gestæ*, may be submitted to a jury; and, in general, the *res gestæ* mean those declarations and those surrounding facts and circumstances which grow out of the main transaction, and have relations to it.

U. S. *v.* Craig, 4 Wash. C. C. Rep. 729.
State *v.* Swink, 2 Dev. & Bat. 9.
State *v.* Stone, Rice, 147.
Kirby *v.* State, 7 Yerg, 259.
Wills on Circumstantial Evidence, p. 64, § 48, p. 75, § 5.
Potts *v.* Everhart, 2 Casey, 498.
Tompkins *v.* Saltmarsh, 14 S. & R. 275.

John M. Clark, district attorney, and *F. W. Hughes* (with them *C. R. Buckalew* and *F. B. Gowen*), contra.

First Assignment.—Hester did not object to the entry of the *nolle prosequi*, as he ought to have done if its entry was injurious to him. He does not seem to have demanded a trial, and he certainly did not claim or secure a discharge under the two-term regulation of the penal code. We take the record as we find it, and assume that what was done in Court, and by the Court, was rightly done. An untried defendant is not entitled to an absolute discharge at the end of the second term under all circumstances. Application must be made at the proper time, and pro-

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per grounds for its allowance be made to appear.

Commonwealth *v.* Brown, 2 WEEKLY NOTES, 153.
Commonwealth *v.* Sheriff of Allegheny, 16 S. & R. 304.
Clark *v.* Commonwealth, 5 Casey, 129.

Fourth Assignment.—The evidence relating to the Mollie Maguire organization was carefully limited by the Court as to time, and excluded proofs of specific acts of other members of the Society than the defendants, either before or after October, 1869. The admission of this evidence is justified by decisions of the Supreme Court in other cases of like character.

Carroll *v.* Commonwealth, 4 WEEKLY NOTES, 109.
Campbell *v.* Commonwealth, Id. 114.

Sixth and Ninth Assignments.—That the offers of evidence covered by these assignments were properly rejected, see—

Hildeburn *v.* Curran, 15 Sm. 63.
Wharton on Evidence, §§ 541, 547, 559.
Greenleaf on Evidence, vol. i. § 449.

Seventh Assignment.—All testimony relative to Hester's flight and arrest, including his own contemporaneous declarations, were admitted; what was rejected was his alleged declarations about his return and surrender, weeks after his flight, and before the time of his arrest. Clearly he could not make testimony for himself in Illinois and other places, in the absence of any person representing the Commonwealth, and independent of any fact or transaction put in evidence by the Commonwealth. The authorities cited upon the law of *res gestæ* are therefore inapplicable.

Eighth Assignment.—A witness cannot be allowed, for the purpose of strengthening his testimony on his examination in chief, to state that he had previously communicated to others the same facts; but if it should become a material fact that the witness declared his knowledge to other persons, such persons may be called to the fact.

Deshon *et al. v.* Merchants' Insurance Co., 11 Metcalf, 199.
Henderson *v.* Jones, 10 S. & R. 322.
Com. *v.* Wilson, 1 Grey, 337.
Com. *v.* Jenkins, 10 Grey, 489.
Cooke *v.* Curtis, 6 Harr. & John. Md. Rep. 93.
Connecticut *v.* De Wolf, 8 Conn. Rep. 93.

Jan. 7, 1878. THE COURT. At the argument here, no objection was made to the answers given to the points presented on the trial, or to the general charge of the Court below. From a careful examination of the voluminous record that has been brought up,* it is manifest that no effort was spared to secure an accurate and just result. The charge of the president of the Oyer and Terminer developed the whole cause in a perfectly satisfactory way. It was full, fair, temperate, and unprejudiced; the material facts were stated in their due proportions; and the instructions upon legal questions were so intelligent and so clear as to make their apprehension and application by the jury free from the chance of mistake or doubt. In relation to the general features of the case, there is nothing, therefore, that requires remark. Only the particular errors alleged to have been committed in the progress of the trial are left for examination and review.

(1) On the 11th of May, 1869, Patrick Hester, on the motion of his counsel, was discharged from the prison of Columbia County, where he had been confined on a charge of complicity in the murder of Alexander W. Rea. The indictment against him had been found at the February term of the Court of Oyer and Terminer, and when he was discharged, the May term, the second after his arrest and imprisonment, had expired. It began on Monday, the 3d of May, and closed on Saturday, the 8th, for an order had been made on the 10th of February that it should be limited to a single week. Hester was discharged, therefore, three days after the day appointed for the expiration of the term. It was insisted on by his counsel that he was entitled, on the trial of this indictment, to the benefit of the provisions of the 57th section of the Act of the 31st of March, 1860, declaring that if a prisoner "shall not be indicted or tried the second term, session, or court after his or her commitment, unless the delay happen on the application, or with the consent of the defendant, or upon trial he shall be acquitted, he shall be discharged from imprisonment."

Under this provision, the proceeding in May, 1869, was set up as a bar to any subsequent prosecution. The section quoted was a re-enactment in substance of the third section of the Act of the 18th of February, 1785, under which a doubt was expressed in Clark *v.* The Commonwealth, 5 Casey, 136, whether the plea of a discharge under the two-term rule prescribed by the statute, would be available against a second indictment. But the facts presented do not call for an inquiry into the effect upon the after liability to arrest and punishment of a prisoner in whose behalf the statutory provision may have been applied. Here, the record did not show a discharge under the two-term rule. It appears from the Court minutes that immediately before the motion was made, the District Attorney had asked leave to enter a *nolle prosequi* as to Hester—that the motion was allowed—and that the entry was made at once. The motion for the discharge was not grounded on the rule. From anything that the record shows it could not be said that such a motion, if made, would not have been denied.

When the *nolle prosequi* was entered without

* The paper-book of plaintiffs in error contained 874 printed pages.

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conditions, the right of the prisoner to his freedom accrued. The motion for his discharge was the assertion of the right thus created. The other proceedings of the Court, as disclosed by the minutes, show that Hester, Thomas Donahue, John Duffy, and Michael Prior were under a joint indictment.

A jury was empanelled in Duffy's case, and after a trial extending from the 3d to the 11th of May, a verdict of not guilty was rendered. A jury was then sworn as to Prior, and a formal verdict was taken on the 11th of May in his favor. The distinction made in disposing of the cases of the different prisoners proves that the District Attorney did not design to abandon all further prosecution of Hester. The effect of the entry of a *nolle prosequi* is well settled, as well in Pennsylvania as elsewhere. It was said by BLACK, C. J., in McFadden *v.* The Commonwealth (11 Harris, 12), that a prisoner charged with crime is not in jeopardy until the jury is empanelled and sworn. At common law, a *nolle prosequi* may at any time be retracted, and it not only is no bar to a subsequent prosecution on another indictment, but may be so far cancelled as to permit a revival of proceedings on the original bill. (Com. *v.* Wheeler, 2 Mass. 172; Com. *v.* Miller, 2 Ash. 61.) It will not have the effect of a *retraxit* even where a personal agreement has been made by the attorney-general that it should be a bar. (State *v.* Lopez, 19 Mo. R. 254.) The cases collected in the notes to sections 513, 514, and 515 of Wharton's Criminal Law fully support this doctrine. The record of the proceedings of the Columbia Oyer and Terminer in May, 1869, was conclusive as to the ground of the discharge, and ample authority justified the decision that the entry of the *nolle prosequi* was not a bar to this indictment.

(2) Daniel Kelly, a confessed accomplice in the murder of Rea, was offered as a witness to fasten participation in the crime upon the prisoners. He was objected to on the ground that he had been convicted of larceny in the Quarter Sessions of Schuylkill, and sentenced on the 10th of September, 1874, to separate and solitary confinement at labor for three years; and, as this cause was tried in February, 1877, within the period the sentence prescribed, it was urged that he was incompetent. The objection was met by the production of a pardon granted by the Governor on the 6th of January, 1877. Against this it was alleged that the rules of the Board of Pardons had not been observed, and that the full sentence of the Court of Quarter Sessions was not recited. The pardon was the act of the chief executive officer of the Commonwealth. It recited a recommendation in writing by the Lieutenant-Governor, the Secretary of the Commonwealth, and the Attorney-General. It set out the offence for which Kelly was tried and convicted, the date of the conviction and sentence, the amount of the fine, the direction to pay the costs of prosecution, and the term of the imprisonment. All that was omitted was the direction for the restoration of the property stolen or the payment of its value. Upon irregularities and omissions of form such as these, it was proposed that the Judges of the Oyer and Terminer should set aside and annul the deliberate action of the Governor, taken in the execution of a constitutional power expressly conferred. There was no allegation that the pardon was obtained by fraud or false pretence. If there had been, it is possible that the principles announced by Chief-Justice LOWRIE, in The Commonwealth *v.* Halloway (8 Wright, 210), might have required its investigation. With the evidence presented to them, the Court were simply bound to accept the Executive action as controlling and conclusive.

(3) Kelly's testimony was objected to for another reason. He had been convicted of highway robbery in Schuylkill County, and sentenced on the 8th of September, 1869, to imprisonment for two years. On the 7th of July, 1871, he was discharged from custody under the provisions of the Act of the 1st of May, 1861. It was insisted that he was not competent to testify because he had not complied with the terms of his sentence. Upon the production of the record of the conviction, it appeared that the trial had been in the Court of Quarter Sessions, and not in the Oyer and Terminer of Schuylkill County. It was held that the proceedings resulting in the conviction and sentence were *coram non judice*, and the objection to the competency of the witness was overruled. There was no doubt in the proof of the facts on which the decision of the Court was rested. While the indictment appeared to have been found in the Court of Oyer and Terminer, Quarter Sessions of the Peace, and general jail delivery, at September sessions, 1869, the record produced was entitled as in the Quarter Sessions alone. It was certified by the clerk, and authenticated by the seal of that Court. Indeed, the parol testimony showed that no other seal for the use of the constitutional criminal courts of the county was in existence. There was presented the naked case of the record of a conviction in the Quarter Sessions for a crime triable only in the Oyer and Terminer. The whole proceeding was a nullity, and was properly disregarded. Dougherty *v.* The Commonwealth (19 P. F. S. 286) was a trial for homicide, where the prisoner had been arraigned, tried, convicted, and sentenced, in the Quarter Sessions. It was held by this Court that the conviction and sentence were void for want of jurisdiction.

(4) When the offer was made to prove the ex-

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istence of the Ancient Order of Hibernians, and its objects and operation, the Court expressed the opinion that it was "on the very outer verge of any evidence" that had been given in the trials in which the character of the organization was involved. It was admitted, however, so far as it related to facts existing in October, 1868, but specific acts of others than those charged with complicity in the murder of Rea, committed either before or after that time, were excluded. Was this testimony irrelevant? It was not designed to be used to establish the commission of any independent crime. Nor was its object to affect general character, or to repel inferences from adversary facts. Its purpose was to explain the relations existing between the conspirators, the reason, motive, and opportunity of their combined action, and the nature of the tie that bound them together. The reason for the exclusion of evidence of collateral facts is that such evidence tends to draw away the minds of the jurors from the point in issue, and to excite prejudice and mislead them. (1 Greenleaf's Evidence, § 52.) Here the offer was not to show what could accurately be called collateral facts. The testimony could affect nobody but the parties charged with this murder, and could illustrate or tend to the proof of no other crime. Ten men, including the three prisoners, met in Donahue's saloon on the evening of the 16th of October, 1868, and openly arranged the details of their plan to attack and rob Rea on the following day. Hester was the body-master of the Locust Gap division, and the nine others were members of the order. It was proposed to prove that, under its practical workings, the organization had come to be the means of procuring crimes of every grade to be perpetrated with comparative impunity; that protection of the perpetrators from arrest and punishment was afforded by secreting them, aiding their escape, and employing counsel and procuring false testimony for their defence; that from the members of each division individuals were selected by the body-master to commit any offence he might require at their hands; and that the members were bound to comply with his requirements. In effect, it was proposed to prove that these ten men, as members of the Ancient Order of Hibernians, and under the relations they held to each other as individual Mollie Maguires, organized themselves as a gang of bandits to carry into effect on the 17th of October the plot deliberated and decided upon the night before for the assault and robbery which ended in the murder. Without regard to the merits of other cases in which this class of evidence has been received, it was clearly competent, to the extent to which it was admitted, under the circumstances presented here. The facts were relevant, direct, and essential. Without them, the conduct of the prisoners and their associates would be explicable on no recognized or rational theory regarding the motives and modes of human action. With them a jury would be able to understand how the brutal and cold-blooded consultation in Donahue's saloon could have been had without concealment or reserve, and how a horrible murder could have been committed the next morning on a public highway in the open day.

(5) For the same reasons that justified the admission of the general testimony, the question to Kelly, complained of in the fifth assignment of error was warranted. It was certainly relevant to prove that the place where the men met was a common resort of members of the order. It afforded them means of communication and intercourse, and tended to explain the circumstances of the gathering at which the plan for the attack on Rea was arranged. Under this assignment, the question of the extent of the credit to which the testimony of Kelly as an accomplice was entitled was discussed. The question was not properly raised. If it had been, it would be necessary only to say that it was disposed of with entire accuracy in the answers to the points and in the general charge.

(6) If, from the testimony of John Cannon in contradiction of Kelly, which the prisoners offered, any motives operating on Daniel Kelly's mind, when his alleged declarations were made, that had relation to this cause or these prisoners, could have been inferred, its admission would have been required by the principle decided in Gaines *v.* The Commonwealth (14 Wright, 327). But the offer was not connected with the prisoners, or either of them. The testimony could have had no effect except upon the general credibility of Kelly as a witness. Unconnected with the cause and with the parties as his answers on cross-examination had been, they were given in reference to collateral matter, and were not subject to contradiction. "If a question is put to a witness which is collateral or irrelevant to the issue, his answer cannot be contradicted by the party who put the question, but it is conclusive against him." (1 Greenleaf's Evidence, § 449.) So much of the offer as proposed to prove Kelly's declaration, as connected with the murder, was inadmissible; for as to those declarations, he had not been cross-examined.

(7) On behalf of Hester, all the evidence of his conduct and declarations that could be at all legitimate, was permitted to be given. Declarations which form part of the *res gestæ* may be proved. (Kirby *v.* The State, 7 Yerger, 259.) And declarations of one party made in the presence and hearing of the other, are *res gestæ*. (McClenkan *v.* McMillan, 6 Barr, 367.) Evidence was permitted of what Hester said and did in November, 1868, when he went West. The

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fact that he apprehended arrest on a charge of adultery and a charge of violating the laws of the United States against illicit distillation was allowed to be shown. And his words and acts at the time of his arrest, including his statement that he had come to give himself up, were testified to by Lewis S. Parr and Jacob L. Girton. Statements made by himself to outside parties in Illinois and at his home in Locust Gap, could not be made evidence on any principle as *res gestæ*.

(8) When E. R. Ikeler's testimony was offered, it was admitted without exception. Lewis S. Parr had sworn to a conversation between Donahue and Hester in 1869. Evidence was given subsequently on behalf of the prisoners to discredit Parr's statement. Mr. Ikeler, who was district attorney in 1869, was called to testify that Parr had made the same statement to him before Hester's discharge on the first indictment. The eighth error has been assigned for the refusal of a motion to strike out Ikeler's testimony. It was ruled in Henderson *v.* Jones (10 S. & R. 322), that where a witness is contradicted, and evidence is given to impeach his character, evidence may be given of what he swore on a former trial of the cause, in order to corroborate his testimony. "A witness cannot be allowed, for the purpose of strengthening his testimony on his examination in chief, to state that he had previously communicated to others the same facts; but if it should become a material fact that the witness declared his knowledge to other persons, such persons may be called to prove it." (Daniel & Deshon *v.* The Merchants' Insurance Co., 11 Metcalf, 199.) The same rule was laid down in Com. *v.* Wilson (1 Grey, 337), and in Com. *v.* Jenkins (10 Grey, 489). In the charge the jury were instructed that "the testimony of Mr. Ikeler, the district attorney, is evidence only for the purpose of showing that Parr's statement is not a fabrication of recent date, and not that the statement of Parr is true. That is for the jury to determine." The refusal to strike out the evidence was justified by authority, and proper instructions were given for its application.

(9) John Traverse was called to prove that Kelly had robbed him. Kelly had denied that he had done so in his cross-examination. The testimony was objected to as irrelevant and immaterial. It had no connection with any question in this cause. For reasons stated in passing on the seventh assignment of error, the ruling of the Court was right.

The judgment is affirmed, and it is ordered that the record be remitted, that the sentence of the Court of Oyer and Terminer may be carried into execution.

Opinion by WOODWARD, J.

Jan. '78, 91 & 92. Feb. 6, 1878.

Leaming's Appeal.
Espen's Appeal.

Landlord and Tenant—Claim for Rent—Execution.

Where a levy is made on personal property under a number of executions, and the proceeds of the sale are not sufficient to satisfy all, the landlord's claim on the proceeds for rent due is to be reckoned up to the date of the levy made on that execution which was the last to participate in the fund.

Appeal from the Common Pleas No. 3, of Philadelphia County.

These were appeals taken by the respective landlords of Nos. 1018 and 1020 Chestnut Street, known as the "St. Stephen's Hotel," from a decree of the Court distributing a fund arising from a sheriff's sale of the furniture, etc., on the premises. As the principle of the two cases is identical, the facts of the first only are given, which, as they appeared before the Auditor appointed to distribute the fund, were as follows:—

Leaming, by a lease dated June 9, 1875, demised the premises 1018 Chestnut Street to one Ashton for the term of five years at the yearly rent of $10,000, payable monthly on the tenth day of every month. On the 20th, 22d, 23d, 24th and 25th days of November and the 14th day of December, 1876, executions were issued against Ashton at the suit of various plaintiffs, to all of which the sheriff returned that he had levied on the said goods on the day of the issuing of the writs respectively.

The sale took place December 15, 1876, the goods having remained on the premises up to that time. The last rent paid to Leaming under the lease was on October 10, 1876. Before the Auditor appointed to make distribution Leaming claimed from the fund rent up to December 14, 1876, the date of the issuing of the last execution. The execution which issued on November 23, 1876, was the last which received any portion of the proceeds.

The Auditor (E. R. Worrell) reported as follows:—

"The Auditor would allow the rent to December 14, 1876, the date at which the last (Supplee) execution was placed in the hands of the sheriff, were it not for the authority of Worley *v.* Meekley (1 Phila. Rep. 398). The Act of Assembly of 16th of June, 1836, provides, that:

"The goods and chattels being in or upon any messuage, land or tenements which are or shall be demised, . . . *taken by virtue of an execution*, and liable to the distress of the landlord, shall be liable for the payment of any sums of money *due for rent at the time of taking such goods on execution*."

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"The endorsement of a second *fi. fa.* by the sheriff amounts to a re-seizure of goods already taken under a former writ. From that moment the goods are considered in his custody *on all the executions*. In contemplation of law he is deemed to have seized under the *second writ* the *same property* that was seized under the first. It is the duty of the sheriff *to levy and sell on all the executions* (Watmough *v.* Francis, 7 Barr, 206). If the current quarter has been paid, the landlord can claim an amount proportioned to the part of the quarter which has expired (Purdy's Appeal, 11 Harris, 97).

"Upon the authority of Watmough *v.* Francis (*supra*), the Auditor holds that the goods and chattels in the messuage No. 1018 Chestnut Street were 'taken by virtue of an execution' (the Supplee execution), December 14, 1876, and consequently were 'liable for the payment of any sums of money due for rent at the time of taking such goods in execution,' to wit, December 14, 1876. Worley *v.* Meekley (*supra*) can only be sustained by determining that the goods and chattels were *not* taken by virtue of the Supplee execution, but Watmough *v.* Francis decides that they were. To hold that the goods were *not* taken under the Supplee execution, would be to say that no execution except the first could ever participate in the distribution of the funds raised by the sale of personal property. For without the levy, without the taking in execution, there can be no right of participation. To follow to its conclusion the decision in Worley *v.* Meekley, the Auditor would award the first execution creditor the amount of his debt, and the balance to the defendant on the execution, upon the ground that there had been no taking of the goods, no levy, except under the first execution, and consequently *no lien* or right to join in the distribution.

"The landlord's right does not depend upon whether the fund is sufficient to pay the last execution a portion of its debt or not. There is nothing in the statute which can bear any such interpretation, and the whole question is only the construction of the statute. The Auditor believes his view to be the equitable one.

"The first, or any other execution creditor can have the goods removed from the demised premises and sold within eight or ten days after the levy. If he leaves them upon the premises he does it with the risk that a subsequent execution may be levied, and extend the time to which the landlord may claim rent. The landlord cannot compel the removal of the goods; *he* cannot call upon the sheriff to pay him for the use and occupation of the premises, for the tenant's title to the premises is not divested; he cannot distrain while the sheriff's levy exists; he could have no standing in Court to enforce a speedy execution of the *fi. fa.*

"The Auditor thinks that Worley *v.* Meekley should not be followed by the Court, and has, therefore, presented the subject thus fully, in order that the point may be fully raised for consideration."

The Auditor reported a decree awarding the landlord's rent to November 23, 1876, the date when the last execution which shared in the fund was placed in the hands of the sheriff. The Court, after argument, confirmed the report, and Leaming then entered this appeal, assigning for error the action of the Court.

George Northrop (with him *Sulzberger* for Espen), for the appellant.

The landlord is entitled to rent to the date of the last levy. The Act of 16 June, 1836 (Purd. Dig. 645, pl. 51) undertakes to give him a year's rent out of the proceeds of the sheriff's sale (Ege *v.* Ege, 5 Watts, 139), and this does *not* depend upon the amount of the judgment under which the sale is made. Worley *v.* Meekley (1 Phil. Rep. 398), by which the Auditor thought himself bound, was misapplied by him. In that case the Auditor had decided that as the sale was made under all the executions it was all one proceeding, and the landlord was limited to the date of the first levy. This doctrine the Court overruled, and gave the landlord rent up to the second levy.

The Auditor's construction of the case makes the right depend upon the amount of the judgment under which the goods are sold. But that case, at any rate, is contrary to Watmough *v.* Francis (7 Barr, 206).

Pile and *Booth*, contra.

The doctrine of Worley *v.* Meekley is the correct one. That case decided that the claim of the landlord might be apportioned down to the execution last to participate, on the ground that the first execution could take only enough goods to pay its amount, and the force of that execution would be then expended. Then if there be a second execution the sheriff would proceed on it, and as soon as the goods were exhausted, there would be nothing upon which a subsequent execution could operate.

Feb. 18, 1878. THE COURT. The result at which the Auditor arrived was correct, though his reasoning on the question was not.

The Act of 16 June, 1836, gives to a landlord a lien for any sums of money *due* for rent at the time of taking such goods in execution. If the rent *due* take all the money, none will be left for the execution; but, if any be left, it is manifest that it goes to the execution, for the claim of the landlord is satisfied by giving to him what is due.

If, however, another execution be levied afterward, and in the mean time another sum of money for rent has fallen due, it is quite as clear that the

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rent thus accrued will again take the preference, and what remains will go to the execution. Now, if a third execution be afterwards levied on the same goods and still another sum of rent shall have accrued, it is obvious the same result would take place, if a surplus were left to go to the third execution. But it is equally obvious that, if the proceeds of sale had been exhausted by application to the second execution, the subsequently accruing rent has nothing to grasp, neither rent nor execution taking anything. The confusion on this subject arises in forgetting the fact that the rent last claimed had not accrued when the proceeds of sale were exhausted by the executions previously issued. It is not the fact that the sale is made on all the executions levied on the goods which governs, but the falling due of the rent, which must accrue before the proceeds of sale are exhausted in order to come in for a share.

Decree affirmed at the costs of the appellants in each case, and their appeals are severally dismissed.

PER CURIAM.

Oct. & Nov. '76, 261. Oct. 24, 1877.

Shepler v. Scott.

Contract—Performance within a reasonable time—Parol evidence to vary written instrument—Act of May 27, 1841—Brokers' licenses—Sale of real estate by one not having a broker's license.

Where a contract provides for the future performance of an act, without specifying any time, the implication of law is that it should be done within a reasonable time; and the question of what is a reasonable time, is for the jury.

The testimony offered to establish a parol agreement to limit the operation of a written agreement to a particular time, must be both positive and clear

Where one under a special contract effects a sale of real estate, his right to recover the compensation agreed upon is not affected by his failure to show that he had a license to act as a real estate broker.

Error to the Common Pleas of Westmoreland County.

Covenant on articles of agreement by Joseph H. Scott against Davis Shepler. Pleas "*Non infregit conventiones*, covenants performed *absque hoc*," etc.

The following is the instrument sued upon:—

"Agreement made this 6th day of May, 1874, by and between Joseph H. Scott, of Washington County, Pennsylvania, of the one part, and Davis Shepler, of Westmoreland County, Pennsylvania, of the other part, witnesseth, that the said party of the first part, for the consideration hereinafter mentioned, is to use his best endeavors to sell for the said second party one hundred and twenty-six acres of coal, more or less, situate in Rostraver Township, Westmoreland County, and in case of sale of said coal by said first party, or from his efforts to sell the same, the said second party hereby binds himself, his heirs and executors, to pay to the said first party all that the said property shall be sold for over and above $50 per acre. In witness, the said parties have hereunto set their hands and seals this 6th day of May, 1874.

(Signed) DAVIS SHEPLER. [SEAL.]
JOSEPH H. SCOTT. [SEAL.]"

Upon the trial (before LOGAN, P. J.), it was shown, on behalf of the plaintiff, that Moses Scott, an uncle of the plaintiff, had, through the instrumentality of the plaintiff, purchased, on August 1st, 1874, the property for $55 per acre.

On behalf of the defendant there was testimony to the effect that the agreement was only to be in force for three weeks, and that the bargain with Moses Scott was not concluded until the defendant had agreed to grant the right to "excavate a shaft or well . . . . for airing and draining, etc.," and a right of way under the land for taking out the coal; that these concessions were not in the minds of the parties to the agreement, and that the defendant would not have made them had he not supposed that he was to receive the additional five dollars an acre therefor.

In rebuttal, the plaintiff's witnesses denied that there was any limitation as to the time within which the sale was to be made, and that the additional concessions were merely such as were usually made in the sale of rights to mine, and that without them the grant would have been valueless. The plaintiff proved no license to act as a real estate broker.

Plaintiff's counsel requested the Court to charge, *inter alia*, (2) "That if the jury find that the plaintiff was the procuring cause of the sale he would be entitled to recover under his contract, unless it had terminated by lapse of time, or was rescinded before the sale to Moses Scott." *Affirmed.*

In the general charge the Judge said: "There is, however, a further question, which is one particularly for you. The defendant, Davis Shepler, insists that this contract, instead of being, as written upon its face, without any limitation as to time in which the sale is to be made, was limited to a period of three weeks, and that it was agreed between the parties at the time the paper was made that Joseph Scott should only have three weeks in which to consummate the sale, and at a time before the sale the parties met, and it was agreed between Joseph Scott and Davis Shepler that the sale not having been made within the three weeks, the paper was declared off, and it was so agreed between them. If this fact be so—if you are satisfied under all the testimony in the cause that it is so, that will defeat the right of the plaintiff to recover. In determining that, you will look at all the testimony in the cause. The paper is with the plaintiff; the contract as read

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is as it is alleged to have been by the plaintiff. The burden, therefore, rests with the defendant to satisfy you by positive and clear testimony that the contract embraced the terms the defendant says it did, and not recited in the paper that the time was limited to three weeks, and at the end of three weeks they agreed to give up that paper. You will scan all the testimony in the cause, and say whether the defendant has satisfied you by clear and positive proof of the fact that it was limited to three weeks, and the contract declared off at the end of three weeks. If he had insisted upon the paper conveying simply the coal at the time, he ought to have stood upon it, or at least given Joseph Scott notice of it, and an opportunity to be heard. There is no evidence that he did give such notice, and if the facts are so, as they seem to be under the testimony in the cause, then this matter of additional privileges would not be considered an element of defence on the part of the defendant."

The Court reserved the question whether the failure of the plaintiff to show that he had a broker's license, either under the laws of the United States or the State of Pennsylvania, would defeat his right to recover.

Verdict for the plaintiff $600, subject to the point reserved.

A motion to enter judgment for the defendant *non obstante veredicto* was subsequently overruled, and judgment was thereupon entered for the plaintiff.

Defendant took this writ, assigning as error (1st and 2d) the answer to the plaintiff's second point (3d and 4th), the portion of the charge above quoted, and (5th) the refusal of the motion to enter judgment for the defendant *non obstante veredicto*.

Henry D. Foster, for plaintiff in error.

The charge of the Court below upon the question of the limitation of time did us injustice. The jury were told that evidence to contradict the written contract must be positive and clear. Now positive and clear evidence to prove a contract must be by persons who were present. It is plain that such evidence was not requisite, and the defendant was thus deprived of the benefit of testimony which was in fact all-sufficient. The plaintiff should not have been permitted to recover without showing a license to act as a real estate broker.

Act May 27, 1841, Purd. Dig. 180, 181.
Commonwealth *v.* Holmes, 1 Jones, 468.
Clapp *v.* Hughes, 1 Phila. 382.
Commonwealth *v.* Manley, 2 Id. 173.
Kellogg *v.* Conklin, 6 Id. 177.
Holt *v.* Green 23 Sm. 198.

H. P. Laird (with whom were *H. C.* and *J. A. Marchand*), for defendant in error.

The plaintiff was not bound to show that he had a license. If he were required to have one the law would presume that he had until evidence were given that he had not. But he was not acting as a broker, and there is nothing in the law to prevent his recovering an amount which the defendant had agreed should be his compensation.

Chadwick *v.* Collins, 2 Casey, 138.

Exception is taken to the use of the words "positive" and "clear" in the charge of the Court; now we submit that it is unfair to take these two words apart from their general connection, but even so, his Honor is justified by the rulings of this Court.

R. R. *v.* Shay, 1 Nor. 198.
Martin *v.* Berens, 17 Sm. 460.

January 7, 1878. THE COURT. According to the terms of the contract executed by the parties on the sixth day of May, 1874, the plaintiff below agreed to use his best endeavors to sell for the defendant one hundred and twenty acres of coal, and in case of a sale by him, "or from his efforts to sell," the defendant agreed to pay him all that it should "be sold for over and above $50 per acre." On the fourth of August following the coal was sold, by articles of agreement, to Moses Scott for $55 per acre; and the plaintiff, claiming that the sale had been effected by his agency, demanded $600 as compensation for his services rendered in pursuance of the contract.

The main grounds of defence were that the time within which the plaintiff was authorized to negotiate a sale was limited to three weeks, and had expired before Moses Scott agreed to purchase; that the sale to Moses Scott embraced grants and concessions by the defendant, which the plaintiff was not authorized to make in any sale he might have effected under his agreement with the defendant; and that the plaintiff could not recover without showing that he had a license to act as a real estate broker.

The question of law involved in the last-mentioned ground of defence was reserved, and afterwards rightly decided in favor of the plaintiff below. Under the pleadings, his right to recover did not depend on proving that he had a license; and, aside from this, there was no evidence that the plaintiff was engaged in the business of a real estate broker as an occupation, or that he held himself out to the public as such.

The Court was clearly right in affirming the plaintiff's second point, and thereby instructing the jury that if they found "the plaintiff was the procuring cause of the sale he would be entitled to recover under his contract, unless it had been terminated by lapse of time, or was rescinded before the sale to Moses Scott." The question of fact upon which the case mainly turned was thus fairly presented and submitted to the jury. If the sale to Moses Scott was negotiated by the

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plaintiff, or resulted from his efforts, he was entitled to the compensation fixed by the agreement, unless the jury found from the evidence that the contract had previously expired by limitation, or had been rescinded by the parties. The contract itself is silent as to the time within which the plaintiff was authorized to negotiate a sale; but the implication of law would be that it should be done within a *reasonable* time, and this would be a question for the jury. The defendant, however, contended that when the contract was signed, it was expressed that the time should be limited to three weeks; that afterwards the plaintiff requested an extension of time, which was refused, and it was then mutually understood that the contract was no longer in force. Testimony bearing on this point was offered by both parties, and submitted to the jury with instructions as to the nature of the proof required to establish the limitation contended for by the defendant. This portion of the charge is assigned for error.

After stating to the jury what was claimed by the defendant, as to the limitation agreed upon at the time the contract was executed, etc., the learned Judge instructed them that, if they were satisfied from all the testimony in the cause that the facts were so, the plaintiff could not recover; that the written contract as it stood was with the plaintiff, and, therefore, the *onus* was on the defendant to satisfy them, by "positive and clear testimony," that the time was limited to three weeks; that they should "scan all the testimony in the cause," and say whether the defendant had satisfied them "by clear and positive proof of the fact that it was limited to three weeks and then declared off." After referring to the conflicting testimony of the parties themselves, and the corroborative testimony introduced on both sides, he concluded by saying, "All these circumstances you will take into account in determining whether or not the contract is as written, or whether it is as claimed by the defendant."

The plaintiff in error has no reason to complain of this branch of the charge. The testimony was fairly submitted to the jury with proper instructions as to the character of the proof that was required to sustain his proposition. While the parol testimony introduced by him did not contradict anything expressed in the written contract, its purpose was to restrain its operation as to time, and thus vary its legal effect. In such cases it is not requiring too high a degree of proof to say that the testimony should be clear as well as positive. It should undoubtedly be clear, and there is no reason why it should not be positive also, as contradistinguished from testimony of a negative character. It is in this sense that the instruction would be understood by the jury. None of the testimony was withheld from the jury. They were instructed, as we have seen, to carefully consider it all, and take into account all the circumstances, and if they were satisfied "by clear and positive proof" that the time was limited to three weeks, they should so find. This was quite as favorable as the plaintiff in error had a right to ask. We find no error in any of the assignments.

Judgment affirmed.

Opinion by STERRETT, J.

AGNEW, C. J., and SHARSWOOD, J., absent.

July, '75, 91. Feb. 6, 1878.

Oberle v. Schmidt et al.

Affidavit of defence—Averment that plaintiff is not the real owner of note—Bills and notes—Indorsers.

In an action on a promissory note by the last of three indorsers against the second, the affidavit averred that the defendant was informed and believed and expected to be able to prove that the first indorser (who was also the payee) was the real owner of the note, and that the suit was brought for his benefit:

Held (reversing the judgment of the Court below), that this averment was sufficient to carry the case to a jury, as the first indorser, if the real owner of the note, could have no right of action against a subsequent indorser.

Error to the Common Pleas No. 1, of Philadelphia County.

Assumpsit, by Schmidt & Heil against Charles L. Oberle, on a promissory note for $350, drawn by C. Rhoads to the order of Charles M. Fauth, and indorsed "Charles M. Fauth; Charles L. Oberle; Schmidt & Heil."

A copy having been filed, the affidavit of defence averred that the defendant was informed, and believed, and expected to be able to prove on the trial, that the suit was really brought for the use and benefit of Charles M. Fauth, who, he was informed, and believed, and expected to be able to prove, was the real owner and holder of said note; and not for the benefit of the said nominal plaintiffs, who, he was informed, and believed, were merely nominal holders thereof.

The Court below entered judgment for want of a sufficient affidavit of defence; whereupon the defendant took this writ, assigning for error the entry of judgment.

E. B. Watson (*R. L. Ashhurst* with him), for the plaintiff in error.

Fauth was responsible to the defendant below, and if he were the real owner of the note, could not recover on it.

Murray *v.* M'Kee, 10 Sm. 35.

The affidavit was sufficient in its averment of this fact; for the defendant need not state the manner in which he will prove (Eyre *v.* Yohe, 17

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Sm. 477), but he may either state his grounds of belief, or state his expectation of ability to prove.

Bronson *v.* Silverman, 27 Sm. 94.
Twitchell *v.* McMurtrie, Id. 383; 1 WEEKLY NOTES, 407.
Moeck *v.* Littell, 1 Norris, 354; 3 WEEKLY NOTES, 341.

Woodward and *Jackson*, contra, did not appear, and submitted no paper-book.

March 11, 1878. THE COURT. This was an action by the holder of a promissory note against a prior endorser. *Prima facie* he would be entitled to recover, but the defendant put in an affidavit of defence, averring that he is informed, and believes, and expects to be able to prove, that the suit is brought for the use and benefit of Charles M. Fauth (payee and first indorser), who is the real owner and holder of said note, and not for the benefit of the plaintiffs, who are merely nominal holders. This averment was sufficient to carry the case to a jury. Fauth is responsible as payee and first indorser to every subsequent indorser. Hence, if Schmidt & Heil are allowed to recover against Oberle, the next preceding indorser, he in turn would have his remedy against Fauth. It is plain that the latter can have no right of action against any of the subsequent indorsers; if he is really the owner of the note, as alleged in the affidavit, and if this suit was brought for his benefit, there can be no recovery.

Judgment reversed and a *procedendo* awarded.

Opinion by PAXSON, J.

[*Cf.* Delp *v.* Sowers, *ante*, 167.]

Jan. '77, 243. June 19, 1877.

Guyer et al. v. Spotts.

Recognizance in error—Liability of sureties therein on an appeal from a judgment for defendant in a feigned issue under the Sheriff's Interpleader Act—"Condemnation money"—Meaning of term.

In a feigned issue under the sheriff's Interpleader Act, to try the question of the plaintiff's title to certain goods, the verdict and judgment were "for the defendants." On an appeal therefrom to the Supreme Court the plaintiff, with sureties, entered into a recognizance to pay the "condemnation money" and all costs if plaintiff did not prosecute his writ of error with effect. The judgment was affirmed. In an action on the recognizance against the sureties:

Held (reversing the judgment of the Court below), that as the question in the feigned issue was as to title to the goods only, and not for their value, the words "condemnation money" created no other liability on the sureties than to pay the proper costs.

Error to the Common Pleas of Union County. Debt on a recognizance of bail in error, by William Spotts, who survived David Henning, against Peter Guyer and Samuel S. Barber.

The facts were as follows: On April 8, 1868, David Henning and William Spotts obtained a judgment against Jacob Dundore and John M. Taylor for $3931.33, upon which they issued a *fi. fa.*, and the sheriff levied upon property in the possession of Dundore, to which one William Bogar claimed title. A feigned issue was awarded under the sheriff's Interpleader Act, in which William Bogar was plaintiff and Spotts and Henning defendants, to try the question of Bogar's claim of title to the property. A verdict was rendered "for the defendants" (no amount mentioned), whereupon plaintiff sued out a writ of error to the Supreme Court, and entered into a recognizance in the sum of $500, with Peter Guyer and Samuel S. Barber as sureties, conditioned "that the above-named William Bogar, plaintiff in error, prosecute his writ of error with effect, or in default thereof the obligors will pay the costs and condemnation money with the costs of this writ of error." The Supreme Court affirmed the judgment. The plaintiff then issued execution and the sheriff made return "goods eloigned," whereupon this suit was brought to recover the value of the goods levied on under the *fi. fa.*, the costs of the feigned issue and the costs of the writ of error.

Defendants filed a special plea alleging "that plaintiff had no cause of action, on the ground that Jacob Dundore, defendant in execution, was, on April 29, 1869, declared bankrupt, and had since procured his discharge."

Upon the trial (before JUNKIN, P. J.) defendants presented the following points: (1) That on the recognizance in evidence the defendants in no event can be made liable for more than costs. *Refused.* (2) The words "condemnation money" in the alleged recognizance do not make the defendants liable for the property in dispute. *Refused.*

Verdict and judgment for the plaintiff for $1308.40, being for the value of the goods as assessed by the jury, and for the costs on the feigned issue and the writ of error. Defendants took this writ, assigning for error, *inter alia*, the refusal of the above points.

G. F. Miller (*Wm. Vangezer* with him), for plaintiffs in error.

The only question involved in the feigned issue was one of title. No sum of money was in dispute. The judgment was that the goods belonged to the defendants in execution, the recognizance, therefore, created no liability on these sureties for the value of the goods. Liability for the "condemnation money" is a liability for the results of the judgment of the Court, which in this case are the proper costs.

Linn and *Dill*, for the defendants in error. A

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judgment for the goods is a judgment for the value of the goods if they be not forthcoming. This is the "condemnation" money which plaintiffs are liable for, *i. e.*, what we lost by the intervention of this bail.

Oct. 1, 1877. THE COURT. This suit was on a recognizance entered into by the plaintiffs in error, on the purchase, by one Bogar, of a writ of error to a judgment against him, in favor of the defendants. That judgment was recovered in a feigned issue, framed under the Interpleader Act, to try the right of Bogar to certain goods and chattels, levied on by the defendants, as the property of Dundore. On the trial of the issue Bogar failed to establish his right to the property, and judgment was entered against him for costs. When Bogar took a writ of error to that judgment the plaintiffs in error entered into this recognizance conditioned that he should "prosecute his writ of error with effect or in default thereof will pay the costs and condemnation money, with the costs of this writ of error." The judgment was affirmed.

What then became the liability of the sureties in the recognizance? The legal effect of the judgment over the subject-matter therein, was not changed by the affirmance of the judgment. It was neither enlarged nor diminished. The only question involved in the issue, was whether the right of property in the said goods and chattels was in Bogar at the time of the levy thereupon. He affirmed that right. The defendants denied it. This was the only issue presented. It was the only one tried. Neither party claimed to recover a judgment for the value of the property nor for any sum of money. The one sought to establish a right of ownership to the property, the other to defeat that claim of right. No other verdict in favor of either party could have been rendered in the issue but a general one determining the right of property. The verdict having been against Bogar, the effect of the judgment thereon was to permit the goods and chattels levied on, to be sold as the property of Dundore, and to give the defendants the right to execution against Bogar for costs. This was the only judgment against Bogar. The rulings in that case are all that were reviewed on his writ of error. The only condemnation to which the affirmance of the judgment subjected him was the payment of costs.

In order to stay execution by reason of the pendency of a writ of error the Act of 13th of June, 1836 (Purd. Dig. 605, pl. 16), *inter alia*, declares the recognizance given shall be with condition if the judgment be affirmed, or the writ be discontinued or non-prossed, to pay the debt, damages, and costs, as the case may be, adjudged or accruing upon such judgment, and all other damages and costs that may be awarded upon such writ of error. The Act of 10th April, 1849 (Id. 603, pl. 5), permits a writ of error to be taken in issues under the interpleader Act "with the usual force and effect." It is contended that under these Acts, the effect of the affirmance of the judgment was to make the sureties in the recognizance, liable for such portion of the goods and chattels levied on, as could not be found when the defendants again moved to collect their executions, that this was a portion of their damages, for which the sureties are liable.

In this view we cannot concur. The design of the Act of 1836 is to obligate the sureties for a writ of error, to pay and discharge the judgment only in which the writ is taken, in case of a failure to reverse.

The judgment may be for debt and costs, or for damages and costs, or for costs alone. The recognizance should be framed to suit it "as the case may be." If the judgment be for costs only, the payment thereof limits the liability of the sureties. In the issue in question the affirmation of the judgment was general. No special damages and costs were awarded. The costs on the writ of error superadded to the costs in the Court below constituted the whole condemnation money adjudged to be paid.

The sheriff was not justified in withdrawing from the possession of the goods and chattels levied on, unless a bond with sufficient security for their forthcoming, when legally required, had been given to the defendants, and as the giving of this bond should precede the formin: of the issue, we will presume it to have been done.

If so executed and delivered, the remedy of the defendants is upon that bond if the goods were not forthcoming. If they waived the givin of the bond, they cannot impose the loss they may have thereby sustained, on the sureties for a writ of error to the judgment entered in the issue. It therefore follows that the learned Judge erred in not affirming the first and second points submitted by the defendants below; and the third and fourth assignments are sustained.

This view of the case substantially disposes of the other assignments, Dundore's discharge in bankruptcy could not discharge the plaintiffs in error from their liability as sureties for Bogar. There was no contract between them and Dundore to be affected.

Judgment reversed, and a *venire facias de novo* awarded.

Opinion by MERCUR, J.

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Oct. & Nov. '77, 69. Nov. 17, 1877.

Pittsburgh and Connellsville Railroad Company v. McShane.

Common carriers—Railroad Company—Transportation of cattle—Contract—Interpretation of—Liability of Railroad Company for damage caused by accidents and delay—How far it may be modified by special contract.

Error to the Court of Common Pleas of Fayette County.

Assumpsit, by McShane against the Pittsburgh and Connellsville Railroad Company to recover damages for injuries done to plaintiff's cattle while being transported over defendants' road. The following facts appeared:—

The cattle were shipped at Uniontown, Pa., on Wednesday afternoon, December 23, 1874, to be carried to Philadelphia. While *en route* an accident occurred to the train, and one of the cars containing McShane's cattle was broken down, the cattle thrown out, and a steer so badly injured that it was taken possession of by the Company and killed. The remainder were taken out of the car, reloaded, and sent on, reaching Baltimore *en route* on Friday morning, December 25. At that place they were taken out and fed, rested six hours, and again sent on, arriving in Philadelphia on Saturday morning, December 26. Plaintiff brought this suit, claiming damages (1) for the value of the steer; (2) for injuries done to the market value of the cattle by the accident itself; and (3) for injury done to the market value of the cattle by the delay in transporting them to Philadelphia.

At the trial (before WILSON, P. J.) evidence was given on the part of the plaintiff showing that the cattle brought considerably less per head in Philadelphia, owing to their loss in weight from being so long confined in the cars, and also from the bruises and other injuries occasioned by the accident. Defendant admitted its liability for the steer taken and killed, and gave in evidence a contract between it and plaintiff entered into at Uniontown, December 23, 1874, and which, it claimed, relieved it from liability for all other damage or loss occurring to the cattle, as there was no evidence of gross or wilful negligence on the part of the Company. Some evidence was also given by the defendant tending to show that the cars were overloaded by the plaintiff, thus contributing to the breakdown and delay. The contract referred to recited, *inter alia*:—

"That, whereas, said Railroad Company transport live stock only at first-class rates, as per their tariff, excepting only in the cases where the owner assumes certain risks and incidents, specified below, in considerations of obtaining the transportation at reduced rates; and whereas, the said party of the second part in the present case assumes and takes upon himself said risks and incidents for said considerations; now, therefore, in consideration that said Railroad Company will transport for the said party such live stock at the reduced rate of fifty dollars for single decks from Uniontown to Philadelphia, and charges advanced, the said party of the second part does hereby agree to take, and hereby does assume, all and every the risk of injuries which the animals, or either of them, may receive in consequence of any of them being wild, vicious, unruly, weak, escaping, maiming or killing themselves or each other, or from delays; or in consequence of heat, suffocation, or the ill effects of being crowded upon the cars of the said Railroad Company, or on account of being injured by the burning of hay, straw, or any other material used by the owner for feeding the stock or otherwise, and for any damage occasioned thereby, and also all risk of any loss or damage which may be sustained by reason of any delay, or from any other cause or thing in or incident to or from, or in the loading or unloading said stock."

Defendants' counsel requested the Court to instruct the jury that this agreement released the Company from any liability except for wilful negligence, of which there is no evidence in the case. The Court refused so to charge, and instructed the jury, *inter alia*: "It is true that a railroad company may limit its responsibility to the shipper; that has been held by the courts. But we instruct you that that contract only applies so far as to relieve them from those responsibilities as common carriers that they would not be relieved from under the law without any such contract as that which has been read to you."

Verdict and judgment for the plaintiff, for $275. Defendant took this writ, assigning for error, *inter alia*, the refusal of the point and the portion of the charge given above.

D. Kaine, for plaintiff in error.

The contract relieved the Company from liability for everything except wilful negligence, and the burden of proof of such negligence was upon the plaintiff.

Colton *v.* Cleveland & Pittsburgh R. R. Co., 17 Sm. 211.
Farnham *v.* Camden & Amboy R. R. Co., 5 Sm. 53.
Goldey *v.* Penna. R. R. Co., 6 Casey, 242.
Bankard *v.* Baltimore & Ohio R. R. Co., 34 Md. 197.
Sager *v.* Portsmouth R. R. Co., 31 Maine 228.
Michigan Southern R. R. Co. *v.* McDonough, 21 Mich. 189.
Heineman *v.* Grand Trunk R. R., 31 Howard's Pr. (N. Y.) 430.
Wharton on Negligence, 617.
Adams Express Co. *v.* Sharpless & Sons, 27 Sm. 516.
Penn *v.* Buffalo & Erie R. R. Co., 49 N. Y. 204.

Boyle (with whom was *Mestrezat*), contra.

The question of negligence on the part of the railroad was one wholly for the jury, and the Court left it there. The ruling of the Court below as to the effect of the contract is sustained by many authorities.

Empire Transportation Co. *v.* Mining Co., 13 Sm. 14.
Wharton on Negligence, § 589.
Powell *v.* P. R. R. Co., 8 Casey, 414.
Goldey *v.* P. R. R. Co., 6 Casey, 242.
Camd. & A. R. R. Co. *v.* Buldauf, 4 Harris, 68.

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Jan. 7, 1878. THE COURT. The true questions in this case depend upon the interpretation of the stock or cattle contract between the parties.

The assignments of error are based, in our opinion, upon an erroneous view of the terms of this contract. Its purpose was not to exempt the Railroad Company from liability for actual negligence on its own part, but to secure it from liabilities which might attach in the absence of express terms, growing out of the peculiar character of the freight carried. The true intent was that a measure of diligence might not be required of it incompatible with its general business, but which the nature of the stock carried would require, if not expressly provided for. Hence the owner of the stock was to be at the risk of injuries which the animals might do each other, or in consequence of heat or suffocation from over-crowding, or by the burning of the hay or other fodder, and delays in loading and unloading. The owner was to load and unload the stock at his own risk. It is true the contract says the owner is to assume the risks of *delays*, but it is evident, from its connection with the other parts of the contract, these delays mean the ordinary delays of the business, and not delays arising from the negligence of the company. Cattle require a very speedy transportation to market, and every day's confinement in the cars takes from their weight and good condition. Hence without a provision for ordinary delays at way stations, a duty to carry in the shortest time might be inferred from the character of the stock, and therefore a provision for the delays of ordinary business was deemed a prudent safeguard. The plaintiff having made out a *prima facie* case of actual negligence on the part of the company, the contract alone, without evidence to show that the delays fall within its terms, was no defence. There was no sufficient evidence to sustain the defence that the plaintiff had overloaded the cars, and that this was the cause of the injury complained of.

Upon the whole the charge appears to have met the true view of the contract, and the case was properly submitted to the jury.

PER CURIAM. Judgment affirmed.

Common Pleas—Equity.

C. P. of Luzerne Co. March, 1878.

Allen et al., Stockholders of the People's Savings Bank of Pittston, v. County Commissioners and Receiver of Taxes of Luzerne County.

Corporations—Banks and savings institutions—Taxation on capital stock—Whether shares taxable on assessed value of their nominal amount, or on par value of stock actually paid in—"Par value" defined—Act of March 31, 1870, §§ 3, 4—Other Acts relating to taxation of bank stock—Election by directors to collect and pay over tax on shares—Injunction to restrain subsequent assessment thereon.

Motion for special injunction and hearing sur demurrer to bill.

Bill in equity, filed by the complainants on behalf of themselves and other stockholders of The People's Savings Bank of Pittston against Dean *et al.*, Commissioners of Luzerne County, and Winters, Receiver of Taxes, for an injunction to restrain the defendants from levying and collecting certain taxes on the capital of the said bank.

The bill set forth that the People's Savings Bank was incorporated by Act of May 25, 1871 (P. L. 1159) with a capital stock of $100,000, with power to increase the same to a maximum amount of $300,000, of which capital 20 per cent. was required to be paid in; that the capital was increased to the said maximum amount and twenty per cent. thereof paid, the shares being of the nominal par value of $100 each, and the certificates stating on their face the fact that $25 per share had been paid; that the directors, with the view of exempting the stockholders from all other taxation of their shares for the year 1877, and in pursuance of an Act of Assembly of March 31, 1870, § 4 (Purd. Dig. 143, pl. 97), paid to the Treasurer of the Commonwealth, in January, 1877, a tax of one per cent. upon the actual par value of all the shares of the bank, so far as the same had been paid in, to wit, the sum of $750; that subsequently in July, 1877, the Bank Assessor of Luzerne County, in pursuance of the said Act of March 31, 1870, § 3 (Purd. Dig. 143, pl. 96), assessed the said shares of the bank, fixing the actual value of each share at $25, or of the whole capital stock paid in at $75,000, and that upon this basis the County Commissioners had levied a tax on said stock for the year 1877, of three mills for State purposes, and also a tax of seven mills for county purposes, amounting to the

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sum of $750, which tax the defendant Winters, as receiver of taxes, is about to collect by process of law.

The bill prayed an injunction to restrain the defendants from levying and collecting the said tax.

The defendants demurred to the bill, for want of equity.

C. S. Stark, for complainant, cited the following Acts of Assembly:—

Act of April 12, 1867, § 5, P. L. 74.
Act of May 1, 1868, § 10, P. L. 112.
Act of Dec. 22, 1869, § 3, P. L. 1870, 1374 (repealed).
Act of March 31, 1870, § 4, P. L. 42.

There is no distinction in law between the terms "capital stock" and "paid in capital stock."

Citizens' Pass. R. Co. *v.* Philadelphia, 13 Wr. 251.
Second and Third St. Pass. R. Co. *v.* Philadelphia, 1 Sm. 465.
Philadelphia *v.* Gray's Ferry Pass. R. Co., 2 Id. 177.
Connersville *v.* The State Bank, 16 Ind. 105.
Farmers' Loan and Trust Co. *v.* Mayor & New York City, 7 Hill, 261.

The expressions "par value of capital stock," and "par value of all the shares" are synonymous:—

Gorgas's Appeal, 29 Sm. 149 (opinion of Court, p. 152).
Carlisle School District *v.* Hepburn, 29 Sm. 159.

Payment of one per cent. upon the par value of the capital stock for 1877, exempted shareholders from all other taxation for that year.

Carlisle School District *v.* Hepburn, 29 Sm. 159.

A court of equity may enjoin against the collection of taxes levied without authority of law.

St. Clair School Board's Appeal, 24 S. 256.
Dunne *v.* Deegan, 7 Wr. 334.
Miller *v.* Gorman, 2 Wr. 313.

George B. Kulp, for defendants, relied on—

Gorgas's Appeal, 29 Sm. 149.
Carlisle School Dist. *v.* Hepburn, Id. 159.

March 11, 1878. THE COURT (after stating the facts). The defendants' demurrer to the bill raises the question, Did the election on the part of the bank to pay, and the payment to the State Treasurer on the 20th of January, 1877, of a tax of one per centum upon the amount actually paid in upon all the shares of the bank, defeat the right of the defendants to levy and collect a State and county tax upon the *assessed* value of these same shares for the year 1877?

The section of the Act of Assembly under which the defendants claim the right to levy and collect these taxes is in these words: "All the shares of national banks located within this State, and of banks and savings institutions incorporated by this State, shall be taxable for State purposes at the rate of three mills per annum upon the assessed value thereof, and for county, school, municipal, and local purposes, at the same rate as now is or may hereafter be assessed and imposed upon other moneyed capital in the hands of individual citizens of this State."

The section under which the bank made the payment of January 20, 1877, and which, as is claimed, gave the shareholders immunity against any further taxation of their shares for that year, is as follows: "In case any bank or savings institution aforesaid shall elect to collect annually, from the shareholders thereof, a tax of one per centum upon the *par value* of all the shares of said bank or savings institution, and pay the same into the State treasury on or before the twentieth day of January in every year, the said shares, capital, and profits shall be exempt from all other taxation under the laws of this Commonwealth."

The disposition of the main question, before stated, depends much upon the legislative intent in the use of the words *par value*, as applied to the capital stock of banks, or all the shares of banks, in the Acts of Assembly of April 12, 1867 (P. L. p. 74), May 1, 1868 (P. L. p. 112), December 22, 1869 (P. L. of 1870, p. 1373), and March 31, 1870 (P. L. p. 42).

Both the common law meaning and the generally accepted meaning of par is a state of equality or equal value. Bills of exchange, stocks, and the like, are at par when they sell for their nominal value, that is, the value expressed on their face. When they sell for more they are said to be above par; when they sell for less they are said to be below par. And so it is with coins. The silver dollar and the gold dollar of the United States each bears a face representation of equality or equal value with one hundred cents. The former, for example, sells for ninety-nine cents, and is said to be below par; the latter sells for one hundred and one cents, and is said to be above par. To go back to the old State banks: Every one dollar note issued by them bore upon its face a representation that it was equal in value to one hundred cents or one dollar; but for causes generally understood many of them came to be worth much less. Their actual value, however, was well known or capable of ready ascertainment. Whenever, therefore, they were used in business transactions, they were paid out on the one hand and received on the other, not at their par value, but at their actual value. The same is true to-day also of certificates of shares of bank stock or other corporations. Whenever a certificate of a share is issued which purports on its face to be the equivalent of one hundred dollars, the idea is conveyed and is thus universally understood, that there has been paid in as part of the capital of the corporation an actual one hundred dollars, which such certificate represents. Its par value, therefore, is one hundred dollars.

But the case is widely different where a bank or other corporation has authority to raise and

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form a capital of a fixed *maximum* amount, accompanied with a right to commence business whenever a fixed *minimum* amount of that capital had been paid in. Under such circumstances the certificates of shares are issued bearing upon their face, perhaps, some indication of the maximum or permissive capital of the corporation, but always a statement of the actual amount paid in. They profess to be worth no more; they are received for no more; they are sold for no more; their *par value* is no more. Throughout the business world par means equality, or equal value with a given standard; it means dollar for dollar, no less, but no more. (State of Illinois *v.* Delafield, 8 Paige Ch. 526; Delafield *v.* The State, etc., 2 Hill, 159.)

We come now to inquire whether there is any difference between the words "capital stock" of a bank and "all the shares" of a bank, as they are used in the statutes before referred to. Capital stock of a bank means the sum of money divided into shares which is raised by mutual subscription of the members of the corporation, and used for the purpose of banking. (Angell & A. Corp. §§ 151,556; State *v.* Morristown Fire Association, 3 Zabr. 195.) Shares of a bank are the sums resulting from a division of the capital stock by a given divisor into equal amounts. Clearly, therefore, the terms "capital stock" of a bank and "all the shares" of a bank cannot have different meanings; they are necessarily synonymous, and undoubtedly were so regarded by the Legislature.

In other connections it is true enough that the meaning of capital or capital stock of banks or of other corporations is of much broader signification. It is said to be the fund upon which an incorporated company transacts its business, and which would be liable, in case of insolvency, to its creditors, and would pass to a receiver. (International Life Assurance Soc. *v.* Comm'rs of Taxes, 28 Barb. 318; Mutual Ins. Co. *v.* Supervisors, 4 N. Y. 442.) Subscribers to the stock of a bank who had paid in but one-fourth of the authorized capital, would, in case of the insolvency of the institution, be liable to its creditors, unless otherwise provided in its charter, not for the equivalent of their actual payments only, but for the whole nominal value of the shares subscribed. And so, too, in cases where the Legislature in providing for the taxation of the capital stock of banks, has used the specific words, "capital paid in and secured to be paid in," shareholders could not successfully claim immunity from taxation beyond the amount actually paid on their shares, but they would be liable for taxes assessed upon the whole nominal value of the shares subscribed. Under such circumstances, capital stock, "secured to be paid in," means all that has been subscribed, no matter whether paid up in part or in whole. (Bank of Utica *v.* The City of Utica, 4 Paige, 399; Farmers' Loan and Trust Co. *v.* The Mayor, etc., 7 Hill, 261.) And the same would be true, likewise, even though the capital actually paid in originally had been diminished or impaired by subsequent losses. (State Bank of Wisconsin *v.* The City of Milwaukee, 18 Wis. 281.) . . . . . We have already seen what the general, universal meaning of the words par or par value is, as applied to certificates of stock bearing upon their face the actual sum which they represent; we have also seen what the meaning of the words capital or capital stock is; we have further seen what the meaning of the words, "all the shares of a bank," is: Now, is it fair or reasonable to assume that the Legislature used these words or terms, in *any* of the several Acts referred to, in a totally different and greatly enlarged sense? Is it fair or reasonable to assume that the Legislature intended to select specifically those banks and savings institutions incorporated by this State, having authority to do business whenever a fixed minimum sum of their authorized or maximum capital had been paid in, and impose upon them a tax for a common purpose, fivefold greater than that exacted of like banks and savings institutions doing business upon an authorized or maximum capital fully paid up? Is it fair or reasonable to assume that the Legislature intended to inaugurate in this Commonwealth, upon a small and exceptional scale, a system of taxation unprecedented either in ancient or modern times, and alike unequal and unjust? And yet, this is the very monstrosity which the levy and collection of the taxes complained of in the plaintiffs' bill accomplishes. It will not do to say that the option accorded to national banks by the fifth section of the Act of April 12, 1867, and extended to State banks and savings institutions by the first section of the act of December 22, 1869, was purposely modified in its application to those particular State banks or savings institutions having a right to do business upon a *paid in* capital less than their authorized or *maximum* amounts, by the fourth section of the Act of March 31, 1870, as an equivalent for the special privileges granted to the latter, and as a fair compensation for the exemption of their shares from local taxation. The language of the fourth section of the Act of March 31, 1870, will bear no such construction. Besides, if the Legislature had intended any such thing, language fitly adapted to the expression of that purpose would have been used.

In cases where corporations other than State banks and savings institutions, possessing privileges of the same character as those of the People's Savings Bank of Pittston, but subject to taxation on their dividends in excess of six per centum upon their capital stock for a specific purpose, have made large earnings on the amount of cap-

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ital actually paid in, which they have attempted to distribute in dividends upon their whole *authorized* capital, so that nothing would be left to tax for the particular purpose specified in their charters, the courts have been invoked, and have decided that the dividends in excess of six per centum upon the capital stock meant, under such circumstances, dividends in excess of six per centum upon the capital stock paid in. (Citizens' Pass. Railway Co. *v.* The City of Phila., 13 Wr. 251; City of Phila. *v.* Gray's Ferry Pass. Railway Co., 2 P. F. S. 177; The Second and Third Street Pass. Railway Co. *v.* The City of Philadelphia, 1 P. F. S. 465.) To the average mind there is no difference in the principle of these cases and that in the one before us. In the latter the boot is simply on the other foot.

Decree for an injunction as prayed for.

Opinion by HARDING, P. J.

C. P. No. 3. March 12, 1878.

Endsor v. Simpson et al.

Part owners of a ship—Settlement of accounts—Equitable jurisdiction—Act of Oct. 13, 1840.

Sur demurrer to bill.

The bill set forth that the complainant was master and part-owner of a schooner; that, under a verbal agreement with the respondents, his co-owners, he was to navigate and command her on "half shares;" that on November 11, 1876, the complainant and respondents adjusted a full settlement of their accounts up to that date, and a large sum of money was then due to plaintiff; that, subsequently, the respondents became indebted to complainant for money paid out for salvage, repairs, and general and particular average; and that the complainant then made a statement and account to them of all moneys received and expended by him on account of said schooner, which respondents refused to accept, and upon demand they refused to pay complainant the amount due him.

The bill prayed an account, and general relief.

The respondents demurred for want of equity, and assigned for cause that complainant had a full and complete remedy at law.

C. M. Husbands (with him *H. Flanders*), for demurrer.

Part-owners of a vessel hold not as partners, but as tenants in common, and as such their remedy is at law and not in equity.

H. R. Edmunds, contra.

The ordinary remedy for part-owners of vessels to obtain an adjustment of the ship's accounts among themselves, is a suit in a court of equity.

Flanders on Shipping, p. 391.

A part-owner cannot maintain an action at law against another part-owner for money paid on joint account, where no settlement has been made or balance struck. The remedy is in equity.

Irvine *v.* Hanlin, 10 S. & R. 219.
Griffith *v.* Willing, 3 Bin. 317.
Ozeas *v.* Johnson, 1 Bin. 191.
Andrews *v.* Allen, 9 S. & R. 241.
Knerr *v.* Hoffman, 15 Sm. 126.
Shriver *v.* Nimick, 5 Wr. 80.
Maguire *v.* Pingree, 30 Maine, 508.
Dodge *v.* Hooper, 35 Maine, 536.
Persch *v.* Quiggle, 7 Sm. 247.

Part-owners are tenants in common of a ship, but jointly interested in her use or employment; and the law as to the earnings of a ship, whether as freight, cargo, or otherwise, follows the general law of partnership.

Greene *v.* Briggs, 6 Hare, 395.
Act of 13 October, 1840, sec. 19 (Purd. Dig., p. 591, pl. 4).

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March 16, 1878. THE COURT. Part-owners of a vessel are tenants in common. They are jointly interested in her use or employment; and the earnings of a ship, whether as freight, cargo, or otherwise, follow the general law of partnership. (Greene *v.* Briggs, 6 Hare, 395.)

Starting with this principle, if an account had been actually settled, and a balance struck, there might be something in the demurrer. Article 4 of the bill does allege that a settlement had at one time been made, but the claim of the plaintiff arises after this settlement. How, except by an action of account render, the plaintiff can sustain his case at law it is impossible to understand.

If the transaction is to be considered a partnership transaction merely, then the demurrer must fail; and if an action of account render can be sustained, then the Act of 13 of October, 1840, sec. 19 (Purdon, p. 591), gives us complete jurisdiction.

Demurrer overruled, with leave, etc.

Opinion by LUDLOW, P. J.

Common Pleas—Law.

C. P. No. 2. Feb. 16, 1878.

Keating et ux. v. Union Passenger Railway Co

New trial—Order discharging rule, upon terms—Judgment prematurely entered, by order of attorney, not warranted by the record, is invalid—Writ of error pending motion for new trial—Effect of—Damages allowed by Supreme Court—Not an affirmance of the judgment originally irregularly entered.

Rule on plaintiffs to elect whether they will

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remit all of the verdict above $1000, or rule for new trial absolute.

There was a verdict for plaintiffs for $2000. A rule for a new trial was entered, and on June 21, 1877, the Court made an entry of "Rule discharged on entry of a remittitur for all over $1000, otherwise rule absolute." Before plaintiffs elected between the remittitur and a new trial, the defendant paid the jury fee, and had judgment entered. On the same day defendant took a writ of error, but assigned no error nor took a bill of exceptions, and discontinued the writ before the return day. Subsequently a rule on plaintiffs in error to show cause why damages, at the rate of six per cent. in addition to the legal rate, on $2000, and an attorney fee of $20, should not be awarded to defendant in error, was made absolute by the Supreme Court. Defendants then took this rule.

P. Archer, Jr. (with whom was *J. A. Bonham*, for the company), for the rule.

Entering a remittitur for all above $1000 was a condition precedent to any judgment being taken for plaintiffs.

Ward *v.* Patterson, 10 Wr. 374.

Until this condition was fulfilled, the motion for a new trial was pending, and, as it never was fulfilled, the subsequent proceedings were a nullity. Even after a judgment affirmed in the Supreme Court, the Court below has power over a motion for a new trial which was open on the record at the time of taking the writ of error.

Harper *v.* Keely, 5 H. 234.

The writ of error could not prevent plaintiffs filing the remittitur.

Wm. Henry Sutton, contra.

We had the election between a remittitur for all over $1000 or a new trial; defendants tied our hands by paying the jury fee, causing judgment to be entered, and taking a writ of error, thus also waiving the rule for a new trial. This is an ingenious method of attempting to open a judgment, which cannot be done after the term.

King *v.* Brooks, 22 Sm. 363.

Neither of the cases cited on the other side apply, for defendants here, by paying the jury fee and entering judgment, and taking a writ of error, waived the condition precedent. The Supreme Court, having made absolute a rule for extra damages of twelve per cent. on the *verdict for $2000*, have affirmed the judgment for that amount. It is too late now for defendants to be relieved from the position into which they voluntarily put themselves, and where they are by reason of their attempt at delay.

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Feb. 23, 1878. THE COURT. There never was any valid judgment in this case, for the rule for a new trial was pending when the entry of judgment was made. Under these circumstances the plaintiff could not have entered judgment without making his election to remit the excess in the verdict. But if plaintiff could not, so neither could the defendants. The entry of judgment, though upon the instance of a party, is legally the act of the Court, and the law does not recognize the hand of either party in it. The form of entering judgment was gone through in this case, but there was an order of the Court pending which prevented the judgment ever having any vitality. We do not regard the Supreme Court, in their order for special damages under the Act of 1874, as deciding that there was a valid judgment for $2000. They merely imposed a proper penalty for the delay to plaintiff's cause by a writ of error taken out and then abandoned.

As this Court, on full hearing and consideration of the case, was of opinion that the verdict was excessive, the order we then made must be sustained.

Rule absolute on plaintiff to elect, on or before March 6, 1878, to remit $1000 of the verdict *nunc pro tunc*, as of the day it was rendered, or rule absolute for new trial as of June 21, 1877.

Opinion by MITCHELL, J.

[A remittitur of $1000 was subsequently filed.]

C. P. No. 3. March 14, 1878.

Moyer v. The Delaware and Chesapeake Canal Co.

Practice—Pleading—Local action—Jurisdiction—Suit against a foreign canal company for not keeping its banks in repair must be brought in the State in which the canal is—Plea in abatement.

Sur demurrer to plea in abatement.

Trespass on the case, by the owner of a barge against the Delaware and Chesapeake Canal Co., a corporation owning a canal which runs from Chesapeake City, Maryland, to Delaware City, Delaware.

The declaration set out a contract whereby the defendant, late of the county of Philadelphia, agreed to tow the plaintiff's barge through the canal from Chesapeake City, Maryland, to Delaware City, Delaware, "to wit, at the county aforesaid," for a certain hire, and averred that by virtue of the said contract it became the duty of the defendant to keep the canal in good and navigable condition, its banks strong and firm, and to provide proper floodgates, etc., so that the plaintiff's barge might be securely towed through. The declaration further alleged that the defendant, wrongfully intending to injure the plaintiff, did not keep the canal in a safe and navigable condition, and did not preserve its banks strong and firm, nor provide sufficient floodgates, etc.,

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but permitted the canal to be unsafe for navigation, and the banks to become weak and defective, whereby they gave way and were destroyed, the water of the canal flowed out and escaped, and the barge of the plaintiff, which was lying properly made fast near the place of the breaking, was torn from its moorings, driven through the break, and greatly damaged, entailing thereby upon the plaintiff great expense in repairs, and depriving him of the use of his barge for a long time.

The defendant pleaded in abatement (1) that it was a corporation created by the States of Delaware and Maryland; that its duties in respect to the construction and maintenance of said canal arise under the charter granted to it by the said States, and not under any charter or law of Pennsylvania; (2) that the cause of action arose within the limits of Maryland and Delaware, and (3) that the Court has no jurisdiction.

Plaintiff demurred to this plea on the ground that the action is transitory and not local.

Charles H. Howell (with whom was *J. Warren Coulston*), for demurrer.

When an action is founded on privity of contract it is transitory, whether the subject matter of the contract is real or not.

Chitty on Pleading, vol. i. p. 268–70.
Henwood *v.* Cheeseman, 3 S. & R. 500.
Thursby *v.* Plant, 1 Saunds. Rep. 230 *b*.

In Oliphant *v.* Smith (3 P. & W. 180), Prevost *v.* Gorrel (2 WEEKLY NOTES, 440), and Furbush *v.* Phillips, (Id. 442), the action was for a nuisance, but this is an action for negligence, and arises out of a breach of contract and is transitory.

McMurtrie, contra.

The declaration does not proceed upon the contract to tow, which is simply matter of inducement. This is in effect an action for a nuisance. The averment in the narr. is a breach of the duty to keep in repair, and there is no averment whatever of breach of contract. It is a breach of the obligation resting upon the canal owners as owners. and not of the contract to tow.

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THE COURT. There is no breach of the contract to tow alleged in the declaration. That contract is pleaded merely as matter of inducement. This is a tort, and the case falls within that well-defined class of cases which hold that these actions are local and not transitory. Moreover, this case is a very important one, and can best be determined by the courts in whose jurisdiction the defendant is.

Demurrer overruled.

Oral opinion by LUDLOW, P. J.

C. P. No. 3. March 14, 1878.

Brandt v. City of Philadelphia.

Case—Duty of the city to keep bridges in repair—Damages—Loss of business and profits.

Sur demurrer to declaration.

Trespass on the case, for damages. The narr. set forth that the plaintiff was a duly licensed hotel-keeper, his place of business being in the 27th ward of the city, at the terminus of the Penrose Ferry Bridge, on the Schuylkill River; that he had a large custom from persons daily frequenting his tavern by way of the bridge, which was now owned by the city, and kept as a free public highway, the road therefrom on the east side leading into the built-up parts of the city, and on the west side into the rural districts; that it was the duty of the defendant to maintain the bridge at all times in good repair and suitable for public travel; and averred that the defendant, not regarding its said obligation, had negligently allowed the bridge to remain for two years in such a weakened and dilapidated condition that on or about the 1st of July, 1876, it broke and gave way, and has since remained wholly unfit for public travel; and that all access to the plaintiff's premises therefrom was entirely cut off, by means whereof he was greatly injured in his business, and lost great gains which he otherwise would have made in his daily sales to those of his customers who usually frequented his hotel by way of the bridge, and who since its destruction have been compelled to take a more circuitous route to his tavern, whereby their visits were diminished, his business ruined, and his premises rendered of no value to him.

Demurrer.

J. Howard Gendell and *T. Cuyler Patterson*, for the demurrer.

The declaration does not allege any cause for which the plaintiff is entitled to bring an action; the damage alleged is consequential, too remote and speculative; and the declaration fails to disclose that the road west of Penrose Ferry Bridge is a public highway with which the defendant is required to maintain any communication by bridge or otherwise.

Aaron Thompson, contra.

The defendant was authorized by Act of Assembly to construct the bridge, and to keep and maintain it as a public highway. The defendant is therefore obliged to keep it in repair.

Scott *v.* Hunter, 10 Wright, 194.

The damage alleged is not too remote; neither is it consequential nor speculative.

Rose *et al. v.* Miles, 4 M. & S. 101.
Iveson *v.* Moore, 1 Ld. Raym. 486.
Wilkes *v.* Hungerford Market Co., 2 Scott, 446.

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THE COURT. This is an action for damages. The plaintiff alleges that by reason of the failure

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of the defendant to keep in repair the Penrose Ferry Bridge, access to plaintiff's premises was cut off, and his business, that of a hotel keeper, was diminished and destroyed by the interruption of travel. The defendant demurs on the ground of want of liability, and of the damage, if any, being too remote and consequential.

The duty of the defendant to repair the bridge is evident. The damage which ensued to plaintiff from defendant's neglect to repair may be too remote and consequential to sustain an action, but at this stage, we cannot say that plaintiff may not have sustained damages.

Demurrer overruled.

Opinion by LUDLOW, P. J.

C. P. No. 3. March 30, 1878.

Woodside et al. v. Stevenson.

Practice—Affidavit of defence law—Upon the disappearance of an affidavit filed, the Court will give judgment.

Rule for judgment for want of an affidavit of defence.

There was an entry on the docket of the filing of an affidavit March 23, 1878, but no affidavit or receipt for one could be found among the papers.

F. W. Shain, for the rule.

THE COURT entered the following order: And now, March 30, 1878, the record of the Court having been produced and no affidavit of defence in fact being among the papers in the above case, judgment is entered for plaintiffs and against defendant in the above case, for want of said affidavit of defence.

C. P. No. 3. March 20, 1878.

McGettigan v. Penna. R. R. Co.

New trial—Injuries to person—Negligence—Contributory negligence—Fright of plaintiff as affecting the question of contributory negligence.

Sur rule for new trial.

Action on the case for injuries caused by alleged negligence of defendant's servants.

On the trial it was proved that plaintiff was leading a horse and cart along Trenton avenue, in the city of Philadelphia. The tracks of the Pennsylvania Railroad Company, defendant, lay in the middle of the street, at a distance of sixteen feet from each curb. While walking on the near side of the horse, which was between him and the track, plaintiff noticed the light of an approaching train at some distance ahead, and thinking the cart too near the track, though it was in a position of perfect safety, attempted to turn the horse towards the siding. In doing so the hindmost part of the cart was struck by the engine, the cart demolished, and he himself sustained severe injuries. Evidence was adduced to prove that the train was travelling at a great rate of speed, a fact which alarmed plaintiff, and did not allow him sufficient time to move to what he considered a place of safety.

YERKES, J. charged, *inter alia*, that the evidence in this case was not sufficiently strong for him to instruct the jury, that they might infer, from the mere fact that a train was approaching at a great rate of speed, that the plaintiff was frightened and lost control of himself, and in consequence his acts were not necessarily contributory negligence. There was no evidence that plaintiff was frightened, or that his horse was unmanageable.

Verdict for defendant.

George Biddle, for rule.

The question of contributory negligence should not have been left to the jury.

Johnson *v.* The West Chester and Philada. R. R., 20 Sm. 361.

If the excessive rate of speed influenced the mind and act of John McGettigan at the time, and solely under such influence and by reason thereof, he turned his horse's head so as to place the end of the cart in the way of the moving train, he was not necessarily guilty of contributory negligence.

If McGettigan was frightened solely by reason of the too rapid approach of the train, and until the time of fright was guilty of no contributory negligence, then what he may have done under the influence of fright caused by reason of defendant's negligence is no bar to his recovery.

Chapman Biddle, contra.

Rule discharged.

C. P. No. 3. March 20, 1878.

Simes v. Blair.

Province of Court and jury—When the Court should not direct a verdict, though testimony uncontradicted—New trial—Promissory note put in circulation by fraud—The holder having proved bona fides and consideration, the case should be submitted to the jury.

Rule for a new trial.

Assumpsit on two promissory notes, by the holder against the maker.

At the trial (before YERKES, J.) the plaintiff put the notes in evidence and proved affirmatively that he paid full consideration therefor before maturity without notice of any equities. The defendant offered to prove that the notes had been

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obtained from him and put in circulation by fraud. Objected to, and offer overruled, unless coupled with an offer to prove that the plaintiff gave no consideration, or that he had notice of the alleged fraud. The defendant subsequently called as a witness one Stevenson, who testified, among other things, that he sold the notes in suit to the plaintiff, for full value, and gave him no notice of any defence.

The defendant requested the Court to charge that the defendant having shown or offered to show fraud in the obtaining of the notes, and that they were put in circulation in fraud of the defendant's rights, it was incumbent on the plaintiff to satisfy the jury that he is a bona fide holder for value before maturity of the notes; and, further, that the questions of consideration, and of the bona fides of the transaction, were for the jury.

The Judge refused so to charge, and instructed the jury that "there being no evidence to sustain fraud—that having been ruled out—the verdict should be for the plainiiff." Verdict for plaintiff accordingly for $978.02.

Platt and *Dickson* showed cause.

The fact that the plaintiff was a bona fide holder for a valuable consideration before maturity, was clearly proved not only in the first instance, as part of the plaintiff's case, but also by defendant's witness, who sold plaintiff the notes. This evidence being full, clear, and undisputed, there was no question of fact for the jury, and the Court was right in pronouncing upon the effect of the evidence and giving a binding instruction. The defendant's offer to prove fraud, made *after* the proof of consideration and bona fides of the plaintiff, not being coupled with an offer to contradict plaintiff's evidence of consideration, etc., did not amount to a defence, and was properly ruled out, and the jury were properly instructed to find for the plaintiff.

McCracken *v.* Roberts, 7 Har. 395, per BLACK, J.
Graff *v.* R. R. Co., 7 Cas. 489, per WOODWARD, J.

Had the case been submitted to the jury and a verdict found for defendant, the Court would have been bound to set it aside, and in such case it is proper for the Court to give a binding instruction in advance.

Graff *v.* R. R. Co., *supra*.

M. Hampton Todd, for the rule.

The question of consideration was for the jury. They might have disbelieved the evidence of consideration and bona fides. The defendant's offer to show fraud in obtaining the notes and putting them in circulation should have been admitted. Evidence of such fraud overcomes the presumption in the holder's favor, which he must then affirmatively establish to the satisfaction of the jury. The plaintiff by proving consideration in the first instance could not deprive the defendant of his defence on the ground of fraud, and of his right to a jury trial. The questions were of fact for the jury, and not for the Court, to decide.

Hutchinson *v.* Boggs & Kirk, 4 Cas. 294.
Hoffman *v.* Foster & Co., 7 Wr. 137.
Maples *v.* Browne, 12 Id. 458.
Phelan *v.* Moss, 17 Sm. 59.
Miller & Race, Sm. L. Cas. 823, Notes (7 Am. ed. *609.)

Rule absolute.

C. P. No. 4. March 23, 1878.

Rand v. Lore.

Affidavit of defence law—Practice—Judgment for want of a sufficient affidavit of defence will not be entered for an amount admitted to be due on a matter not in suit.

Rule for judgment.

The plaintiff brought suit upon several promissory notes, and the defendant filed an affidavit of defence, averring that all of the notes in suit were given for the accommodation of the plaintiff; and, further, that "the only outstanding matter between this deponent and the said Rand is a matter arising upon a settlement made by the said Rand with Charles Katz, which settlement is entirely distinct from said notes, and refers exclusively to $2000 paid in 1874, on account of note (not in suit) due Sept. 2, 1873, held by said Katz, and $9848.13 paid about Jan. 1, 1875, by said Rand on a bond held by said Katz; but these payments by him are entirely distinct from, and have no reference to, said notes filed in this case, and on account of which this deponent is not in any manner indebted to the said Rand."

Whereupon this rule was taken for judgment for the amount admitted to be due.

H. T. King, for the rule.

THE COURT (per THAYER, P.J.). When you sue for one thing, and the defendant denies liability on that, but admits an indebtedness to you in another matter, you cannot have judgment. Upon filing your narr., the case may be different.

Rule discharged.

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WEEKLY NOTES OF CASES.

VOL. V.] *THURSDAY, APRIL* 18, 1878. [No. 12.

Supreme Court.

Jan. '77, 115. Jan. 11, 1878.

In re Chestnut Street.

Roads, highways, and bridges—Widening of streets in the city of Philadelphia—Jurisdiction of the Court of Quarter Sessions—Review of the Road laws of Pennsylvania relative to the city of Philadelphia.

Under the Road Laws of the Commonwealth of Pennsylvania relative to the city of Philadelphia, the Court of Quarter Sessions of the County of Philadelphia has no jurisdiction of a petition of property owners in said city to widen a street upon one side thereof.

A petition praying for such a widening must be presented to the Board of Surveyors. If they approve of the proposed widening, it may be proceeded with under the Act of 6th June, 1871 (P. L. 1353).

Certiorari to the Quarter Sessions of Philadelphia County.

On October 2, 1875, William Conway and others filed their petition in the Court of Quarter Sessions, setting forth: That they were the owners of real estate upon the south side of Chestnut Street, between Fifteenth and Sixteenth Streets; "that the line of the houses on the south side of Chestnut Street, as at present built, is south of the established line of the street; that the necessity of business and travel demand that the said street be widened at least to the extent that the houses recede from the street;" and praying that a jury be appointed to "view the locality and to report upon the expediency of widening said street between said points."

On the same day a jury was appointed who subsequently filed a report recommending that Chestnut Street, between Fifteenth and Sixteenth Streets, be widened on the south side thereof "to the extent that the houses or buildings on said south side recede from the present established south line of said street, ... so that the width of said street should be fifty-seven feet six inches from the present north line of said Chestnut Street as established by law."

Exceptions were, thereupon, filed on behalf of John Crump and others, which, after argument, were overruled by the Court, and the report was confirmed.

The exceptants, having obtained an *allocatur*, took this writ, assigning as error the action of the Court in confirming the report of the jury, for (*inter alia*) want of jurisdiction in the Court below.

J. G. Rosengarten and *Michael Arnold* (with whom was *A. A. Hirst*), for appellant.

There is no authority of law to widen the streets of Philadelphia by means of a jury of view. Two modes only are provided for the purpose of widening streets in the city. One is by direction of the City Councils, on the petition of a majority of the owners of land fronting on the street proposed to be widened (Act of April 27, 1869, section 1, Purd. Dig. 1287, pl. 123, and Act of March 24, 1870, P. L. 547), and the other is by the Board of Surveyors of said city, upon the petition of the majority of such owners (Act of June 6, 1871, section 4, P. L. 1354). Besides, if such power of widening by jury of view does exist, it cannot be used to make a street more than fifty feet wide (Act of June 13, 1836, section 5, Purd. Dig. 1273, pl. 5). As Chestnut Street is now made fifty-five feet wide by Act of April 28, 1870 (P. L. 1291), the limit to which a road jury may go is already passed.

In re Jackson St., 2 N. 328.

No counsel appeared contra.

March 11, 1878. THE COURT. This was a proceeding to widen Chestnut Street, between Fifteenth and Sixteenth Streets. It was commenced by petition to the Court of Quarter Sessions of the county of Philadelphia, of the owners of real estate upon the south side of the street, between the points named. The petition was presented on the 2d of October, 1875, and the jurors were appointed on the same day.

The main question presented by the assignments of error is whether the Quarter Sessions then had jurisdiction.

The legislation relating to highways in Pennsylvania shows a diversity of sentiment as to what jurisdiction should be given to the Courts of Quarter Sessions. Thus the Act of 12 William III., chap. IV., declared that all the king's highways or public roads within this province or counties annexed should be laid out by order of the Governor and Council for the time being, but the justices of the County courts were authorized to lay out for housekeepers roads (private) leading from their premises to public roads. (Bradford's Laws of Pennsylvania, page 13.)

The Act of 6th April, 1802 (P. L. 178), authorized the Justices of the Court of Quarter Sessions of each county in the Commonwealth, on petition, to order, view, and lay out public and private roads.

This Act, however, expressly declared that it should not interfere with any special provision theretofore made respecting the county of Phila-

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delphia, and it further excepted from its repealing clause roads, lanes, alleys, and bridges in the city of Philadelphia, and in other corporate towns.

The Act of 22d March, 1813 (P. L. 136), incorporating the District of Spring Garden, provided for the election of commissioners, who were authorized to appoint surveyors to survey and lay out such streets, roads, lanes, courts, and alleys as were deemed necessary for a regular and convenient town plan. The surveyors were to return to the commissioners two copies of the drafts and plans, one of which was to be filed in the office of the Clerk of the Court of Quarter Sessions. The Court was then empowered to determine whether any and what alteration should be made therein, and the time when the same should be opened.

The seventy-sixth section of the Act of 13th June, 1836 (P. L. 566), declared that the proceedings to obtain the laying out or *widening* of a street, road, or alley within the city and county of Philadelphia should be by petition, presented to the Court of Quarter Sessions at least thirty days before the commencement of each term of said Court, and thereupon the Court should direct a *venire* to issue directing the sheriff to return a panel of forty-eight freeholders to the next term to act as viewers in all cases of said applications; from which panel, on the return of the venire, the Court should direct six names to be drawn as viewers to act in each case.

The first section of the Act of 16th March, 1866 (Purd. Dig. 1286, pl. 111), declared, in all cases relating to the opening of streets upon the plans of the city of Philadelphia, and of view, review, and assessment of damages for and in relation to roads, bridges, or property otherwise taken for public use, that the persons appointed to view, review, and assess damages shall be appointed by the Court of Quarter Sessions of the county of Philadelphia in the same manner as was "provided by the general laws of this Commonwealth." It provided, however, *inter alia*, that the several supplements to an act to incorporate the city of Philadelphia, relating to opening and widening streets or vacating the same, then in force and not inconsistent with said act, should not be affected or repealed thereby. Precisely how far this act prescribed the mode of proceeding to merely widen a street already opened is now unnecessary to determine. It was followed by the Act of 27th April, 1869 (P. L. 1235). The first section of this Act declares it shall be lawful for the city of Philadelphia to widen, straighten, or change the course of any of the streets of the city of Philadelphia that may be upon the confirmed plans of the city, when a petition signed by a majority of the owners of property fronting thereon shall be submitted to Councils, and a plan of the same duly prepared and approved by the Board of Surveyors shall have been confirmed by the Court of Quarter Sessions, as now provided in law, under which the late District of Spring Garden was surveyed.

The provisions of this Act of 27th April, 1869, were re-enacted by the Act of 24th March, 1870 (P. L. 547). They both declare that a proceeding to widen, straighten, or change the course of any street on the confirmed plans of the city shall be commenced by petition to Councils. Both these Acts, in requiring the petition to be signed by a majority of the owners of property fronting on the street to be widened or otherwise changed, manifestly included owners of property on both sides of the street. It remained to make some provisions for the widening of a street on the petition of the owners of property on one side only of the street. Hence, the fourth section of the Act of 6th June, 1871 (P. L. 1353), declared, "that whenever a petition asking for the widening of any street in the city of Philadelphia shall be signed by a majority of the owners of property, or the owners of a majority of feet front fronting on one side of said street, and shall be submitted to the Board of Surveyors of said city, they shall examine into the expediency of granting the petition as asked for, and, if approved by them, the said street shall be widened upon the side on which the property of the said petitioners may be located, in accordance with the existing laws relative to opening streets in said city."

Thus in a proceeding to widen a street on one side thereof, this Act gave no jurisdiction to the Court of Quarter Sessions. The petition therefor was to be submitted to the Board of Surveyors. If they approved of the expediency of granting the petition, the street was to be widened accordingly. No action of the Court of Quarter Sessions was required.

The thirteenth section of the Act of 23d May, 1874 (P. L. 230), declares "the municipal authorities and courts having jurisdiction in any city of this Commonwealth shall have exclusive control of and direction of the opening, widening, narrowing, vacating, and changing grades of all streets, alleys, and highways within the limits of such city, and may open or widen streets of such width as may be deemed necessary by such city authorities and courts, proceedings to be had in such cases as are now required by law."

The language first used indicates that the municipal authorities and Court of Quarter Sessions shall unite in the exercise of all the powers enumerated in the section, but does not prescribe the order or manner in which they shall proceed. The later clause, however, orders the "proceedings to be in such cases as are now required by law." As no law then existing authorized the Court of Quarter Sessions to appoint a jury for

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the purpose of widening a street on one side thereof on the presentation of a petition of the owners fronting on that side, it acquired no such power by virtue of this section. The Quarter Sessions acquired no exclusive jurisdiction thereby which it did not possess before. It, therefore, follows that the Court had no jurisdiction in the premises. As this conclusion is fatal to the proceedings, it is unnecessary to discuss the insufficient form of the petition or the ambiguous terms of the report.

Decree reversed, report set aside, and all prior proceedings dismissed.

Opinion by MERCUR, J.

Jan. '76, 115. Jan. 11, 1878.

In re Chestnut St. Appeal of John Crump et al.

Road law—Appeal—Practice.

An appeal does not lie from the decree of the Court of Quarter Sessions in the matter of a street or road.

In the matter of the widening of Chestnut Street, John Crump and others, exceptants to the report of the jury (*ut supra*), took this appeal from the decree of the Court of Quarter Sessions confirming the same.

J. G. Rosengarten and *M. Arnold*, for appellants.

March 11, 1878. THE COURT. As no Act of Assembly gives an appeal from a decree of the Quarter Sessions, in the case of a street or road, no appeal lies. The proceedings can be reviewed on certiorari only. On such a writ we have just reviewed the record in this case; therefore—

Appeal quashed.

Opinion by MERCUR, J.

Jan. '76, 161. Feb. 15, 1878.

In re Fifteenth Street. Sharp's Appeal.

Roads, highways, and bridges—Power of the Court to direct an amendment to the report of a road jury—Act of April 1, 1864.

An order by the Court of Quarter Sessions upon a road jury for an amendment to their report, which is merely formal, does not require notice to the parties interested to give it validity.

Certiorari to the Quarter Sessions of Philadelphia County.

On February 18, 1873, the Monument Cemetery Company of Philadelphia presented their petition to the Court of Quarter Sessions, setting forth:—

That they are a corporation duly created by the Commonwealth of Pennsylvania (Act of March 19, 1838, P. L. 124), and are the owners of a large and valuable lot of ground in the Twenty-eighth Ward of the city of Philadelphia.

That the Legislature, on May 6, 1872 (P. L. 1163), passed an Act, entitled "An Act to authorize the opening and paving of Fifteenth, Sixteenth, and Norris Streets," the provisions of which were as follows:—

"SECTION 1. *Be it enacted, etc.*, That Fifteenth, Sixteenth, and Norris Streets are hereby laid out through Monument Cemetery of the same width as laid out on existing public plans up to the boundary lines of said cemetery; and it shall be the duty of the chief commissioner of highways, within sixty days, to cause said streets to be opened and paved. The third section of an Act relating to Monument Cemetery, in Philadelphia County, passed March 15, 1847, is hereby repealed, as to the opening of the streets herein directed. In assessing damages for said opening, the cost of a suitable inclosure of said cemetery ground on said streets shall be allowed."

That the Supreme Court of the State of Pennsylvania, on the sixth day of February, A. D. 1873, decided that the said Act was constitutional, and ordered that Mahlon H. Dickinson, the Chief Commissioner of Highways, should proceed to open the said streets through the said property of your petitioner, as directed by the said Act, and he is about to do the same.

The petition prayed that a jury be appointed to assess the damages which would be due to the petitioner by reason thereof.

A jury was accordingly appointed, who found that "no damages will be sustained by the said Monument Cemetery Company by reason of the opening of the said streets through the said cemetery. They are further unanimously of opinion, and do so report, that the cost of a suitable inclosure for the said cemetery upon the line of the said streets, will be $34,460, and they accordingly award that sum as the cost of such suitable inclosure." They further reported that certain properties were benefited to the amount of the aforesaid sum.

Upon exceptions, the Court below (PAXSON, J.) held the report insufficient, and recommitted it, with instructions that whatever sum was awarded against the neighboring properties, and in favor of the cemetery company for the cost of an inclosure, must be awarded by them "as damages sustained by the company by reason of the opening of said streets" (31 Leg. Int. 340). Whereupon the jury, without giving notice to the exceptants or other parties interested, reassembled and reported that "the jury find, determine, and award to the said company, as the full damages sustained by them by reason of the open-

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ing of Fifteenth, Sixteenth, and Norris Streets through the grounds of their cemetery, the sum of $34,460, and do assess and apportion the same among the respective properties in the vicinity benefited by the opening of said streets, as shown by the former report, as reference being had thereunto will more fully and at large appear."

To this finding exceptions were filed on behalf of Joseph Sharp, which, after argument, were dismissed, and the report confirmed; whereupon the exceptant took this writ, assigning as error (*inter alia*): (2) The action of the Court in confirming the award of a suitable inclosure to the cemetery company's property, the same being without warrant of law. (3) In confirming the supplemental report of the jury, for the reason that it does not appear that due notice of the meeting at which it was prepared was given to the parties interested.

David W. Sellers (*Thomas A. Gummey* with him), for appellant.

The Act of April 1, 1864 (P. L. 206), requires that "due notice" of the award of the jury shall be given "by advertisement or otherwise." The supplemental report shows affirmatively that no such notice was given, and it is, therefore, defective.

The cost of a suitable inclosure for the ground of the cemetery company does not constitute such damages as the law allows.

J. Howard Gendell, Assistant City Solicitor, for the city of Philadelphia, appellee.

The Act of 1872 having made the cost of an inclosure an element of damage for the jury to consider, and the jury having been appointed to assess the damages for the opening of the streets in question, it is contended that the Act of 1864 made it obligatory upon them, after they had determined the amount of the damages, to go on and consider the advantages to neighboring properties. The appellant had no vested right in the standard of damages. This was fully within the power of the Legislature. The only matter in which he was interested, after the damages were determined, was the question of how much the advantages which his property derived from the improvement made him liable to pay, and this question has been settled by the report of the jury and the decree of the Court.

There is nothing on the record to show that the notice required by the Act of 1864 was not given. The presumption is that judicial proceedings are regular, and, without support from the record, the third assignment of error must fall.

March 11, 1878. THE COURT. The damages awarded to the cemetery company in the case under consideration may, for aught we know, be excessive. As, however, the Legislature has made the subject of damages a matter for the consideration of the Court of Quarter Sessions, and of the jury appointed by it, we are by no means disposed to revise what they have done. Indeed, to attempt a thing of this kind would be both impertinent and unwise, for we have not only no authority to judge of this matter, but we have not the data upon which to found a judgment. We have, then, but to look to and consider the record. To this, the only exception that has been seriously insisted on is that which relates to the order of the Court directing the report to be returned to the viewers for amendment without notice to the parties. The Court treated this amendment as merely formal, and hence requiring no notice. In this judgment we concur. These streets were authorized to be laid out through the grounds of the Monument Cemetery Company by the Act of May 6, 1872. By this same Act it was provided that, "In assessing damages for said opening, the cost of a suitable inclosure of said cemetery ground on said streets shall be allowed."

Now, the jury of viewers reported that the company had sustained no damages by reason of the opening of said streets through its ground, but were of the opinion, and so reported, that the cost of a suitable inclosure for said cemetery, on the line of said streets, would be $34,460, and they accordingly awarded that sum as the cost of such suitable inclosure. They then proceeded in due form to assess this sum of money so awarded upon the several properties benefited by the opening of the streets. The only error in this report, was in not designating the cost of the "suitable inclosure" as damages due the company. The error was, however, purely formal; the finding was substantially a finding of damages, and was so treated throughout the proceedings, inasmuch as this cost was assessed after due notice to the parties interested upon the several properties benefited.

When, therefore, the Court ordered the report to be returned for correction, it was not to make any new work on the ground, not to make a new assessment or reapportionment, but only to make a verbal amendment. But in this the parties had not such material interest as required notice to be given to them.

It was the business of the Court to put its records in due form, and, as this did the exceptants no harm, they have no room for complaint.

Proceedings affirmed.

Opinion by GORDON, J.

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Jan. '76, 159. Feb. 14, 1878.

Keely v. Wright, administrator, etc.

Bills and notes—Statute of limitations—The running of, how barred—Husband and wife—Husband's interest in his deceased wife's choses in action.

In a suit upon a promissory note by the husband as administrator of the deceased payee, commenced more than six years after the maturity of the note, it appeared that within the six years, and after the death of the wife, but before her husband had taken out letters of administration, the maker had acknowledged the debt to the husband and had promised to pay the note:

Held, that the running of the statute of limitations was tolled, and the plaintiff was entitled to recover.

PER CURIAM. The husband was not a stranger, but was the owner of the note in question as part of his wife's estate; he could therefore receive a promise to pay it or an acknowledgment consistent with such a promise.

Error to the Common Pleas No. 3, of Philadelphia County.

Assumpsit, upon a promissory note, by John Wright, administrator of his wife, Mary Ann Wright, deceased, against Jacob Keely. The pleas were *non assumpsit*, *non assumpsit infra sex annos*, payment with leave, etc., set off.

The note was made by the defendant to Mary Ann Keely (afterwards Mrs. Wright), for $200, dated June 2, 1866, payable in one year with interest at 5 per cent. This action was commenced by the administrator of the deceased payee, May 8, 1874.

Upon the trial, before LYND, J., it appeared that after the death of Mrs. Wright, but before the plaintiff had taken out letters of administration, the defendant had acknowledged the debt to the plaintiff and promised to pay the note; this acknowledgment and promise being within six years before the beginning of the action.

Verdict for the plaintiff for $293.22, the Court reserving the following point:—

Whether the plaintiff as administrator of the estate of his deceased wife is entitled to recover on the promissory note of the defendant, payable to the wife, and given to her before marriage, in this suit, brought more than six years after the maturity of the note, upon proof that the defendant, after the death of the wife and before the grant of the letters of administration, acknowledged the debt and promised to pay it to the plaintiff.

The Court *in banc* entered judgment for the plaintiff upon the point reserved. The defendant took this writ, assigning the judgment for error.

J. Q. Hunsicker (*J. W. Hunsicker* with him), for the plaintiff in error.

A new promise or acknowledgment to take the debt out of the statute of limitations must be made either to the creditor himself or to his agent whom the debtor knows to be such.

Kyle *v.* Wells, 5 H. 286.
Bank *v.* Wilson, 10 Watts, 261.

And the Courts apply with strictness the rules relating to acknowledgments or promises to bar the statute, especially since the Act of 1869, allowing parties to testify.

Johns *v.* Lantz, 13 Sm. 326.
McKinney *v.* Snyder, 28 Sm. 497.

A husband, through insolvency or incompetency, may lose his right to take out letters. Until the letters are actually granted, therefore, he cannot be looked upon as the authorized agent of his deceased wife's estate.

Steel *v.* Steel, 2 Jones, 64.

H. G. Hartranft, contra.

The husband of the decedent, being the only person entitled to her estate under the intestate law, was the proper one to demand and collect any debts due his late wife, and it is immaterial whether letters of administration were granted before or after the acknowledgment of this debt to him.

Feb. 25, 1878. THE COURT. John Wright, the husband of Mary Ann, was not a stranger but was the owner of the note in question as part of his wife's estate. He could therefore receive a promise to pay it, or an acknowledgment consistent with such a promise. When he took out letters he was competent to sue upon the claim thus acknowledged.

PER CURIAM. Judgment affirmed.

WOODWARD, J., absent.

July, '75, 1140. Feb. 7, 1878.

Carty's Appeal.
Carty v. Shields.

Easement—Right of way visible to vendee of land—Restriction of, to special use existing at the time of the purchase—Railroad siding—License.

An existing right of way cannot be enlarged or altered by uses not contemplated by the parties at the time of its creation.

A. was the owner of two lots fronting upon a railroad, the larger of which he used as a coal yard. Under a license from the railroad company he connected their tracks with his coal yard by a siding passing across a portion of of the smaller lot. Over this siding he carried on the traffic of a coal dealer. He soon after sold the small lot to B., without any terms as to ways or incumbrances. After the sale to B., A. established a lime business on his lot in addition to the coal business, and used the siding for the passage of cars employed in both these trades. B. threatening to tear up the siding, A. filed a bill in equity to restrain him from so doing:

Held, that A. was properly restricted by the decree of

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the Court below to such use of the siding as existed at the time of the sale to B., to wit, the carrying on of the *coal* business.

PER CURIAM. Presumably the license of the railroad company to connect with their tracks was for the purposes of the coal business in which the plaintiff was then engaged. . . . . What the defendant saw when he purchased the lot was merely a siding used by the vendor in his coal business. Hence, in the absence of terms, it is not to be presumed that he accepted his deed burdened with a larger use or incumbrance than that of which his observation gave him notice.

Certificate from the late Court of Nisi Prius.

Bill in equity, by Andrew Carty against Thos. Shields, praying for an injunction to restrain Shields from tearing up a certain railroad siding which passed across a portion of Shields's property. The facts, as alleged in the bill and answer, and found by the Master, were as follows:—

Prior to the year 1866 Carty was the owner of two adjoining lots of ground fronting upon Pennsylvania Avenue, in the city of Philadelphia. The western lot was used as a coal yard. In 1865, the Philadelphia and Reading Railroad Company, which occupied Pennsylvania Avenue with their tracks, had constructed, at the request of Carty, without any formal limitation as to its use, a siding or turnout running from the railroad across the end of the eastern lot into the western lot, used as a coal yard. Over this siding and track the usual traffic of a coal dealer was carried on. In the year 1871, in pursuance of a verdict in ejectment against him, Carty, by deed, conveyed to Shields the eastern lot, over the edge of which the above-mentioned siding passed. The verdict in ejectment found title in Shields by purchase from Carty, from Sept. 1st, 1866.

While the litigation resulting in this conveyance was pending, Carty constructed on the western lot a second track, also connecting with the siding, for the purpose of carrying on the lime business, the coal business being still carried on in another part of the lot by his tenant. The turnout or siding formed, therefore, the common connection between the two tracks owned by Carty and the railroad, and over it the cars employed in both the lime and the coal business had to pass.

Shortly after the deed from Carty to Shields, which contained no words granting rights of way to the grantee, nor reserving them to the grantor, Shields threatened to tear up and remove the siding across his property, claiming that the same was unlawfully there. To prevent this, the present bill was filed by Carty.

The Master (Jos. Mason) reported, *inter alia*, as follows: "The law seems to be well settled that the right of way for a particular purpose cannot be enlarged and used for other purposes. The principle is enunciated and illustrated in Woolrych on Ways, 34 and 35. . . . . The general principle is fully recognized in Kirkham *v.* Sharp (1 Wharton, 323). There it was held that the defendant could not, by means of the extension of it over his own land, use an alley appurtenant to his and the adjoining messuage for the purposes of ingress to and egress from a stable at the end of his lot, either as a footway or a horseway. It is true, that this case may appear to differ from the present, in that the use of the alley was restricted by the terms of the grant to the two adjoining messuages, while in the present case the additional track is on the same lot as the first; but the general principle involved is essentially the same. The plaintiff has endeavored to make an exception to its application, by contending that the right to the use of the turnout being established, it is commensurate with any and all purposes for which the lot to which it leads may now and hereafter be used. But what is the right which is established? Undoubtedly the plaintiff, at the time he sold to the defendant, could have provided, by express words of reservation, that the right of passage over the turnout should be such as he now claims he is entitled to. This, however, he omitted to do. He simply sold, as found by the verdict of the jury in the ejectment case, the small lot of ground—without more. In the absence of express contract, what are the 'terms of grant' which the law inserts in the conveyance? That the defendant shall 'have and hold the said lot or piece of ground, under and subject to the full and free privilege and authority of ingress, egress, and regress over the turnout entering the easternmost portion of the plaintiff's lot from the railroad on Pennsylvania Avenue, for any or all kinds of cars necessary for any or all kinds of business, to or from any track or tracks, which are now or shall hereafter be constructed on said lot or any portion thereof?' Would that be a construction consistent with the principle that the burden or benefit of the grantor or grantee is that which is palpable and manifest at the time of the conveyance? I cannot so understand it.

"The defendant in this case must be considered as having purchased the small lot, subject to the visible easement at the time of his purchase, which was the passage of coal cars over the turnout running across the footway in front of the small lot to a single track in the plaintiff's adjoining lot, *and for this only*. He cannot, I think, be subjected to the annoyance and inconvenience of the passage of lime cars to another track."

The Master further recommended a decree enjoining the defendant perpetually from interfering with the siding, and enjoining the complainant perpetually from using it for any other purposes than the passage of coal cars to and from

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the track on the complainant's lot nearest to Pennsylvania Avenue.

The Court (without filing an opinion) dismissed the exceptions to this report, and entered a decree enjoining the defendant from interfering with the use by the complainant of the turnout as it was used by him on the 1st day of September, A. D. 1866.

The complainant appealed, assigning for error the action of the Court in entering the above decree.

David W. Sellers, for the appellant.

In the absence of any limitation of the use of the siding imposed by the railroad company, the law must presume a full and unqualified grant of the siding for every lawful purpose; this license or grant the railroad alone can revoke.

Garrett *v.* Jackson, 8 H. 335.
Pierce *v.* Cloud, 6 Wr. 114.
Heyl *v.* P. W. & B. Railroad, 1 Sm. 469.

The defendant knew that the license was unqualified when he purchased the lot; the fact was open and notorious. Can it be pretended that we can transport cars with coal in them, but cannot transport cars carrying lime?

John O'Byrne, contra.

The appellant, if he sold the land to Shields subject to an easement, had no right to enlarge, extend, or burthen that easement with uses not contemplated in the original grant.

Kirkham *v.* Sharp, 1 Wh. 323.

Feb. 18, 1878. THE COURT. Presumably the license of the railroad company to connect with their tracks was for the purposes of the coal business, in which the plaintiff was then engaged; otherwise the company might find its tracks encumbered with cars and articles of transportation not contemplated when the license was granted. In the absence of the production of a license granting larger terms, it must be supposed that the company examined the premises, and saw the business in which the plaintiff was then engaged, and charged a price for the license according to the probable business to be done over the switch and siding. When the defendant bought, he took the property without terms as to the siding passing over a part of his lot, but his deed gave him a title clear of incumbrances committed by his vendor, except that which lay before his eyes and challenged his attention, growing out of a use imposed by the vendor while he had the power to do so. But what he then saw was merely a switch and siding used by the vendor in his coal business. Hence, in the absence of terms, it is not to be presumed that he accepted his deed burdened with a larger use or incumbrance than that of which his observation gave him notice.

The decree of the Court of Nisi Prius remits him to that precise extent, and hence we perceive no error in the record.

Decree affirmed, with costs to be paid by the appellant, and the appeal is dismissed.

PER CURIAM.

Jan. '78, 55. Jan. 28, 1878.

Craig's Appeal.
Wilson's Estate.

Decedents' estates—Limitation of lien of debts of decedents—When not extended—Act of Feb. 24, 1834, P. L. 77.

The presentation and proof of a claim on a decedent's estate, before an auditor, does not constitute an "action" within the Act of Feb. 24, 1834, and accordingly does not extend the lien on the decedent's real estate.

Bindley's Appeal, 19 Sm. 297, followed.

Though an order of sale be made within the statutory period, and successive appeals taken by the devisee to the Supreme Court be dismissed, if the sale is made after five years from the decedent's death, it will be set aside on petition of the purchaser with the concurrence of the devisee.

Appeal from the Orphans' Court of Philadelphia County.

The following facts appeared from the record: Daniel Wilson died in April, 1869, leaving a will by which he gave all his estate, after payment of his debts, to his only child, Daniel J. Wilson. The account of the executor, one Koeneman, was duly referred to an auditor, before whom Craig & Son proved a claim for $701.99 against the estate. The auditor, finding the personal estate sufficient to pay 4½ per cent of the decedent's debts, awarded $30.44 to Craig & Son.

On April 27, 1871, the executor petitioned the Court for leave to sell certain real estate of the decedent to pay the balance of indebtedness to Craig & Son, and to pay another creditor. On October 28, 1871, the Court ordered the said sale. The guardian of Daniel J. Wilson, minor, appealed to the Supreme Court from this order, but the order was affirmed without prejudice to the appellant's right to contest the debts any time before confirmation of the sale. On January 26, 1874, the record was returned to the Orphans' Court. On February 21, 1874, the guardian obtained a stay of the order of sale. On June 20, 1874, a rule of Craig & Son to show cause why stay of proceedings should not be revoked and sale proceeded with, was made absolute. The guardian again appealed to the Supreme Court, but his appeal was non-prossed when reached in January Term, 1876.

In May, 1876, the real estate was sold to one

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McLean for $1200, and the sale was confirmed. On May 24, 1877, the Court dismissed a petition of Daniel J. Wilson, now arrived at full age, to set aside the sale; but in July, 1877, McLean filed a like petition for setting aside the sale, on the ground that it had taken place more than five years after the decedent's death; and on October 20, 1877, the Court ordered, adjudged, and decreed "that the sale of the premises particularly described in order of sale be set aside, and the confirmation of sale vacated" and the order of sale revoked.

Craig & Son took this appeal, assigning for error the decree last above mentioned.

Henry Wharton and *J. J. Ridgway, Jr.*, for the appellants.

Though the limitation may be for the benefit of the heirs and devisees, they may renounce such benefit. Even a parol agreement, on the part of the heirs, not to take advantage of this limitation will be enforced.

Wallace's Appeal, 5 Barr, 103.

If it be urged that an action at common law should have been brought, it may be answered that Craig & Son, having elected their forum by claiming before the auditor, properly remained in the Orphans' Court. The Supreme Court should not establish a rule depriving decedent's creditors of the economical and expeditious procedure of the Orphans' Court.

The devisee should not be permitted to exhaust the statutory period during which a decedent's debts remain a lien on his real estate, by bringing vexatious appeals. The dismissal of an appeal remits all parties to their pre-existing rights, even though death has intervened.

Shore *v.* Jones, 1 Brocken. C. C. 285.

The lien of a judgment from which an appeal is taken is only suspended, and revives on the affirmance of the judgment.

Hardee *v.* Stovall, 1 Georgia, 92.

Any vexatious litigation which suspends the creditor's rights is ground for a bill in equity to restrain the debtor from setting up the statute of limitations at law, for so much time as the litigation has consumed.

Bond *v.* Hopkins, 1 Sch. & Lefroy, 430.
Pulteney *v.* Warren, 6 Ves. 73.
Barker *v.* Millard, 16 Wend. 572.
Sugg *v.* Throsher, 30 Miss. 135.

Jno. Cadwalader, Jr., and *J. L. Ferriere*, contra.

The question is whether the presentation and proof of a claim before an auditor is "commencing and prosecuting an action" within the meaning of the Act of 24 Feb. 1834 (P. L. 77), and as such a bar to the five years' limitation therein prescribed. Bindley's Appeal (19 Sm. 297), following Maus *v.* Hummel (1 J. 228), presented the same question. It was held that such presentation of a claim did not continue the lien; and that the power and duty to sell the decedent's real estate for the payment of debts resulted from the fact that the debts were made liens, and was lost when the liens were lost. The testator in this case died in April, 1869; the lien was gone in April, 1874.

Jan. 28th. THE COURT. This case is ruled by the principles stated in Bindley's Appeal (19 Sm. 297).

The lien of the debt was gone long before the sale was made and approved by the Orphans' Court. The petition being by the purchaser, concurred in by the devisee, and the sale being set aside by the Orphans' Court itself, no question arises upon the effect of the order of sale and confirmation, as the decree of a Court of competent jurisdiction in a collateral proceeding. What might be the effect of an order of sale originally made when the lien of the debt still existed, if set up by the purchaser against the heir or devisee, it is not proper to say now.

This is an appeal by a creditor, the lien of whose debt is gone, from the decree of the Orphans' Court, directly and not collaterally, upon the very sale itself.

Decree affirmed, with costs to be paid by the appellants, and appeal dismissed.

PER CURIAM.

Jan. '76, No. 164. Feb. 15, 1878.

Cake v. The First National Bank of Lebanon.

Renewal notes—Accommodation indorser—National banking Act—Usury—Estoppel.

Where usurious interest has been charged upon a series of discounts by a national bank, the defendant is entitled to credit upon the principal of his debt for all the interest paid on the whole series.

The question whether or not renewal notes have been accepted in payment of notes in suit, is a question of fact, the evidence of which it is error to withhold from the jury.

Hart *v.* Boller, 15 S. & R. 162; and Overholt *v.* Bank, 1 Norris, 490; S. C., 3 WEEKLY NOTES, 419, followed.

Error to the Common Pleas No. 4, of Philadelphia County.

Assumpsit, by the First National Bank of Lebanon against Henry L. Cake, to recover from the defendant the amount of a draft, dated Dec. 27, 1872, for $3150 at four months, and a note dated May 1st, 1873, for $650 at two months, on which defendant was indorser. Plea, the general issue.

Upon the trial (before THAYER, P. J.), it appeared that these instruments had been discounted by the plaintiffs for Simon J. Stine, in re-

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newal of similar paper, the original debt having been created at least two years prior to the date of the draft, and renewals having taken place every few months; and that interest at the rate of twelve per cent. per annum had been paid by Stine during the whole time. About the dates at which the respective instruments in suit fell due Cake indorsed other notes of Stine to take up those in suit, and Stine sent the new notes to the bank for that purpose—the note to renew the draft being sent after protest of the draft. The bank made no response to the request to renew the credit, though it had been a common thing for them to renew protested paper for Stine, but they retained the notes. Cake always thought the instruments in suit had been renewed by the new notes until this suit was brought. Stine was insolvent at the time of suit brought, and still is so; but when the instruments sued on were protested, and the note renewing the draft fell due, he had enough property to save Cake harmless. The bank's cashier told Stine some time after the receipt of the new notes (Stine said after the note renewing the draft fell due) that they would not renew the instruments in suit, but they did not return the notes sent them for the purpose of effecting a renewal.

The defendant requested the Court to charge the jury, *inter alia*, as follows:—

(3) "If the jury believe the note and draft in suit were paid by other notes, the plaintiff cannot recover." *Refused.* (First assignment of error.) (5) "If the jury believe that the defendant had reasonable cause from the conduct of plaintiff's officers to believe that the draft and note in suit had been renewed by other notes, and that in consequence of such belief the defendant has lost his opportunity of recovering the amount of the draft and note in suit against Simon J. Stine, the principal debtor, or of securing himself against loss thereon, the plaintiff cannot recover." *Refused.* (Second assignment of error.) (8) "If the jury believe that the plaintiff knowingly received, reserved, or charged a rate of interest greater than six per cent. per annum on the draft and note in suit, or either of them, or on any paper, for which the principal debtor, Simon J. Stine, was liable, and of which the draft and note in suit are renewals, either immediately or remotely, the plaintiff can only recover the sum or sums loaned *at the date of the original usurious charges*, less the whole amount of interest paid on and after the last-mentioned date or dates, respectively." *Refused.* (Fourth assignment of error.)

In the general charge his Honor said, *inter alia*:—["It was Stine's duty to ascertain whether the notes of April and July, 1873, were accepted by the bank in renewal of the draft and note in suit or not; and the defendant is in no better situation. There is no evidence that the bank agreed to accept the notes in payment or renewal of the note and draft.] (Third assignment.)

"But the Act of Congress provides that the taking of illegal interest by a national bank shall work a forfeiture of all the interest they would otherwise be entitled to. The plaintiff, therefore, is not entitled to recover any interest at all if you find that more than six per cent. was charged on the note and draft in suit [but the Act of Congress only applies to the instrument in suit, and not to prior transactions between the parties, although the instruments in suit may have grown out of them, and have been in whole or in part renewals of them. Mr. Stine, however, would have a defence to the extent of the *usurious* interest charged not only on these notes, but other transactions out of which these have come]. (Fifth assignment.) Whatever he has paid as usury goes to reduce the amount of the principal, and the indorser has the same defence to the extent of the usurious interest as the maker would have."

Verdict and judgment for plaintiff for the amount of the draft and note, without interest.

Defendant took this writ, assigning as error the answers to the above points and the portions of the general charge inclosed in brackets.

J. S. Sharp (*Alleman* with him), for plaintiff in error.

The Court below was in error in withholding from the jury the question whether the note and draft in suit had not been paid by the acceptance of renewal notes.

Slaymaker *v.* Gundacker's Exec., 10 S: & R. 75.
Hart *v.* Boller, 15 Id. 162.

The conduct of the bank in not notifying the defendant below of their non-acceptance of the renewal notes works an estoppel.

Smith *v.* McNeal, 18 Sm. 167.
Commonwealth *v.* Moltz, 10 B. 530.
Chapman *v.* Chapman, 9 Sm. 214.
Beaupland *v.* McKeen, 4 C. 124.

The portion of the charge relating to usury is in conflict with a recent decision of this Court.

Overholt *v.* Bank, 1 Norris, 490; S. C., 3 WEEKLY NOTES, 419.

A. Lewis Smith, for the defendant in error.

There is no obligation upon a bank to renew protested paper, and it is difficult to see how mere silence will raise a presumption that they have done so. The facts in this case differ materially from the facts in Overholt *v.* Bank (*supra*). The defendant below borrowed no money and paid no interest, and has therefore no right of action on account of usurious interest paid by Stine.

Bly *v.* Bank, 29 Sm. 453.
Brown *v.* Bank, 22 Id. 209.

It may well be that Stine would prefer to reserve his right respecting the interest, and defalcate in some other transaction.

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[MERCUR, J. The rule is that an accommodation indorser may make any defence that the maker could make.

SHARSWOOD, J. The bank cannot do indirectly what they may not do directly.]

The Act of Congress confines the forfeiture to the note in suit.

Act June 3d, 1864; Rev. Stat. 5198; Dig. p. 1012.

Feb. 25, 1878. THE COURT. We think the first, third, fourth, and fifth assignments of error must be sustained, but not the second.

The defendant below was accommodation indorser for Stine on two notes which had been discounted by the bank, and, being unpaid at maturity, were duly protested. Stine procured Cake to indorse renewal notes, and sent them to the Bank, who retained them until at least after one of them had fallen due, and then informed Stine that they had not accepted them.

No notice of non-payment was given to Cake on these notes. This suit was instituted on the first notes. It is the very case of Hart *v.* Boller (15 S. & R. 162), in which this Court held that it was error to take from the jury the question whether the renewal notes were accepted in payment.

We think, too, that Overholt *v.* The National Bank of Mt. Pleasant (1 Norris, 490) is directly in point on the question raised as to the usurious interest received by the bank. It was there decided that where there has been a series of renewal notes given for the continuation of the same original loan, the taint of usury in the first transaction follows down the descent through the whole line, and when, therefore, a national bank sues to recover its debt on the last of the series of renewal notes, the borrower is entitled to credit for all the interest he has paid from the beginning on the loan, and not merely to the excess above the lawful rate.

Judgment reversed, and *venire facias de novo* awarded.

Opinion by SHARSWOOD, J. WOODWARD, J., absent.

Jan. '77, 211. Jan. 21. 1878.

Freeman and Wife v. Shreve

Attorney and client—Special retainer—Contract of an attorney-at-law and solicitor in chancery for a specific sum for services in winding up an estate—Claim to chancellor's allowance as taxable costs for services to the general estate independent of the special retainer.

Where, in a contract between an attorney and his client, the attorney has accepted a special retainer to do all that is requisite in settling an estate for a fixed sum, the client is entitled to a credit for whatever the attorney may receive under an order by a chancellor, in another State, granting a certain sum as solicitor's costs.

Error to the Common Pleas No. 4, of Philadelphia County.

Assumpsit, by E. Mercer Shreve against Chapman Freeman and Marcia R. Freeman, his wife. The narr. consisted of three counts for professional services as attorney-at-law and solicitor in chancery in the State of New Jersey, in a suit in the Court of Chancery of that State, and in divers suits and business, rendered to Mrs. Freeman, at her request, and necessary to her separate estate. Pleas, non-assumpsit, set off, payment with leave, etc.

On the trial (before THAYER, P. J.), the following facts appeared from the evidence:—

Isaac B. Parker died, domiciled in the State of New Jersey, leaving an estate of $1,800,000 to be divided among seven children, one of whom was Mrs. Freeman, one of the defendants. The assets of the estate were distributed in the States of New York, Pennsylvania, and New Jersey. The executors were domiciled in Pennsylvania, where there was a large amount of real estate belonging to the estate. A difficulty having arisen as to the jurisdiction to which the administration of the estate belonged, after long litigation the Pennsylvania assets were, by order of the Court, transferred to the Chancery of New Jersey. Mrs. Freeman receiving no income from the estate, and becoming apprehensive that John Brown Parker, who was one of the executors, and who had entire control of the estate, was mismanaging and wasting it, some time in 1873 employed the plaintiff, E. Mercer Shreve, a member of the bar of New Jersey, to expedite the settlement of the estate, about which there was, at that time, considerable litigation in New Jersey, to secure the prompt payment of the income of that portion of the estate to which she was entitled, to look after the general safety of the estate, and to take it out of the hands of John Brown Parker. Mr. Freeman, who acted for his wife, agreed to give the plaintiff the sum of $5000 when the estate was finally settled for all his services; to which the plaintiff assented. Accordingly the executor was duly discharged, Mrs. Freeman's interest in the estate was separated from the rest, and the estate was wound up, a final decree having been made June 1, 1875. For these services the plaintiff received from the defendant, from time to time, the sum of $3100—thus reducing his claim under the contract to $1900.

A large number of attorneys were employed by the various parties in interest, and when the final decree was made, an application was made to the Court of Chancery, by the various solicitors, for allowances, in the way of taxable costs, for ser-

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vices rendered to the general estate. Out of the $12,500 allowed by the Chancellor, the plaintiff received, as his allowance, the sum of $2500, which the defendant claimed should be credited on the fee account. This the plaintiff refused to do, but offered to credit the defendant with the sum of $357, one-seventh of the allowance. The plaintiff did not advise his client of the application for and receipt of the allowance, nor did he inform the Chancellor of his contract for a specific sum for services to Mrs. Freeman's estate, nor did he apply to the Chancellor for relief of the defendants out of the general estate for the large fees they were under contract to pay.

In the general charge the Judge said, *inter alia:* "All the Chancellor of New Jersey undertook to allow to Mr. Shreve was his allowance for his services to the general fund, and not a compensation for services rendered to Mrs. Freeman alone. He did not undertake to pass upon what was due from Mr. and Mrs. Freeman as clients to the plaintiff, that was a private matter over which the Chancellor of New Jersey neither had nor exercised any control in the proceeding then pending before him. These allowances made by the Court of Chancery were not by any means or in any sense a compensation to the plaintiff as between him and his client for the particular services he had rendered to that client."

Verdict and judgment for the plaintiff for $1689.40, being the balance of the fee of $5000 with interest, less the credit of $357.

The defendant took this writ of error, assigning for error the portion of the charge of the Court given above.

George L. Crawford (with whom was *Benjamin Harris Brewster*), for the plaintiff in error.

The contention that this is a question of law wholly is erroneous, for the charge of the Court took from the jury the question of fact that the contract for a specific sum for services was to include all the services of the plaintiff, whether rendered to the general estate or to his client, and that the defendants were to have the benefit of any allowance the Chancellor might grant in relief.

Where a special arrangement is made by counsel for a fee, I submit that it is the duty of the counsel, when application for an allowance is made, to call the attention of the Chancellor to the fact of such relation, so that the general burden may be equitably adjusted.

The confidential relation was such as to make it the duty of the counsel to have advised his client of the application for an allowance, and omission to do so was a violation of duty.

Henry C. Titus, contra.

If the plaintiffs are entitled to this allowance, the right must arise either from a contract or by law apart from the contract. The jury found that there was no evidence of a contract under which they could claim. No right could arise by law, aside from a contract, for the Chancellor had no authority to charge the whole estate with the burden of paying for private services.

[SHARSWOOD, J. Is there any law of New Jersey granting allowances to counsel independent of specific fees contracted for?]

By the custom of the Court of Chancery of New Jersey, fees are allowed to counsel of all parties out of the general estate, taxable as part of the costs.

Harris *v.* Vanderveer's Estate, 6 C. E. Green, 424.
In re will of Henry Vanderveer, 5 Id. 463.
Whitenack *v.* Stryker, 1 Green's Chanc. 9.

The agreement between attorney and client that the attorney shall receive a fixed sum for his services does not affect the right of the attorney to the allowance.

Phenix *v.* Romer, 1 Edmonds' Sel. Cas. 353.

Feb. 4, 1878. THE COURT. It is undisputed and indisputable from the testimony of the plaintiff below himself that he was retained by Mr. Freeman (on behalf of his wife) "to secure the safe custody of the estate of Isaac Brown Parker, and his wife's interest, and take it out of the hands of John Brown Parker. He (Mr. Freeman) said, if you will do that, we will give you $5000." This, then, was the contract on the plaintiff's own showing. All the services which he could or did render to the estate were clearly within the scope of his duty under this undertaking. Had he failed in taking any steps which were necessary to secure the general fund, he would have been derelict in his duty and responsible to Mrs. Freeman, and nobody else, for any loss which she might sustain by his neglect. He would not have been responsible to the other claimants upon the fund, for he owed them no duty. He could in no event have called upon them for compensation, though in attending to and protecting the interest of Mrs. Freeman, he was at the same time attending to and protecting theirs. All that he did in the cause was under and by virtue of his retainer as solicitor of Mrs. Freeman. It does not appear that he was retained or acted as solicitor for any other party to the cause. His services, then, were rendered under the contract to secure the safe custody of the estate and Mrs. Freeman's interest. No part of the $2500 which he received by the order of the Chancellor was for services rendered to any body else but Mrs. Freeman. She was the owner of the seventh of the general fund, and to protect her seventh, as long as it was undivided, it was necessary to protect that general fund. To treat the services of the solicitor to the general fund as something distinct from and independent of his services for his client as one of the joint owners of that fund,

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as was done by the learned Judge below, we think was an error calculated to mislead the jury from the true question—the contract that the plaintiff was to receive $5000 in full for all his services in the cause. It is true that a Chancellor will, out of a fund for distribution, order compensation to the counsel engaged, in his sound discretion, according to his estimate of what they reasonably deserve to have. He will often order such compensation to the counsel of a losing party, who is decreed to have no interest, on the equitable ground that, being a necessary party, he was compelled to litigate, or had sufficient reason. It is a charge which the fund ought in equity and good conscience to bear. But whatever the counsel thus receives ought to be regarded as a credit on account between him and his client. Let us take the case of a general retainer without any contract for a certain sum, and a suit is afterwards brought on a *quantum meruit*. Surely it will not be pretended that the amount received under such an order would not be admissible in evidence to reduce or satisfy the plaintiff's claim. When, therefore, there is a special retainer, and the solicitor is to do all that is required for a sum certain, the client is entitled to a credit for whatever he may receive from any other source growing out of the same employment. The offer to credit Mrs. Freeman with one-seventh of the $2500 is no answer to all this.

If the contention of the defendant in error is sound, she has no right to this much even. Of the whole $12,500 paid out by the Chancellor's order, one-seventh was from Mrs. Freeman's share. Why Mr. Shreve was allowed a greater proportion than this we know not—nor is it material in this controversy. What is material, and all that is material, is, that Mr. Shreve acted as solicitor for Mrs. Freeman, and nobody else, and by special contract was to receive $5000 for all his services, and no more. It is clear, then, that Mrs. Freeman was entitled to a credit for the whole sum of $2500, which he had received.

Judgment reversed, and a *venire facias de novo* awarded.

Opinion by SHARSWOOD, J.

July, '76, 106. Feb. 6, 1878.

Watson v. Grier.

Principal and agent—Evidence.

A receipt signed "A. by his agent B." is competent evidence of the fact that the agent received the money stated in it, but not of his personal liability therefor.

Error to the Common Pleas No. 2, of Philadelphia County.

This, in the Court below, was an appeal by Patrick Watson from the judgment of an alderman rendered against him at the suit of John Grier.

The narr. was in the common counts, and the bill of particulars claimed $100 "money paid by the plaintiff to the defendant in part consideration of the purchase of a house, the defendant not having conveyed, or caused to be conveyed to the plaintiff, the said house, and still retaining the said sum of money in his possession."

Pleas, non assumpsit, set-off, payment with leave.

It appeared on the trial (before HARE, P. J.), that the defendant Watson, a real estate agent, was employed by one Armstrong to sell a house. Watson made a sale of the property to Grier, the plaintiff, receiving from him $100 on account of the purchase-money, and giving him a receipt for the same, as follows:—

Rec'd, Phila., September 18th, 1871, of John Grier, One Hundred Dollars on account of purchase money of house 1536 Christian street, sold to him this day for the sum of Five Hundred Dollars, subject to a ground rent of One Hundred and Thirty-two Dollars per annum, and subject to a Building Association Mortgage, on which there has Twenty-five Dollars per month to be paid into until the Association runs out, the title to pass on or before the second day of October A. D. 1871, and if the title should prove imperfect, this One Hundred Dollars to be refunded to the said John Grier, otherwise to be forfeited.

$100. DAVID ARMSTRONG,
By his Agent, PAT'K WATSON.

Subsequently, Armstrong's wife refused to sign the deed, and the contract of sale was thereupon rescinded. The defendant retained the $100 paid to him, claiming that he was entitled to it for his services in effecting the sale. The plaintiff offered to put in evidence the above receipt. The defendant objected that the receipt purported to be that of Armstrong, but the Court admitted the evidence under exception.

Verdict and judgment for the plaintiff ($121.50), to which the defendant took a writ of error, assigning for error the above ruling.

Wm. Hopple, Jr., for the plaintiff in error.

The receipt offered was that of Armstrong only, who was not a party to the action, and whose receipt ought not to have been permitted to affect the interest of the defendant below. It is true that the defendant had not actually paid the money over to his principal, but the sale had been negotiated, the sum in his hands had been earned, and the money was thereby in contemplation of law paid to Armstrong. No action, then, can recover it from the defendant.

Chas. F. Corson (*John Goforth* with him), contra.

It is settled that in the case of a failure of consideration, an agent is liable to refund money received by him, and which has not been paid over to his principal.

Wharton *v.* Hudson, 3 Rawle, 390.

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Feb. 18, 1878. THE COURT. Watson's receipt was competent evidence of the fact that he had received the money stated in it. But whether he was liable personally upon the receipt of this money depended on other facts and the charge of the Court, which are not before us upon the assignment of error.

PER CURIAM. Judgment affirmed.

Quarter Sessions.

Jan. 12, 1878.

Contested Election of J. Johnson.

Mode of electing surveyor and regulator—Ballot tickets—Informality—When ballots sufficient—Act of May 13, 1856—Where no method of preparing tickets is provided by Act, the electors may select their own mode of balloting.

Sur petition, answer, and examiner's report.

At an election for municipal officers Joseph Johnson was returned elected to the office of Surveyor and Regulator for the Eleventh District.

It was not denied that he received a majority of the votes cast, but it was shown that a large number of ballots for said office and candidate were printed on "ward" tickets, and not printed separately in accordance with the requirements of the Act of May 13, 1856 (P. L. 568). It further appeared that the ward and the district in this case were conterminous.

The petition averred that the said ballots cast on "ward" tickets should be stricken out as irregular and illegal, and that, deducting them, the petitioner, George W. Hancock, received a majority of the legal votes cast for said office, and prayed that the petitioner should be declared duly elected.

J. Alexander Simpson and *Robert N. Willson*, for petitioner.

The method of voting is prescribed by law, and should be uniform. The Act of May 13, 1856 (*supra*), gives the ballot authority. All ballots not framed and cast in accordance therewith must be thrown out.

Commonwealth *v.* Read, 2 Ash. 261.
In re Contested Election of 1867, 1 Brewster, 162.

Under the Act of May 13, 1856 (P. L. p. 568) the ward and division tickets should be printed separately under their respective titles. If the ballot is not properly designated, the vote must be rejected.

In re Election of Bedford, 1 Clarke, 484.
In re Election of Fearon, Id. 489.
Melvin's case, 18 Sm. 333.
Penn. Dist. Election, 2 Parsons, 536.

David W. Sellers (with whom were *Henry C. Hawkins* and *Edward R. Worrell*), for respondent.

When one candidate has a certificate of election and the matter is brought before the Court, the decision must be upon the merits.

In re Sheppard's Contested Election, 27 Smith, 295.
Sheppard *v.* Gibbons, 8 Phila. 469.

The office of surveyor was created one year before the Act of 1856 was passed. No method of electing surveyors was then or has been since prescribed by the Legislature.

As this was an office for which all the electors of the ward should vote, it was properly printed on the ward ticket.

Act 17th April, 1866, P. L. p. 968.

C. A. V.

Jan. 19, 1878. THE COURT (after stating the facts). The admission by the petitioners narrows our consideration to this one inquiry: Were the ballots objected to cast in accordance with law?

Section 1, of Article VIII. of the Constitution, gives to the elector who possesses the qualifications therein named, the right to vote at all elections; and the fourth section declares: "That all elections by citizens shall be by ballot," but does not prescribe the form in which the ballot shall be printed or written.

There can be no doubt, however, that the Legislature may, in order to insure uniformity, and the more readily to detect fraud in voting, direct the manner in which the ballots should be cast. This brings us to the inquiry: Is there any law which prohibits the recognition and counting of the ballots objected to?

The third section of the Act of May 13, 1856 (P. L. 568), directs that the tickets for municipal officers of this city shall be respectively headed: "City Ticket," "Ward Ticket," and "Division Ticket." This act was passed one year after the passage of the Act requiring surveyors for this city to be elected, and the division of the city into survey districts; and yet it contained no provision nor has any law been since enacted, specifying the manner those officers should be voted for. Hence, in view of the clearly defined right given to the elector by the Constitution to vote by ballot, and there being no law declaring how the ballot for surveyor should be printed and cast, the elector is left to select his own mode, so that in doing so he indicates his choice in an intelligent way, and at the same time contravenes no positive law.

All of the ballots objected to were cast for the respondent *for surveyor* by qualified electors residing in the Eleventh Survey District, at the time and place designated by law for holding the municipal election, and in a manner not prohibited

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by law, and in a way as clearly indicating their choice, as if said ballots had been printed on separate tickets and so voted. With these meritorious features favoring the ballots objected to, it would be a flagrant violation of law and disregard of the rights secured by the Constitution to citizens to reject said ballots from the count.

It, therefore, follows that the said Joseph Johnson has been duly elected to the said office of surveyor.

Petition dismissed.

Opinion by BRIGGS,

Common Pleas—Equity.

C. P. No. 3. March, 1878.

Bachman et al. v. Einhorn.

Equity practice—Bill for dissolution of partnership—Act of June 16, 1836—Act of Oct. 13, 1840—The latter statute does not repeal the former, and the certificate of counsel provided for by it is not required in partnership bills in Philadelphia County.

Demurrer to bill in equity.

The bill, filed by two partners against a third, set forth that: On April 20, 1874, a verbal agreement of copartnership was made between the complainants and respondent, by the terms of which, as complainants alleged, the respondent was to receive as his share of the business, one-fourth of the net profits. In order to effect a settlement of the affairs of the firm, a meeting was held by the parties on January 3, 1878, and the accounts of the partnership were then and there examined by "bookkeepers representing plaintiffs and defendant, respectively," and the net profits and losses definitely, and as was admitted by all, correctly ascertained. At that meeting the bookkeepers also found that a sum certain in excess of the respondent's one-fourth share of the profits had been collected by him, and was still in his possession; but the respondent, while admitting that he did hold such a sum, and that it was in excess of a one-fourth interest, yet refused to make restitution of the same, claiming, as the bill alleged, "wilfully, falsely, and fraudulently (and for the first time)" that he was entitled to one-third of the profits instead of one-fourth. The prayers of the bill were for a dissolution of the partnership, and that an account might be had of the firm dealings; that the defendant be required to answer; and for general relief.

Demurrer, for want of equity, and because the bill was not accompanied by a certificate stating "that the case is of such a nature that no adequate remedy can be obtained at law, or that the remedy at law will be attended with great additional trouble, inconvenience, or delay," as required in cases for the settlement of partnership accounts by Sec. 19 of the Act 13 October, 1840 (Purd. Dig. p. 591, § 4, P. L. 7).

Franklin Swayne and *Pierce Archer, Jr.*, for complainants.

Richard C. White, for respondent.

March 16, 1878. THE COURT. Under the Act of June 16, 1836, the Court of Common Pleas of the county of Philadelphia had the jurisdiction of a Court of Chancery, so far as relates, among other things, "to the supervision and control of partnerships." The Act of October 13, 1840 (Purd. Dig. 591, § 4), extended this jurisdiction to "the several District Courts and Courts of Common Pleas within this Commonwealth," and also to "such other accounts and claims as by the common law and usages of this Commonwealth have heretofore been settled by the action of account render."

Unless the first clause of the law of 1840 repeals the section of the Act of 1836, first above referred to, which we think cannot be contended, the clause relating to the certificate of counsel can have no application to partnership bills filed in this county.

Throughout the State the law may be otherwise; the practice here has been settled for years, and the opinion of the profession, we believe, is uniform upon this point. Demurrer overruled.

Opinion by LUDLOW, P. J.

Common Pleas—Law.

C. P. No. 1. March 18, 1878.

Price v. Guardian Mutual Life Insurance Company.

New trial—Life insurance—Paid-up policy—Damages—In an action brought to recover damages for failure to issue a paid-up policy in accordance with a stipulation to that effect, the value of such a policy must be proved by testimony—The amounts paid with interest do not constitute the measure of damages in such a case—When a breach of contract is shown, but no damage proved, and the Court instruct the jury that, if they find for plaintiff, they should assess no damages, a new trial will not be granted

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though the plaintiff might have been entitled to nominal damages.

Sur rule for new trial.

This was an action on the case to recover damages for the refusal of the company defendant to deliver to plaintiff a paid-up life insurance policy for $1000.

On the trial, before BIDDLE, J., the following facts were in evidence:—

The defendant issued to the plaintiff a policy for $5000 on the ten year endowment plan, containing a stipulation, that if after the payment of two annual premiums default should be made in the payment of any subsequent premium, then, upon surrender of the policy within thirty days after such default, the company would, in exchange therefor, issue to plaintiff a paid-up policy for as many tenth parts of the sum insured as annual premiums had been paid. Two annual premiums of $540 each had been paid. Default was made in the payment of the third, and the plaintiff had thereupon within thirty days after such default offered to surrender the policy, and demanded a paid-up one in accordance with the stipulation to that effect.

The company having refused, the present action was brought, wherein the plaintiff claimed to recover as damages for the breach of contract the full amount of the premiums paid and interest thereon.

No evidence was given of the value of a paid-up policy of the amount of $1000 (two-tenths of the sum insured), but the plaintiff rested on proof of the amount of premiums paid.

BIDDLE, J., charged that, the action being for damages for breach of a contract to deliver a paid-up policy, the measure of damages was the market value of such a policy, and not the amount of premiums paid with interest; and, as no evidence whatever had been offered by plaintiff to show the value of a paid-up policy of the amount stipulated for, if the jury found for the plaintiff they should assess no damages.

The verdict was for the plaintiff, without damages.

Scanlan now showed cause.

The measure of damages was the market value of a paid-up policy, and not the premiums paid with interest.

American Life Insurance Co. *v.* Shultz, 1 Norris, 46.
In re Albert Life Insurance Co., Bell's Case, Law Rep. 9 Eq. 706.
Moses *v.* Brooklyn Life Insurance Co., 50 Georgia, 196.

There was no evidence of the value of a paid-up policy; in fact, such value could only be approximated by the aid of insurance tables, with which experts were alone familiar. A paid-up policy had no actual market value; and as no value was fixed by the policy issued to plaintiff, its value was a matter of mere speculation, and could not be proved legally. The Court had an undoubted right to mould the verdict.

Todd *v.* Jones, 1 Phila. 45.
Allen *v.* Sawyer, 2 P. & W. 325.

Ziegler (with him *Manderson*), for the rule.

The measure of damages was the amount of premiums paid with interest thereon. The value of a paid-up policy was a matter of arithmetical calculation; it was that amount of money which with interest at 6 per cent. would make $1000 in seven years; this is $704.23. The Court erred in instructing the jury that if they found for the plaintiff they should assess no damages.

C. A. V.

March 23d, 1878. Rule discharged.

[See Price *v.* Guardian Mutual Life Insurance Co., 2 WEEKLY NOTES, 405.]

C. P. No. 3. Mar. 19, 1878.

Gerard v. Penna. R. R. Co.

Corporations using steam as a motive power—Act of April 4, 1868—What is a depot within that act—Negligence—Injuries to one not a passenger.

Rule for a new trial.

This was an action on the case by Peter Gerard, administrator of Gregory Gerard, deceased, against the Penna. R. R. Co., to recover damages for an injury to the decedent caused by the alleged negligence of the defendant.

On the trial (before LUDLOW, P. J.) it was proved that the injury to decedent occurred by reason of his horses becoming frightened by a sudden escape of steam from an engine standing in the defendant's Washington Street freight depot. He was unloading hides for transportation on a steamer of the Red Star Line, which was then lying at the pier belonging to the defendant where the accident happened. The next pier to the northward was leased by defendant to the Red Star Line, and decedent was in the habit of going indifferently to either pier under instructions from the receiving clerk of the Red Star Line, with whom alone his business was transacted. This clerk stood by, counted the hides, and signed the receipts for him. There was the same entrance to both piers. There was no sign on the south pier to show that it belonged to the defendant. It was proven for the defence that the south pier, on which the accident occurred, was occasionally used by the Red Star Line, by permission of the defendant, because much of the freight went over its line, but that the pier was its property and under its exclusive supervision and control as a depot.

LUDLOW, P. J. instructed the jury that under the Act of April 4, 1868 (Purd. Dig. 1094, pl. 5),* their verdict should be for the defendant.

* This Act provides: "When any person shall sustain personal injury or loss of life while lawfully engaged or

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Verdict for defendant accordingly. The instruction of the Court was assigned as a reason for a new trial.

Chapman Biddle showed cause.

This case falls clearly within the provisions of § 1 of the Act of April 4, 1868, as the permission given to the Red Star Line was only occasional, the pier being owned and at all times controlled by the Penna. R. R. Co.

Under § 1 of the Act, the right of recovery of plaintiff's decedent is restricted to a case in which an employé could recover.

Kirby *v.* R. R. Co., 26 Sm. 506.
Mulherrin *v.* R. R. Co., 31 Sm. 366.
Ricard *v.* R. R. Co., C. P. No. 2, Mar. Term, No. 2593, decided Feb. 13, 1877.

R. S. Hunter (with him *G. T. Bispham*), for the rule.

The Act of 1868 is in derogation of common law, and must be construed strictly. The act does not cover this case, but applies where employés of railroad companies use a road in common.

Mulherrin *v.* R. R. Co., 31 Sm. 366.
Catawissa R. R. Co. *v.* Armstrong, 13 Wr. 186.

All the cases decided under this act are consistent with this view of the statute. In Ricard *v.* R. R. Co. (*supra*), the plaintiff was on the car of defendant company doing the work of an employé. The use of the pier in question by the Red Star Line, the absence of any notice that it belonged to the defendant company, and the fact that the plaintiff's dealings were exclusively with the Red Star Line, preclude the defendant from sheltering itself under the act.

C. A. V.

March 23, 1878. THE COURT. Unquestionably before the passage of the Act of 1868 (*supra*) the plaintiff would have had a cause of action. But under the Act, recovery is restricted under any circumstances to a case in which an employé could recover. The Supreme Court have given general effect to the sweeping terms of the Act, and any one not a passenger, entering a depot, takes the risk upon himself. Under the law now settled the defendant is entitled to a clear track; and under the construction of the Act of April 4, 1868, the defendant is also entitled to a clear depot. Holding the law to have been correctly laid down in the charge of the Court upon the trial of this case, the rule for a new trial is discharged.

Oral opinion by LUDLOW, P. J.

employed on or about the roads, works, depots, and premises of a railroad company, or in or about any train or car therein or thereon, of which company such person is not an employé, the right of action and recovery in all such cases against the company shall be such only as would exist if such person were an employé: *Provided*, that this section shall not apply to passengers."

C. P. No. 3. April 6, 1875.

Coe, Wetherill, & Co., to use of S. Meeser, v. Schenkmeyer.

Affidavit of defence law—Instrument within the act—Parol evidence contradicting the written agreement.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit on the following instrument in writing:—

"Please insert my advertisement in the *Catholic Standard*, to occupy the space of ten lines, for the period of twelve months, for which I agree to pay thirty dollars, payable to your order on the presentation of this contract, quarterly, after the first insertion of the advertisement.

C. SCHENKMEYER,
No. 620 S. Fifth St.

$30.00.

Plaintiffs also filed an averment that the advertisement had been inserted for twelve months, and that defendant made the first quarterly payment, and then objected to the rest.

The affidavit of defence set forth that this was not such a writing as would entitle plaintiffs to judgment for want of a sufficient affidavit of defence, and that the defendant was induced to sign the instrument on the representation that he could order the said advertisement to be stopped at any time after the first quarter; that at the expiration of the first quarter he paid the money due, and ordered the advertisement stopped, which plaintiffs agreed to do.

R. C. Dale, for rule. The first point is disposed of by—

Fertig *v.* Maley, 5 WEEKLY NOTES, 133.
Sutton *v.* Base Ball Club, 4 WEEKLY NOTES, 90.

As to the second point, although the Courts have gone very far in admitting evidence of verbal statements made at the execution of a contract, it is submited that where the alleged parol agreement in terms directly contradicts the written agreement, it cannot be admitted. The true distinction seems to be that evidence of a collateral undertaking between the parties, upon the faith of which a written agreement is entered into, is admissible; but where the parol evidence in terms makes an entirely different contract from that which was written it is inadmissible.

Greenawalt *v.* Kohne, 4 WEEKLY NOTES, 497.
Martin *v.* Berens, 17 Sm. 459.

Alexander McIlwee, contra.

THE COURT. We fail to perceive the distinction pointed out by the counsel for the rule in this case. Here the written and verbal agreements were made at the same time, and, under the present law of the State, we are obliged to send the case to a jury.

Rule discharged.

Oral opinion by LUDLOW, P. J.

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WEEKLY NOTES OF CASES.

VOL. V.] *THURSDAY, APRIL* 25, 1878. [No. 13.

Supreme Court.

Jan., '77, 21. Jan. 21, 1878.

Creed v. The Pennsylvania R. R. Co.

Common carriers — Negligence — Liability of railway companies for injuries to passengers — Legal status of a passenger in a caboose car — Contributory negligence.

C. was riding in a caboose car in the rear of a mixed train of freight and passenger cars, contrary to the rules of the company, but with the knowledge and consent of the conductor of the train. An accident occurred which resulted in his death. There was no evidence of payment or non-payment of fare:

Held (reversing the judgment of the Court below), that riding in the caboose car was not negligence *per se*.

Held further, that a person not connected with a railway company, travelling by a passenger train, is presumably travelling as a passenger and for a consideration.

Per GORDON, J. The contrary presumption of being a trespasser is an affirmative proposition, the proof of which rests with the party alleging it.

Error to Common Pleas No. 1, of Philadelphia County.

Case, by Joanna Creed against the Pennsylvania R. R. Co., to recover damages for the death of her husband, caused by the defendants' negligence.

The defendants pleaded generally, not guilty; and specially, that there was no contract of carriage of the decedent, and that he was a trespasser in riding in the caboose car in violation of the rules of the company defendant.

Upon the trial (before PEIRCE, J.) the following facts appeared: Henry B. Creed, the husband of the plaintiff, from the death of whom the present action resulted, was a passenger on a mixed freight and passenger train of the defendant, running from Jersey City to Philadelphia, on the night of Nov. 5, 1874. The accident, which occurred at Schenck's Station, was caused by the misplacing of a switch, which had been changed from a stand to a ball or Wharton switch without the conductor's knowledge, and which the latter had turned, as he supposed, in order to run his train upon a side track to clear the main track for the passage of an express. The caboose car of the train which was backing to get on the side track, struck the end of the rail before the conductor had time to correct his mistake, ran off the track with three other cars, and upset, instantly killing Creed (who had at one time been a freight conductor of the defendants' road between Jersey City and Philadelphia), who was riding therein. The caboose was the hindmost car of the train, immediately in front of which were the passenger cars, so that there was ready and easy access from the latter to the former: the latter were the only coaches provided for passengers on the train. This caboose car was one set apart and especially designed for the use and occupancy of the employés engaged in running the train, and by the rules of the company no other persons were permitted to enter it. Creed boarded this train at Jersey City. It also appeared that though Brannig, the freight conductor, had the full and entire charge of the train from the time it left Newark, yet he had no authority to receive passengers or to examine or lift the tickets of such as remained on the train after passing that station, at which point the passenger conductor, who had charge of the cars from Jersey City, left the train. Whether Creed paid his fare or not to the passenger conductor is unknown, but nothing whatever was paid to Brannig. Brannig's duties did not lead him to inquire, and the passenger conductor was not called.

The Court in the general charge submitted the question of negligence to the jury, but reserved, *inter alia*, certain points relating to the question of contributory negligence, and whether the decedent was a passenger, in the following language:—

"Secondly. Is there any evidence in the case which leads you to believe that there was negligence on the part of the deceased? You have heard the testimony; there is no direct proof of negligence on his part, *unless it may be considered in connection with the position which he occupied in the cars as riding in the caboose.* Negligence is a mixed question of law and fact, it is said; and so far as the law of negligence connected with this case is concerned, as relates to his travelling in that caboose, I reserve that portion of the case for the consideration of the Court in banc, leaving the broad question, though, of negligence, both on the part of the company and on the part of the deceased, to your consideration.

"Then the further question has been made, as to whether the decedent was travelling as a passenger on this occasion. We have no evidence of the payment of money by him; but I think there is a reasonable and fair presumption, that if a person, not connected with the company, travels by a passenger train, he is travelling as a passenger, and for a consideration. I reserve, however, in the instruction which I give to you as to this presumption of law, the final determination of this question to the Court in banc."

Verdict for the plaintiff for $10,000.

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On Dec. 20, 1875, the defendants moved for a rule for a new trial, which was granted. The plaintiff subsequently moved for judgment on the reserved points, which rule was discharged and judgment entered for the defendants *non obstante veredicto*.

The plaintiff took this writ of error, assigning for error the entry of judgment in favor of the defendants upon the points reserved.

Pierce Archer, Jr. (with whom was *Lewis C. Cassidy*), for the plaintiff in error.

The decedent was rightfully in the caboose car, for he was there with the express permission of the conductor, who for the time being is the administrator of the rules of the company and may relax them at his discretion.

O'Donnell *v.* The Allegheny Valley R. R. Co., 9 Sm. 239.
Lackawanna & B. R. R. Co. *v.* Chenewith, 2 Id. 382.
Jacobus *v.* St. Paul & Chicago R. R. Co., 20 Minn. 125.
Carroll *v.* N. Y. & N. H. R. R. Co., 1 Duer, 571.
Dunn *v.* The Grand Trunk Railway Co., 58 Me. 187.
Washburn *v.* Nashville & Chattanooga R. R. Co., 3 Head's Rep. 638.

Caboose cars are constantly used by railway companies, under their rules, for the carriage of passengers for hire.

Lake Shore & Michigan Southern R. R. Co. *v.* Greenwood, 29 Sm. 373.
Indianapolis, B. & W. R. R. Co. *v.* Beaver, 41 Ind. 493.
Chicago, Burlington & Quincy R. R. Co. *v.* Hazzard, 26 Ill. 373.

But assuming that the decedent was a trespasser, the carrier who, instead of expelling a trespasser, permits him to remain on the carriage, enters into a contract of common carriage with the trespasser, who then stands, as far as negligence is concerned, on the same footing as the ordinary passenger.

Wilton *v.* Middlesex R. R. Co., 107 Mass. 108.
Wharton's Law of Negligence, 354.

The case of the Union Pacific R. R. Co. *v.* Nichols (8 Kansas, 505) cited on the other side is inapplicable because the plaintiff fraudulently represented himself as an express agent, and his fraud was a bar to his recovery. The case has been criticized and condemned as unsound in—

Wharton's Law of Negligence, 356, n. 3.
Redfield on Carriers, 386.

A passenger in a railroad car is presumed, *prima facie*, to be lawfully there, as a passenger having paid, or being liable when called upon to pay, his fare, and the onus is upon the carrier to prove affirmatively that he is a trespasser.

Penna. R. R. Co. *v.* Books, 7 Sm. 339.

Chapman Biddle, for defendant in error.

The issues raised by the pleadings are (1) whether the decedent was a passenger by contract, or (2) whether he was a passenger by presumption of law at the time of the occurrence of the accident which caused his death. There being no evidence on the first issue, the case is narrowed down to the decedent's legal status.

A passenger by presumption of law is one who takes his seat openly in a carriage in the place assigned to passengers generally (Wharton's Law of Negligence, § 354), is both ready and willing to pay his fare when called upon (R. R. *v.* Books, 7 P. F. Smith, 346), and consents to all the reasonable rules of the company for entering, occupying, and leaving the cars.

Penna. R. R. Co. *v.* Zebe, 9 Casey, 318.
Sullivan *v.* Reading R. R. Co., 6 Id. 235.

Railway companies are authorized to make all reasonable rules for the carriage of passengers, and a passenger is bound to inform himself of the rules of the company.

Dietrich *v.* Penna. R. R. Co., 21 Sm. 432.
Long *v.* N. Y. C. R. R. Co., 50 N. Y. 76.

person on a freight train in presumption of law is not a passenger, and no act of a conductor of a freight train will bind the company as to the carriage of passengers unless the company in some way assents.

Eaton *v.* Delaware & Lackawanna R. R. Co., 57 N. Y. 382.
Lygo *v.* Newbold, 9 Exch. 302.

The case of the Lake Shore & Michigan Southern R. R. Co. *v.* Greenwood (29 Sm. 373), cited on the other side, is clearly distinguishable, for the train was a "way freight" on which passengers were expressly permitted to ride, if they were provided with tickets before getting on.

The decedent therefore being clearly not a passenger by presumption of law, his status was either that of a trespasser or an interloper, and in neither is he entitled to recover.

Robertson *v.* N. Y. & Erie R. R. Co., 22 Barb. 91.
Union Pacific R. R. Co. *v.* Nichols, 8 Kansas, 505.

Feb. 11, 1878. THE COURT. From the evidence it appears that Henry Creed, the husband of the plaintiff, from the death of whom the present action has resulted, was a passenger on a mixed freight and passenger train of the defendant, running from Jersey City to Philadelphia. At the time of the accident, which resulted in his death, Creed was in a caboose, the hindmost car of the train, immediately in front of which were the passenger cars, so that there was ready and easy access from the latter to the former.

This caboose car was one set apart and especially designed for the use and occupancy of the employés engaged in running the train, and by the rules of the company no other persons were permitted to enter it.

It is quite clear from the evidence that Creed boarded this train at Jersey City, for Brannig, the freight conductor, says he saw him first on the afternoon of Nov. 5th, the day of the accident, in that city, and that he next noticed him at Newark in the lookout of the caboose; and, as

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this train left Jersey City in the evening, there can be but little doubt that the deceased got upon it at that point. It is also in evidence that, though Brannig had the full and entire charge of the train from the time it left Newark, yet he had no authority to receive passengers or to examine or lift the tickets of such as remained on the train after passing that station, at which point the passenger conductor, who had charge of the cars from Jersey City, left the train. Whether Creed paid his fare or not is unknown. Brannig's duties did not lead him to inquire, and the passenger conductor was not called. He may have had a ticket, or he may have been surreptitiously on the train through the connivance of the train hands, to whom he may have been known, as he formerly had a position on this road.

Presumably he was rightfully there; certainly he was there with the knowledge and acquiescence of one of the conductors, if not of both. Under this condition of affairs the learned Judge of the Court below charged the jury as follows:—

(1) "There is no direct proof of negligence on his (Creed's) part, unless it may be considered in connection with the position which he occupied in the cars as riding in the caboose."

This point was reserved.

(2) "We have no evidence of payment of money by him; but I think there is a reasonable and fair presumption, that if a person, not connected with the company, travels by a passenger train, he is travelling as a passenger and for a consideration."

This point was also reserved. The verdict was for the plaintiff; but the Court, without giving any opinion, entered judgment for the defendant, *non obstante veredicto*.

It follows, that the converse of one or both of the above propositions was finally held by the Court. That is to say, first, that there was a legal presumption of negligence on the part of Creed, arising from the fact of his being in a car, when the accident happened, not intended for the use of passengers.

Second. That, although travelling by a passenger train, and not connected with the company, the legal presumption is that he was not travelling as a passenger who paid his fare, or intended, in good faith, so to do. As legal propositions these cannot be sustained. No presumption of negligence can arise, either in fact or in law, from the fact of Creed's occupancy of the caboose, for there is no evidence that it was in any degree more unsafe than any other car in the train. It was, indeed, under all ordinary circumstances, the one that was the most safe: from collisions in front of the train it was protected by the cars which preceded it, and from dangers behind—being itself a lookout—it was guarded by the constant vigilance of the employés. That it proved to be the car first in danger, and the one most badly wrecked, argues nothing, since the carelessness of the company in introducing new switches having an action the reverse of the old ones, without notice to those in charge of its trains, could not be foreseen by any one, however prudent. Was Creed's position, under all ordinary circumstances, which a man of ordinary prudence ought to foresee and guard against, as safe as a seat in a passenger car?

If it was, and, as we have said, there is no evidence to the contrary, then negligence cannot be predicated of the fact of his being in the caboose. It is true, however, that Creed as a passenger ought not to have been in that car; not, indeed, because it was less safe than other parts of the train, but because forbidden by the rules of the company. It was a car provided for the use of the train hands and not for passengers, and from its very shape and character that fact must have been obvious to any one of common understanding and observation, much more to the deceased, who had himself been a freight conductor upon this very road. Presuming, then, the knowledge of the design of this car by the deceased—which, however, is a presumption of fact and not of law—was the company thereby released as to Creed from its duty as a common carrier?

This point was raised and determined in O'Donnell *v.* The Allegheny Valley Railroad Company (9 P. F. Smith, 239), in which case the Court below held that the baggage car was an improper place for passengers, whether the rule of the company against such use was communicated to them or not, and that one leaving his seat in the passenger coach and entering the baggage car was guilty of negligence. But this ruling was reversed. Mr. Justice AGNEW, delivering the opinion of the Court, observed: That whilst it is the undoubted right of a railroad company to prescribe reasonable rules for the regulation of those who travel on its cars, yet the conductor is the one who is charged with their administration, and his permission of, or acquiescence in, the use of the baggage car by a passenger exempts such passenger from all blame, and in case of accident to him, resulting from the negligence of the company, he may recover damages. In the case of the Lackawanna & Bloomsburg Railroad Co. *v.* Chenewith (2 P. F. Smith, 382) the plaintiff had obtained permission from the agents of the company to attach his freight car to a passenger train contrary to the rules of the company which were communicated to him, he, at the same time, agreeing "to run all risks."

Notwithstanding this it was held that the com-

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pany was liable for damages resulting to the plaintiff and his car from negligence in the running of the train. And this is reasonable; for, as was said in that case, the plaintiff's car was not unlawfully upon the road, and his engagement to be responsible for all risks did not embrace such as arose from the neglect of the defendants' employés.

The test for contributory negligence is found in the affirmative of the question, does that negligence contribute in any degree to the production of the injury complained of? If it does there can be no recovery; if it does not it is not to be considered. In this we are also supported by the case of Carrol *v.* The New York & New Haven Railroad Co. (1 Duer, 571. Opinion per BOSWORTH, J.).

At the time of the accident complained of, the plaintiff—a passenger—was in the post-office part of the baggage car; and though it was conceded that the position was more dangerous in case of collision than a seat in the passenger car, yet, being injured by a collision to which his position in no way contributed, it was held he was entitled to recover. So it was pertinently asked by Mr. Justice THOMPSON, in the case of the Railroad Co. *v.* Chenewith, above cited: "Why speculate about the supposed dangerous position assumed by the plaintiff, if no damage resulted from it?" "Was he to become an outlaw for assuming what proved to be no risk, and so forfeit his right when he was blameless?"

This doctrine applies with much force to the case in hand. Creed was in the caboose with the knowledge and assent of the freight conductor, if we may believe the testimony of that officer; hence he was not a trespasser. And suppose, knowing that this was not a proper place for passengers, he assumed all risks incident to that car by boarding it; what then? Was a carelessly located or misplaced switch an incident? Or did his position in the remotest degree contribute to the accident? If, however, it did not, why talk about the matter as though it were of importance? This doctrine is further illustrated by the case of Washburne *v.* The Nashville & Chattanooga Railroad Company (3 Head, Tenn., 638), wherein it was held that the fact that one is riding in the baggage car with the knowledge of the conductor, or is riding free, will not preclude him from a recovery for an injury arising from a collision, even though he might or would not have been injured had he remained in the passenger car.

A like decision was made by the Supreme Court of Minnesota, in the case of Jacobus *v.* The St. Paul & Chicago Railway Company (Leg. Intel., 1874, p. 277), holding that the fact that the passenger, at the time of the injury, was in the baggage car, contrary to a rule of the company, was not such contributory negligence as would bar his suit, and this though he may have been informed of the rule and may have persisted in remaining there in violation of it, if his position did not contribute to the accident which caused the injury. It is manifest, therefore, from reason and authority, that there was nothing in the first point for the Court to reserve; but having instructed the jury that there was no evidence of contributory negligence on the part of Creed, the matter should have been allowed so to stand.

As to the second point, it was certainly correct to say "that if a person not connected with the company travels by a passenger train, presumably he is travelling as a passenger and for a consideration." In other words, he is presumed to have paid his fare or to be ready to pay it when called upon.

To presume otherwise would be to presume that such an one was a trespasser; but this is an affirmative proposition, the proof of which rests upon the one alleging it. As the doctrine above stated is expressly ruled in the case of the Pennsylvania Railroad *v.* Books (7 P. F. Smith, per SHARSWOOD, J.), we need pursue this subject no further. The position occupied by the decedent in the caboose car may raise a question for the jury. Creed was upon a passenger train, and as we have seen, might lawfully occupy any part of that train, whether passenger car or caboose, if the conductor, knowing his position, did not object to it.

It follows that all presumptions favorable to the occupant of a passenger car attach in like manner to him, though occupying the caboose. It cannot be said that it was no part of the duty of the passenger conductor to visit this caboose, and that hence no presumption can arise that Creed paid fare to an officer whom he did not see and who did not see him, for it is the conductor's duty to visit every part of his train where passengers may lawfully be. We must presume he did his duty.

Whilst this is so, it does not follow, from the facts developed in this case, that a presumption *de jure* arises that Creed did pay his fare, or that he may not have been a trespasser. That he did not pay his fare to Brannig, the freight conductor, counts for nothing, for he was not authorized to receive it. This fact, however, does not prove that if he paid at all it must have been at Jersey City, at Newark, or between those places, whilst the train was in charge of the passenger conductor; and as he was first noticed by Brannig at Newark in the lookout part of the caboose, and as he may have occupied that position from Jersey City, it is quite possible, or even probable, that he may not have been seen by the passenger conductor, or if seen by that officer, may have

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been mistaken for one of the train hands, and so have avoided the payment of fare. There being this in the case, which ought to be passed upon by a jury, we send it back for re-trial, instead of entering judgment on the verdict.

Judgment reversed, and a *venire facias de novo* awarded.

Opinion by GORDON, J. SHARSWOOD and MERCUR, JJ., dissent.

May, '77, 43. May 16, 1877.

Bowers's Appeal.
Bowers's Estate.

Errors and appeals—Appeal from matter within the discretion of Court below—Orphans' Court—Discretionary power to set aside a sale for inadequacy of price—When refusal to set aside sale, not an abuse of discretion, although higher bid guaranteed.

The Supreme Court will not review an exercise of discretion by the Orphans' Court, unless the record shows palpable and gross abuse in its exercise.

Under an order of sale for the payment of debts, certain real estate of the decedent was sold for $1636. The heirs excepted to the confirmation of the sale, on the ground of inadequacy of price, and a responsible party entered a stipulation that on a resale he would bid at least $2000. The Orphans' Court dismissed the exceptions and confirmed the sale:

Held, that, although the action of the Court may not have been a wise exercise of discretion, yet the record showed no sufficient ground for its review by the Supreme Court.

Appeal from the Orphans' Court of Perry County.

The facts of this case were as follows: Upon the petition of James D. Willis, administrator *d. b. n.* of Findley Bowers, deceased, the Orphans' Court, in June, 1876, awarded an order of sale of certain real estate of decedent for the payment of debts, the amount of which exceeded $2500. For want of bidders, it became necessary to award an *alias* and three *pluries* orders of sale, under the last of which the premises were sold in January, 1877, to one Smith, for $1636. Exceptions to the confirmation of this sale were filed by a daughter and other heirs of the decedent, on the ground that the property was sold below its value, as was proved by the fact that the purchaser had immediately afterwards agreed to resell it for a greater sum. The exceptants filed a stipulation, signed by a responsible person, agreeing to bid at least $2000 for the property at a resale. The Court having dismissed the exceptions and confirmed the sale (without opinion filed), Alice M. Bowers, one of the exceptants, took this appeal, assigning as error the action of the Court. The appeal being from a matter admittedly within the discretion of the Court below, a special *allocatur* was obtained, in accordance with the ruling in Haslage's Appeal (1 Wr. 440).

W. N. Seibert, for appellant, argued that in the refusal of the Orphans' Court to set aside the sale, there was such want of prudence, wisdom, and equity, and such disregard of the rights of the heirs, as to work great and manifest wrong, and warrant a review of the exercise of their discretion. The "discretion" of a Court is not synonymous with option; there must be a "sound discretion in accordance with reason and law, and in the interest of fairness and the rights of all concerned." Here the heirs at law, upon whom the law cast the inheritance subject to the debts of the deceased, were divested of their title, and the estate rendered insolvent; the creditors were prejudiced, and obliged to take less than they might have obtained upon a resale; and the interest of the purchaser, who was a mere speculator, and who had no rights until the confirmation of the sale, was unduly promoted. The interest of the heirs should be primarily regarded in such cases, and it was their right, upon showing that a higher price could be obtained, to have the opportunity of a resale.

Hays's Appeal, 2 Sm. 449.
Brown's Appeal, 18 Id. 53, 56.
Haslage's Appeal, 1 Wr. 440.

W. A. Sponsler, for appellee.

The property was three times exposed to sale without obtaining any bidders, and every opportunity was given to obtain the highest price. To set aside a sale, fairly made, because the heirs are disappointed, or because a slight advance is offered, would be a discouragement to bidders at judicial sales, and contrary to the policy of the law. There was here no such "palpable and gross abuse of discretion" as will warrant a review of the action of the Orphans' Court.

Neeld's Appeal, 20 Sm. 113.
Helfenstein *v.* Leonard, 14 Wr. 462.
North Penna. R. R. Co. *v.* Davis & Leeds, 2 Cas. 238.
Hudson's Appeal, 3 Cas. 47.
Neil *v.* Tate, Id. 208.

May 28, 1877. THE COURT. The power of the Orphans' Court to set aside a sale of real estate made in pursuance of its own order, for inadequacy of price is well settled. It is frequently done when security is offered that the property will bring a higher price at a resale. This power has been recognized by this Court in Hays's Appeal (2 P. F. S. 449); Brown's Appeal (18 Id. 53). It by no means follows, however, that because the power exists, it is to be exercised in all cases. It is a matter that rests in the sound discretion of the Orphans' Court. As a general rule, this Court will not review an exercise of

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discretion, unless the record shows palpable and gross abuse. (North Penna. R. R. Co. *v.* Davis, 2 Ca. 238; Hudson's Appeal, 3 Ca. 47; Neil *v.* Tate, 3 Id. 208; Helfenstein *v.* Leonard, 14 Wright, 462; Neeld's Appeal, 20 P. F. S. 113.) In this case the real estate was sold for $1636. Prior to confirmation, it was ascertained that two thousand dollars could be had for it; in fact, a responsible bid for that amount was tendered in case of a resale. The Orphans' Court, notwithstanding this offer, confirmed the sale. We are not sure that this was a wise exercise of its discretion. The question for our consideration, however, is whether the confirmation of the sale was such a palpable abuse of its discretion as to justify our interference. We are not clear that it was. Repeated efforts had been made to sell this property without success, and it was sold at last upon a third *pluries* order. It was a sale for the payment of debts, and creditors who are delayed in the collection of their money are entitled to some consideration as well as heirs. It also appears from the record that even if the property were sold for $2000, the estate would not more than pay the debts, leaving nothing for the heirs, who are the parties seeking to have the sale set aside. The creditors, who are the only parties practically interested in the matter, make no complaint. If they prefer prompt payment of their money to a larger dividend accompanied with delay, the Court below did no wrong to the heirs-at-law in confirming the sale. There would be nothing for them in either event.

The decree is affirmed, and the appeal dismissed; the costs to be paid by the appellants.

Opinion by PAXSON, J.

Jan. '78, 134. Feb. 13, 1878.

Olmsted's Appeal.

Equity jurisdiction—Injunction, when not granted—Adequate remedy at law—Escheat—Act of Dec. 16, 1869.

There is no jurisdiction in equity to restrain by injunction proceedings in escheat, where the complainant can adequately protect his interests by traversing the inquisition, if it should be found in favor of the Commonwealth.

Appeal from the Common Pleas No. 3, of Philadelphia County.

William E. Naile filed a bill in equity against H. C. Olmsted and George N. Watson, setting forth that Henry Sell, being seized in fee of certain real estate, died on May 18, 1842, leaving a will dated November 2, 1841, with two codicils, dated respectively November 2, 1841, and April 29, 1842, which were duly admitted to probate. By the will he devised certain real estate to the plaintiff, as trustee, to pay the income to certain persons for life, and upon their death to sell the property and divide the proceeds among his surviving brothers and sisters, and the issue of any deceased. By the second codicil the testator revoked a portion of his will, as follows:—

"I hereby revoke and annul so much of my last will, dated November 2, 1841, as gives to my brother Charles, in common with my other brothers and sisters, a certain residue and remainder of the proceeds of the sale therein directed to be made of certain of my real estate, and I do hereby give the share of such proceeds thereby intended to be given to my brother Charles, to my adopted daughter, Cecelia Erben, now, and for several years past, living with me."

The decedent left surviving him seven brothers and sisters, who are still living, and the above mentioned Cecilia Erben, who died July 26, 1852, a minor, intestate, unmarried and without issue.

The last of those having a life interest in the real estate before referred to died October 20, 1876, and thereupon the plaintiff, as trustee, sold the real estate as directed in the will of Henry Sell, filed his account of the trust in the Orphans' Court, where it now remains unadjudicated. On May 9, 1877, the defendant, George N. Watson, filed with the Auditor-General an information alleging the death of Cecelia Erben, intestate and without known kindred. Upon this information a commission issued to the defendant, Henry C. Olmsted, as Deputy Escheator, under which he was about to proceed according to law. The bill charged that the Commonwealth had no right whatever to the said estate as escheated: (1) Because more than twenty-one years elapsed between the death of Cecilia Erben and the beginning of the proceedings for an escheat. (2) Because there is no adequate provision made by law for the escheat of the said property, the same being an interest held in trust; and prayed an injunction to restrain the defendants from further proceeding in the escheat.

The defendants in their answer admitted the facts as alleged in the bill, but denied the right of the plaintiff to the relief prayed for: (1) Because, although more than twenty-one years elapsed between the death of the said Cecilia Erben and the commencement of any proceeding or inquisition for an escheat, the interest of the said Cecilia Erben in the property described in the bill did not vest in her until the twentieth day of October, A. D. 1876. (2) Because it appears from the bill that the interest of the said Cecilia Erben, upon the twentieth day of October, 1876, became a vested interest, freed and discharged from all trusts whatsoever. (3) That by the Act of Assembly of September 29, 1787,

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and other acts relating to escheats, adequate provision is made for the escheat of the said interest of the said Cecilia Erben, in the property described in the bill.

After hearing upon bill and answer the Court below continued the injunction, LUDLOW, P. J., delivering the following opinion:—

"It seems to us that the proceedings to escheat the estate of Cecilia Erben are premature. The trustee under the will of Henry Sell, deceased, has filed his account in the Orphans' Court of this county, and the said account now remains in that tribunal subject to its jurisdiction and decree; it is impossible for us now to say what distribution that tribunal may make of a portion of the fund now in the hands of this trustee; indeed we do not know what the condition of the fund is, or what course may be taken in relation to the final distribution of the whole estate.

"Apart from the difficulties pointed out by the Court in West's appeal (14 P. F. S. 195), where a trust estate does in fact escheat, we prefer to restrain the defendants in this bill until at least the cause has been disposed of by the Orphans' Court of the county.

"Injunction continued until further order of the Court." (Reported 4 WEEKLY NOTES, 558.)

The defendants took this appeal, assigning for error the decree granting the injunction.

R. C. Dale (*H. C. Olmsted* with him), for the appellants.

Admitting that the Commonwealth is not entitled to this fund by an escheat, it does not follow that an injunction can properly be granted restraining the defendants from further proceedings to establish the escheat. The plaintiff has an adequate protection. He can traverse the inquisition. The finding of the inquest in favor of the Commonwealth will not conclude the plaintiff from contesting any subsequent proceeding taken on behalf of the State to obtain the fund from him, it will only place the Commonwealth in a position where she will be entitled to be a party to proceedings to test her right to this particular fund.

As the finding of the inquest in favor of the Commonwealth can do the trustee no irreparable harm, he has no equity upon which to ask for this injunction. This case is distinguishable from West's Appeal (14 Sm. 186). There the plaintiff's equity consisted in the fact that the proceedings for an escheat were calculated to injure the credit of the Savings Fund with the depositors, a class of persons easily infected with a panic, and that thereby irreparable injury might ensue. This was the equity upon which that case rested, and it was a good ground of an injunction in a case where it was clear that the Commonwealth had no right to an escheat.

Alfred I. Phillips (*E. Coppée Mitchell* with him), for the appellees, relied on—

The Act of 16 Dec. 1869 (Purd. Dig. 616, pl. 31).*
West's Appeal, 14 Sm. 186.
West *v.* Penna., 14 Sm. 195.

March 18, 1878. THE COURT. This was heard at first as an appeal from a preliminary injunction in the Court below, and we sustained the appeal and ordered the injunction to be dissolved. Since then the parties have agreed by writing filed that the decree below was a decree upon final hearing upon bill and answer, and we are requested to make a final disposition of the case.

We are of the opinion that the complainant below showed no ground for the interposition of a court of equity to enjoin the proceeding of the Commonwealth to have an escheat declared of the estate of Cecilia Erben. Admitting all that is alleged, that she did not die seized or possessed of any estate, or that if she did the lapse of more than twenty-one years since her death bars the proceeding under the Act of December 16, 1869 (Pamph. L., 1870, p. 1372),—there is nothing in all this to confer jurisdiction upon a court of equity. The complainant invokes no special equity; he alleges no irreparable damage.

Upon the same principle as contended for in this case, every suitor in a court of common law could be enjoined, and every case at the option of the defendant drawn into a court of equity. If the escheat should be found by the inquest, every question here presented could be decided upon a traverse.

West's Appeal (14 P. F. Smith, 186) and West *v.* Penn. Co. (Ibid. 195) were entirely different. It was there held that the funds attempted to be reached by the proceedings were not within the purview of the Act of Assembly relating to escheats, and that the proceedings were illegal both in their object and mode. Besides, danger of irreparable damage to both the institutions interested was manifest.

Decree reversed, and now bill dismissed with costs.

Opinion by SHARSWOOD, J. WOODWARD, J., absent.

* This Act provides: "Whensoever property hath or shall escheat to the Commonwealth for defect of known heirs of the owner last seized or possessed thereof, and there has been no proceeding or inquisition had as and for an escheat for the period of twenty-one years after the decease of the owner, the Commonwealth shall be debarred from claiming the same as escheated, and that whether such period has already elapsed or whensoever hereafter it shall become fully lapsed."

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July, '77, 124, 125. Jan. 17, '78.

Kohler v. Mountney.

Mechanic's lien—Right to strike off when not filed within six months from the completion of the work—Addition of small items after a long period will not revive a dead claim.

Where a bill of particulars, filed with a mechanic's claim, shows an interval of nearly two years between the times of the bulk of materials furnished and a new item of small amount, furnished within the six months, it is evidently an attempt to evade the mechanic's lien law, and the dead claim will not be revived thereby.

A bill of particulars showed a large amount of marble furnished on June 18, 1875; the next item being marble scraper stone furnished April 6, 1877. The claim was filed May 9, 1877:

Held, that the lien was properly stricken off.

Error to the Common Pleas No. 4, of Philadelphia County.

Scire facias sur mechanic's lien filed by Jacob Kohler to use, etc., against Owen Mountney, owner, etc.

The claim was filed May 9, 1877, and set forth marble work done and materials furnished "continuously" to several contiguous houses.

The bill of particulars showed items and dates as follows:—

"PHILA., 1877.

"Owen Mountney,

To Jacob Kohler, Dr.

"1875.		
June 18.	To 9 door-sills, 3 ft. 2 in. by 8 in.	$54 00
	" 2 column blocks,	17 50
	" 9 battlement stone,	18 00
	" 2 flight of steps, 2 steps and platform each,	60 00
	" 4 store door-sills, 5 ft.,	50 00
	" 2 platforms, 5 ft. 4 in.,	50 00
"1877.		
April 6.	To 9 scraper stone,	13 50
		$263 00

JACOB KOHLER."

The defendants took a rule to strike off the lien, on the ground that the bill of particulars did not show a continuance of the furnishing of materials up to six months prior to the filing of the claim, and because an interval of more than six months appeared between the furnishing of the scraper stones and the other materials.

The Court made the rule absolute (reported 4 WEEKLY NOTES, 288).

The plaintiff took this writ, assigning for error the action of the Court below in striking off the lien.

Lucas Hirst, for the plaintiff in error.

There was no limit as to the time in which the materials should be furnished and the work completed; the scraper stones were a part of the steps, which could not be said to be completed without them. All the items formed parts of one continuous contract.

Holden *v.* Winslow, 6 H. 160.

It certainly was a question solely for a jury to determine, whether, under the evidence, the claim was filed in time or not.

Driesbach *v.* Keller, 2 Barr, 77.

The Church *v.* Trout, 4 Casey, 153.

J. Howard Gendell, contra.

A material man, after the lapse of nearly two years from the time of furnishing the materials, cannot recover his lost right to a lien by supplying a scraper stone, which forms no part of the house, and for which, if furnished separately, no claim could be sustained.

Yearsley *v.* Flanigen, 10 H. 489.

In the cases cited by the plaintiff in error it appeared in evidence that all the materials were furnished in pursuance of an entire contract. No such contract is shown here, but it appears upon the face of the bill of particulars that these scraper stones were not furnished "in the *ordinary* progress of the work."

Singerly *v.* Doerr, 12 Sm. 9.

Jan. 28, 1878. THE COURT. There is no sufficient reason to reverse the action of the Court below in striking off this claim. It was an evident attempt on the part of the plaintiff to evade the directions of the mechanic's lien law, by tying a long-defunct claim to a small new item, and thus to infuse life into the dead body of the claim.

Proceedings affirmed.

PER CURIAM.

Oct. & Nov. '76, 58. Nov. 21, 1877.

Wolford and Wife v. Herrington.

Trustee ex maleficio—What will constitute—Purchase of land under parol agreement for one having an interest therein—Denial of the confidence thus created.

Where one having a *bona fide* claim, whether valid or not, to a piece of land is induced to confide in the verbal agreement of another that he will purchase the land at sheriff's sale for the benefit of the former, and in consequence the latter is allowed to obtain the legal title to the same, his denial of the confidence is such a fraud as will make him a trustee ex maleficio.

W.'s land was about to be sold at sheriff's sale; his wife held an unrecorded deed to the same, which she had obtained in good faith, with her own money, and was desirous to save the land from going out of possession of the family. One H., knowing of this deed, advised her not to rely on it, and volunteered to attend the sheriff's sale, bid in the land for her, and give her time to repay the amount bid; and that he would put this agreement in writing as soon as he got the sheriff's deed. H. bought the property, but refused to comply with his agreement:

Held, that he was trustee *ex maleficio* for the wife.

The principles laid down in Wolford *v.* Herrington (24

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Sm. 311), that a party thus purchasing would hold the land as trustee *ex maleficio*, although the wife had no interest in the land, reconsidered and overruled.

Error to the Common Pleas of Crawford County.

Ejectment, brought by John Wolford and Rachael Wolford, his wife, in right of said Rachael, against DeWitt C. Herrington, for twenty-five acres of land.

The plaintiffs, Wolford and wife, had originally been in possession of the premises in dispute. In pursuance of a verdict in a former ejectment (referred to below), the present defendant, DeWitt C. Herrington, obtained possession, whereupon this action of ejectment was brought against him by Wolford and wife.

The plaintiffs claimed title on the ground that Edward Herrington, deceased, through whom the defendant claimed, was a trustee *ex maleficio* for the plaintiff, Mrs. Wolford, of the premises in dispute. The defendant claimed title as one of the heirs—and by deed from the remaining heirs—of the said Edward Herrington, deceased, whose title was derived by a sheriff's deed to him, acknowledged Sept. 20, 1867; the premises having been taken in execution and sold as the property of John Wolford under a judgment, in favor of a stranger, against the said John Wolford and another. Wolford's title had been derived by a conveyance to him of the land from one Joseph Muse, but there being some doubt as to the title thereby conveyed, Mrs. Wolford, subsequently to the death of Joseph Muse, purchased the premises again from Joseph Muse's son, P. K. Muse, paying a valuable consideration therefor out of her separate estate, and taking a deed from P. K. Muse, which deed, however, she failed to record.

The evidence showed that two days before the sheriff's sale, in 1867, Edward Herrington went to the house of Wolford and advised him and his wife not to rely on Mrs. Wolford's title, but to allow him to purchase in the land for Mrs. Wolford, and offered to give her two years or longer to redeem the land. To this Mrs. Wolford objected, saying she had a deed for the land, and if she had to borrow the money she could procure it of Abijah Randolf. Herrington replied that he was willing to give longer time for the repayment of the money than Randolf, and, as a result, his proposition was finally acceded to, the agreement to be put in writing before the sale. The agreement was drawn up, but Herrington said he would wait till after the sale and sign it then. After the sale he again postponed signing till after the deed was acknowledged. Several times afterwards he was requested to sign the agreement, but refused. The land was purchased by Herrington for $650. The value of the land at that time one witness testified to be $1500. Interest was offered to Herrington from time to time, but he refused to accept it unless as rent. Within the two years after the sale, the principal and interest were tendered Herrington, who said he would accept it if they paid his lawyer $50 for services, but this they refused. In October, 1871, Edward Herrington died, leaving the property in this situation. In October, 1872, his son, DeWitt C. Herrington, having acquired the interests of the other heirs, brought an action of ejectment against John Wolford for the land in question. At the trial (before LOWRIE, P. J.), the above facts were given in evidence, but the deed to Mrs. Wolford was not produced. The Court being of opinion that the evidence was insufficient to create a title in Mrs. Wolford, directed the jury to find for the plaintiff. Verdict and judgment for plaintiff accordingly.

Defendant took a writ of error, assigning for error this instruction of the Court, and the case was argued at October and November Term, 1873, before READ, C. J., AGNEW, SHARSWOOD, WILLIAMS, and MERCUR, JJ. The opinion of the Court was delivered Oct. 22, 1873, by SHARSWOOD, J., AGNEW and WILLIAMS, JJ., dissenting (24 Sm. 313). It was there held, under the authority of Beegle *v.* Wentz (5 Sm. 369), and Boynton *v.* Housler (23 Sm. 453), that as Mrs. Wolford had a claim to the land in her own right by an unrecorded deed—whether it conveyed a good title or not—Herrington was, under the facts in the case, converted into a trustee *ex maleficio*. It was further held that the testimony in the case was sufficient, if believed, to make Herrington a trustee *ex maleficio*, independent of any title in the land in Mrs. Wolford. The judgment of the Court below was accordingly reversed, and a *venire facias de novo* awarded. It was further suggested in the opinion, that on a new trial Mrs. Wolford be also made defendant.

On a second trial, Mrs. Wolford being joined with her husband as co-defendant, the Court (LOWRIE, P. J.), made substantially the same ruling as before, and the result was, as before, a verdict and judgment for the plaintiff. The case went again to the Supreme Court (October and November Term, 1874, No. 159, not reported) on substantially the same assignment of error, and was argued before AGNEW, C. J., SHARSWOOD, WILLIAMS, MERCUR, and GORDON, JJ. On Nov. 19, 1874, this Court filed the following judgment in the case: "The Judges being equally divided in opinion upon this record, the judgment of the Court below stands affirmed. PER CURIAM."*

By virtue of this judgment, Herrington obtained possession of the property in dispute, and in March, 1875, plaintiffs brought this suit. At

* It would seem from the Court minutes that WILLIAMS, J., though present at the argument of this case, was not present at the consultation.

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this trial (before LOWRIE, P. J.), in addition to the facts given in evidence at the former trials, there was put in evidence the deed of P. K. Muse to Rachael Wolford, dated Dec. 15, 1862, and conveying to her the property in question for the consideration of $450. Mrs. Wolford testified that she obtained the deed from P. K. Muse about the time of his father's death; that the $450 was paid by herself with money given her by her friends for that purpose; and that her object in getting the deed was to make the property secure to them, as her husband did not appear to have obtained a good title.

Plaintiff's counsel presented, *inter alia*, the following points: (1) "That if the jury find that Mrs. Wolford had a deed from P. K. Muse for the land in question, and that she was induced to confide in the verbal promises and agreement of Edward Herrington—that he would attend the sheriff's sale and bid off the land for her—and that in consequence he was allowed to obtain the legal title to the same, his denial of the confidence is such a fraud as will make him a trustee *ex maleficio*. *Refused.*

(2) "That if the jury find that Mrs. Wolford had an unrecorded deed for the land in question, and that on the eve of the sheriff's sale Herrington—knowing of the deed—told her that her title was doubtful, and then and there promised and agreed with her and her husband that he would attend the sheriff's sale and buy the land for her, and that he would execute a writing before the property was struck off, declaring that he bought it for her, and giving her time for the redemption thereof, and that in consequence of such agreement he was allowed to obtain the legal title to the same, his refusal thereafter to comply was such a fraud as would make him a trustee *ex maleficio*. *Refused.*

(3) "That if the jury find that Mrs. Wolford had a claim to the land in question, whether valid or not, and that Edward Herrington did agree with her and her husband to attend the sheiriff's sale for them and bid off the land for her, and give her time to repay him the amount bid for the same, and that this agreement was to be put in writing by Herrington before the property was bid off, and that Herrington avoided giving the writing before the biddings, by promising that he would do so after the sale and confirmation of the sheriff's deed to him, his refusal to comply thereafter with said agreement would be such a fraud as would make him a trustee *ex maleficio*."

Answer: "Affirmed, but not so if Mrs. Wolford knew that her deed was good for nothing and declined to record it."

(6) "If the jury believe that Mrs. Wolford had an unrecorded claim to the land, and was seeking friends to enable her to save it from the effects of the sheriff's sale, and then Edward Herrington volunteered to buy it in for her, and transfer the title to her in one, two, or three years, and give her a writing to this effect as soon as he got the sheriff's deed, and that was agreed to by her, and he did so buy it in, he thereby became charged to hold the land as trustee for her, and is bound to convey it to her on being refunded his money and interest within the time agreed upon, or in a reasonable time afterwards. If you find the facts to be so, and that the plaintiff tendered the amount due to Herrington on his purchase, you will find for the plaintiff, the said tender having been followed up by bringing the money into Court."

Answer: "Affirmed, with the qualification already stated to you. But such an arrangement with a mere stranger, having no color of right, would not be binding."

Verdict and judgment for defendant. Plaintiff took this writ, assigning for error, *inter alia*, the answers to the points given above.

Wm. R. Bole, for plaintiff in error.

We contend that the facts shown in this case bring it within the rules laid down in—

Beegle *v.* Wentz, 5 Sm. 369.
Boynton *v.* Housler, 23 Sm. 453.

See also the opinion of this Court in—

Wolford *v.* Herrington, 24 Sm. 311.

D. C. McCoy (with him *M. P. Davis*), contra.

The evidence shows that Mrs. Wolford's deed gave her no title in the property, but that it was in her husband, and she was in every sense a stranger to the title.

[SHARSWOOD, J. If Mrs. Wolford thought she had a title, she had a right to get another to bid in the property to protect the title she thought she had.]

The case is at most but a violation of a parol contract concerning land, made with one who had no interest in it, and which had no consideration to support it. It is further void, being with a married woman. That the purchaser of lands would not under the circumstances of this case become a trustee, see—

Barnet *v.* Dougherty, 8 Casey, 371.
Kellum *v.* Smith, 9 Casey, 158.
Williard *v.* Williard, 6 Sm. 119.
Jackman *v.* Ringland, 4 W. & S. 148.

Jan. 7, 1878. THE COURT. When this cause was in this Court before on a former ejectment (24 P. F. Smith, 311), there was no evidence of Mrs. Wolford's title to the lands except her own parol testimony. Her deed was not in evidence. The majority of the Court thought, however, that there was evidence which ought to have gone to the jury that she had a *bona fide* claim—whether her title was good or bad—and if she had such a claim the case fell within the principle of Beegle *v.* Wentz (5 P. F. Smith, 369) and Boynton *v.* Housler (23 Ibid. 453).

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All this, in the opinion filed in that case, was certainly extrajudicial, not necessarily involved in the decision; and I will frankly acknowledge that subsequent examination and reflection have satisfied me that I was in error in the position that Herrington would have been a trustee for Mrs. Wolford, even if she had no interest. I was induced to form this conclusion by a course of reasoning which I now think fallacious—that because a long line of cases had settled that where, at the execution of a writing, the party to whom it was delivered has promised to execute another, and on the faith of which the first was executed, the refusal subsequently to perform the promise was a fraud, which would let in parol evidence of the transaction to reform the writing.

I inferred that it would also be a fraud, under the statute of frauds and perjuries, and make the party delinquent a trustee *ex maleficio*. But these cases are inapplicable. Had Mrs. Wolford been an entire stranger to the title or the defendant in the execution as whose property the land was about to be sold at sheriff's sale, then the determinations in Jackman *v.* Ringland (4 W. & S. 149), Barnet *v.* Dougherty (8 Casey, 371), Kellum *v.* Smith (9 Ibid. 158), Robertson *v.* Robertson 9 Watts, 32), ruled the case.

Upon the trial of this cause in the Court below, the deed P. K. Muse and wife to Mrs. Wolford, dated Dec. 15, 1862, was in evidence. It expressed a consideration of $450, and Mrs. Wolford testified that she had paid that sum with her own money, which had been given to her by her parents and friends for the purpose. She was living on the land with her husband, who had a prior and perhaps better title. There was certainly sufficient evidence for the jury that she had a *bona fide* claim to the land. The cases of Beegle *v.* Wentz and Boynton *v.* Housler, *supra*, settle that, where one having any interest (except the defendant in the execution) is induced to confide in the verbal promise of another that he will purchase for the benefit of the former at a sheriff's sale, and in pursuance of this allows him to become the holder of the legal title, a subsequent denial by the latter is such a fraud as will convert the purchaser into a trustee *ex maleficio*. It is true that in these cases the interest of the *cestui que trust* was not questioned. But while it is clear that a mere pretended claim trumped up for the occasion would be of no avail, it is different where the claim is *bona fide*. Five years before the transaction in question, Mrs. Wolford, with the advice and assistance of her friends, had bought an outstanding title to her husband's land, which was her and his home. She was anxious to protect it, and for that purpose to procure some friend to purchase her husband's interest at the sheriff's sale.

The defendant offered to advance the money, to buy the property, and hold it in trust for her. She had a friend, she said, who would let her have the money for one year. Herrington said he would allow her two years in which to repay him. She spoke of having a writing drawn, setting forth the agreement. He said he would have his lawyer draw one and send it to her. The writing was drawn. Wightman, a friend of Mrs. Wolford, asked him at the sale to sign it. He said: "Wait till I bid it off, then I will sign it." After the sale he was again asked for the writing. He said: "Wait till I get my deed, then I will sign it." After he got the deed he was asked several times to do so, but refused. This was the testimony of Wightman, and it was confirmed by other witnesses.

The plaintiff was entitled to an unqualified affirmance of the first, second, third, and sixth points. There was no evidence that the claim of Mrs. Wolford was not *bona fide*, or that she knew that her deed was good for nothing, and therefore did not record it. Herrington told her it would cost her some trouble, and she had better let him bid it off. All that can be inferred is, that she thought it doubtful. Had she considered it a perfectly good title independent of her husband's, there would have been no necessity of protecting herself by having the property bid off for her. Even if she knew that the title was bad at the time of the sheriff's sale, that would not show that she had not purchased it in good faith five years before.

Judgment reversed, and *venire facias de novo* awarded.

Opinion by SHARSWOOD, J.

Jan. '78, 167. Feb. 14, 1878.

Bagley et al. v. The Atlantic, Mississippi, and Ohio Railroad Co., defendants, and The Pennsylvania Railroad Co., garnishees.

Foreign attachment—Comity between the Courts of different States—Appointment of receiver in another State recognized as against attaching creditor who is a citizen of the same State.

In pursuance of the comity established between the different States, the Courts of this State will recognize the appointment of a receiver in another State, unless his claims come in conflict with the rights of our own citizens.

B. and R., citizens and residents of Virginia, by process of foreign attachment issued in Pennsylvania, attached certain property of a railroad company located and doing business in Virginia. Shortly prior to this attachment, the railroad, by decree of a Virginia Court, had passed into the hands of receivers, who claimed the fund attached as against the attaching creditors:

Held, that the receivers were entitled to the fund, and

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that the equitable transfer to them of their debt in Virginia was binding upon B. and R. in Pennsylvania.

Per AGNEW, C. J. The attaching creditors have no right, after the appointment of a receiver by a Court within their own State, binding upon them there, to attempt to avoid its effect by escaping from its jurisdiction, and coming here to ask us to infringe the comity we owe to the acts of their own Courts within their jurisdiction. Instead of comity this would be unfriendliness, for they ask us to aid them in a violation of their own law.

Error to the Common Pleas No. 3, of Philadelphia County.

Foreign attachment, by Bagley and Rogers against the Atlantic, Mississippi, and Ohio Railroad Company, defendants, and the Pennsylvania Railroad Company, garnishees.

Case stated, substantially as follows:—

Upon June 5th, 1876, a writ of foreign attachment was issued by the plaintiffs, citizens of the State of Virginia, with an indorsed order to attach the goods, chattels, etc., of the defendants, a corporation of the State of Virginia, and operating a railroad in that State, in the hands of the Philadelphia, Wilmington, and Baltimore Railroad Company.

Upon June 10th, 1876, the indorsement on the writ of foreign attachment was amended so as to direct the sheriff to also attach the estate, rights, credits, and effects of the defendant in the hands of the Pennsylvania Railroad Company.

Upon June 12th, 1876, the writ was served upon the Pennsylvania Railroad Company. Judgment was afterwards duly entered against the defendant company for want of an affidavit of defence, and damages assessed at $855.07, as of October 7th, 1876. A *scire facias* was issued against the Pennsylvania Railroad Company as garnishees, and a plea of *nulla bona* filed thereto.

Upon March 13th, 1876, a bill in equity was filed in the Circuit Court of the United States for the Eastern District of Virginia, at Richmond, Virginia, against the said Atlantic, Mississippi, and Ohio Railroad Company, by Francis Skiddy and others, trustees, praying for the foreclosure of a certain mortgage theretofore made by said railroad company to said trustees, and for a receiver of the mortgaged premises.

Upon June 6th, 1876, an order was made in said cause, appointing receivers. The bond ordered to be entered by the receivers was filed upon June 12th, 1876. The receivers took actual possession of the railroad upon and from June 13th, 1876.

The defendant company and the Pennsylvania Railroad Company had had business transactions together, arising out of the sales by each, upon account of the other, of through passenger tickets over the roads of the two companies and others connecting the same. A settlement of the accounts between said companies of this business showed that upon June 6th, 1876, there was in the hands of the Pennsylvania Railroad Company a net balance of $1154.89 due by it to said Atlantic, Mississippi, and Ohio Railroad Company.

The said receivers have claimed from the Pennsylvania Railroad Company the above amount, as part of the property of the Atlantic, Mississippi, and Ohio Railroad Company, of which they are receivers.

If the Court, upon this statement, shall be of the opinion that the plaintiffs are entitled to recover, judgment shall be entered in their favor for $855.07, with interest from October 7th, 1876, otherwise judgment to be entered for the garnishees.

The Court gave the following opinion upon the case stated:—

"Under the facts stated in this record, we adhere to our opinion, expressed in Bagley *v.* The Railroad (3 WEEKLY NOTES, 457). This is, in our opinion, a case in which we ought not to exercise our discretion in favor of the attaching creditor The general principles stated by the Court in Mulliken *v.* Aughinbaugh (1 Pa. 117) seem to direct our judgment to this conclusion."

Judgment for garnishees.

The plaintiffs took this writ, assigning for error the judgment of the Court.

Hon. F. C. Brewster (*F. E. Brewster* with him), for the plaintiffs in error.

The receiver being simply the officer of the Court that appointed him, had no extra-territorial jurisdiction, and his claim to the fund in this State was not good as against the attaching creditors.

High on Receivers, § 47.
Hoyt *v.* Thompson, 5 N. Y. 320.
Willitts *v.* Waite, 25 N. Y. 577.
Hunt *v.* Columbian Insurance Co., 55 Maine, 290.
Booth *v.* Clark, 17 How. 338.

The plaintiffs in error having invoked the aid of a Court of this State, should be considered *quoad hoc* citizens of this State, as against the receiver, who has no status whatever, and should have all the consideration shown to our own citizens. The case of Warren *v.* The Union Bank (7 Phila. 156) is precisely similar to the present.

Thomas Hart, Jr., and *Chapman Biddle*, contra.

The authorities abundantly show that the appointment of a receiver in one State is now recognized, as a matter of comity, in others, unless his claims come in conflict with those of citizens of the State in which the proceedings arise.

High on Receivers, § 47, conclusion.
Runk *v.* St. John, 29 Barb. 585.

No question of the protection of citizens of Pennsylvania arises here. The case is the bare one of an attempt by a citizen of Virginia to reach, through the attachment laws of this State,

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a fund which had theretofore passed to a receiver appointed in his own State. Mulliken *v.* Aughinbaugh (1 Penna. 117) is in point. Also Bentley *v.* Whittemore (4 C. E. Green, 462), Burlock *v.* Taylor (16 Pick. 335), and others.

In the cases cited by the other side, the plaintiffs were either citizens of the State in which suit was brought, or of a State other than that of the receiver.

Feb. 25, 1878. THE COURT. It is true that the plaintiffs below have a right to sue in this State, just as one of our own citizens might, as we held in Morgan *v.* Neville (24 P. F. Smith, 52). But while suit for the debt may be maintained, it is not a legal consequence that the extra-territorial act of an appointment of a receiver in Virginia must be rejected as a defence against these plaintiffs. Such an act, like an assignment by operation of extra-territorial law, rests upon the doctrine of comity, to which our State Courts lend their aid when not in conflict with the rights of our own citizens.

But this comity should not be exercised where the Virginia Court would not itself justify its enforcement. Now, it is clear that as to these plaintiffs, who were citizens of Virginia, the appointment of a receiver was not extra-territorial, but was an act binding on them which the Virginia Court would enforce as to them, had their action been brought in Virginia. Then, certainly, they have no right, after the appointment of a receiver by a Court within their own State, binding on them there, to attempt to avoid its effect by escaping from its jurisdiction and coming here to ask us to infringe the comity we owe to the acts of their own Courts within their jurisdiction. Instead of comity, this would be unfriendliness; for they ask us to aid them in a violation of their own law. Our own citizens would be protected against the extra-territorial act in a proper case, because they are not bound by it; and our assistance given to the extra-territorial act resting only in comity, would not be given at the expense of injustice to them. The case does not fall within the 1st clause, 2d sect., of the 4th Article of the Constitution of the United States, that "The citizens of each State shall be entitled to all privileges and immunities of citizens of the several States." As to a citizen of Virginia, the appointment of a receiver in Virginia, binding on him there, is not set aside by this clause of the Constitution. The equitable transfer of the debt there is binding on him here.

Judgment affirmed.

Opinion by AGNEW, C. J.

May, '77, 268. May 30, 1877.

Huntingdon and Broad Top Mountain R. R. Co. v. Decker.

Railroad company—Master and servant—Liability of master to an employé for the negligence of a fellow-employé—Negligence—Evidence of—Agency—Evidence of—How far the action of an agent in not exercising due care in employing proper workmen will bind the employer—Who may sue under the Act of April 26, 1855—Right of a widow alone, there being children, to sue for and recover full damages—Acts of April 15, 1851, and April 26, 1855—Construction thereof.

A railroad company is bound to use due care in selecting its servants, and to discharge those who are incompetent. The knowledge of the superintendent, intrusted with the management of the road and the power of employing and discharging hands, of the incompetency of an employé, is notice to the company. The company is therefore responsible to an employé for the negligence of a fellow-employé who had been employed by its superintendent with a knowledge of his incompetency.

On Nov. 1, 1872, a collision occurred between a coal and a freight train on the Huntingdon and Broad Top Mountain R. R. Co., resulting in the death of the engineer of the coal train and of the conductor of the freight train. In an action by the widow of the engineer of the coal train against the company to recover damages for the death of her husband, on the ground that the accident happened solely in consequence of the negligence of the conductor of the freight train:

Held, that notwithstanding there were printed rules, regulations, and schedules of the company with the name of the superintendent on them, parol evidence to show that one M. was the superintendent authorized by the company to employ and discharge men was properly admitted.

Held further, that evidence to show that the freight engineer was a man of intemperate habits, that he was drunk on the day of the collision, that the accident was the result of negligence occasioned by his reckless and intemperate habits, and that these habits were known to the superintendent who had employed him, was properly admitted.

Held further, that in such a case the knowledge of the superintendent was the knowledge of the company, and that they were consequently liable.

Held further, that the fact that the action was brought by the widow alone did not prevent her recovering the full amount of damages allowed by the Act of April 4, 1868 (Purd. Dig. 1094), and that the Act of April 26, 1855 (Id.), did not require that the action should be brought by every one entitled to recover damages, but only that their names should be mentioned in the declaration.

Penna. Railroad Co. *v.* Books, 7 Sm. 343, approved.

Error to the Common Pleas of Huntingdon County.

Case, by Mary Decker, widow of Adolphus Decker, against the Huntingdon and Broad Top Railroad Company, for negligently causing the death of her husband. Plea, not guilty.

The case came before the Supreme Court on

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a former writ of error, when a *v. f. d. n.* was awarded. (Reported 3 WEEKLY NOTES, 121.) Upon the second trial (before DEAN, P. J.) the following facts appeared:—

Adolphus Decker was in the employ of the defendant as a locomotive engineer. On the first of November, 1872, he had orders to run what was known as Coal Train No. 2 from Huntingdon south to Mount Dallas, a distance of forty-five miles. This train was a regular train, running on schedule time, and was due at a place called Piper's Run at 1.54 P. M. An irregular train, known as the Local Freight, of which one Jacob Bowser was the conductor, ran between Mount Dallas and points on the upper end of the road. This train had no schedule time for points between its place of starting and destination; it would run by orders from the superintendent transmitted to the different telegraph stations along the road, if any such orders were required. Its standing orders, however, were to keep out of the way of regular trains. These regulations were necessary, as it was only a single-track road. On the day above mentioned this train ran south, arriving at Mount Dallas about noon. Before proceeding on the return trip, Bowser, the conductor, received the following telegram from McKillips, the superintendent of the road:—

"Telegraphic train order.

"Coal Train No. 2 will be represented. Run accordingly. J. McK.

"Correct. J. McK."

From this telegram it was in evidence that Bowser should have known that Coal Train No. 2 was on the road, and should have avoided it by lying off on a siding. He, however, ran on, passed Piper's Run before two o'clock, and collided with Coal Train No. 2 a mile or mile and a half beyond. Both Decker and Bowser were killed in the collision. The telegram mentioned above was found in Bowser's pocket. It was also in evidence that Bowser had time to run his train on a siding at Piper's Run, and thereby have avoided the accident.

During the trial plaintiff offered to prove by parol testimony (1) That McKillips was held out by the company to the employés and the public as the person in charge of its business, by showing "that all schedules and time-tables furnished to the employés were printed with the name of John McKillips, Superintendent of the Company, at the bottom. That all conductors and other employés of the company obeyed the orders of the said McKillips in the running of the trains and conducting the business of the road. That the said McKillips employed and discharged the men at his pleasure." Objected to; admitted; exception. (2) "That Bowser was a man of known reckless and intemperate habits; that about two hours before the collision occurred he was so much intoxicated that he staggered; that Decker's death was occasioned by the recklessness and intemperance of Bowser, whose character and habits were known to the superintendent." Objected to; admitted; exception. (3) "That for more than two years immediately prior to the day of the accident Bowser was in the habit of getting drunk while on duty; that Bowser was drunk on the day of and at the time of the accident; that Bowser was repeatedly discharged from the service of the company by McKillips for recklessness, drunkenness, and disobedience of orders, and was after such discharge re-employed by McKillips, the superintendent." Objected to. The Court admitted so much of this offer as tended to show Bowser's habits, but declined to receive evidence of any specific act of drunkenness, except on the day of the accident. (4) "That a witness who was on Bowser's train gave him two drinks, and that he believed he saw Bowser take a bottle from his pocket and drink from it." Objected to as evidence of a specific act; admitted; exception.

The plaintiff presented, *inter alia*, the following points: (1) "If the jury find McKillips to have been the superintendent of the railroad, with power to employ and discharge all the hands, then it was his duty to employ sober and careful men as conductors; and if they believe that Bowser was careless, reckless, and intemperate while on duty, and this fact was known, or with ordinary care might have been known, by McKillips, and that Decker's death, without fault or negligence by him, was caused by the carelessness and intemperance of Bowser while running his train, then the company is liable and the verdict should be for the plaintiff." Affirmed. (2) "If, under all the evidence, the jury find for the plaintiff, the proper measure of damages is the pecuniary loss suffered by her and her two children; and that loss is what her husband would have probably earned by his labor in his business during his lifetime, and which would have gone for the benefit of the plaintiff and her two children, taking into consideration his age, ability, and disposition to labor, and his habits of living and expenditure." (7 P. F. Smith, 338.) Affirmed.

It appeared from the record that the action had been brought within a year from the date of the accident by the widow alone, and a narr. filed in which the children were not joined. In 1875 an amended narr. was filed averring that the persons who were entitled to damages in the action were the widow and the two children of Adolphus Decker, deceased.

The defendant presented, *inter alia*, the following point: That the action having been commenced by Mary Decker alone and for her own

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use, there can be no recovery in this action for the use of the children, and the verdict in no case can exceed the sum of $1666.66⅔. Refused.

Verdict for the plaintiffs for $6000, subject to a point reserved by the Court as to whether the 21st sec. of Article III. of the New Constitution, which provides that "No Act of the General Assembly shall limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property," took the case out of the provisions of the 2d sec. of the Act of the 4th of April, 1868 (P. L. 58), limiting the amount to be recovered from railroad companies, in case of death, to $5000.

Afterwards a remittitur of $1000 was ordered, and judgment entered for the plaintiff for $5000. Defendants took this writ, assigning for error, *inter alia*, the admission of the evidence objected to as above, and the affirmation of the plaintiff's and refusal of the defendants' points above quoted.

John Cessna and *S. S. Brown*, for plaintiffs in error.

Plaintiff could have readily produced the rules and regulations, printed schedules, and time-tables of the company. These were the best evidence, therefore it was error to admit parol evidence of their contents in order to prove McKillip's agency.

Greenleaf on Evidence, vol. i. sec. 82.
McKinney *v.* Leacock, 1 S. & R. 27.
Parks *v.* Dunkle, 3 W. & S. 291.

The evidence in relation to Bowser's intemperate habits and McKillip's knowledge thereof, while it might have been sufficient as against Bowser, was too vague to bind the company. They only could have had knowledge of Bowser through their superintendent, and their liability depends upon that knowledge.

The Court below erred in instructing the jury as to the measure of damages. This Court has already held that "only such compensation shall be recovered as the evidence shall clearly prove to have been pecuniarily suffered or sustained."

C. & P. R. R. Co. *v.* Rowan, 16 Sm. 393.

In order to have entitled the children to recover, they should have been joined in the action originally. Their names not appearing on the record until two years after the action was brought, and then only by an amended narr, they are barred by the statute of limitations. The recovery should have been for only one-third the amount of the verdict.

Act of Assembly of April 26, 1855, P. L. 309.

R. M. Speer and *E. S. McMurtrie*, contra.

The offer of parol evidence by the plaintiff was not to prove the contents of any writing, but to show who had charge of the road. Agency may be shown by proof of the acts of the agent as such, and that they were recognized by his principal.

Woodwell & Co. *v.* Brown, 8 Wr. 121.
Story on Agency (3 ed.), secs. 54–5.

All the evidence admitted to show Bowser's intemperate habits and his condition on the day of the accident, was proper, as it tended to prove that the collision was the result of negligence occasioned by such habits. Such a habit, in case of accident, raises a presumption of negligence.

Penna. R. R. Co. *v.* Books, 7 Sm. 343.

A master is bound to employ suitable servants. He must use ordinary care in selecting them. The absence of such care, either on his part or on the part of his known agent, renders him liable for the negligence of an incompetent servant.

Oil Co. *v.* Gilson, 13 Sm. 150.
Caldwell *v.* Brown, 3 Sm. 456.
Frazier *v.* Penna. R. R. Co., 2 Wr. 111.

Under the Act of April 15, 1851 (Purd. Dig. 1093, pl. 2), the right of the widow to sue and recover the full amount of the damages allowed by the Act of the 4th of April, 1868 (Purd. Dig. 1094, pl. 6), is unquestioned. The Act of April 26, 1855 (Purd. Dig. 1094, pl. 3, 4), does not take away this right, but defines four successive classes of persons to whom it shall belong, and simply provides how the damages recovered shall be distributed by requiring that the persons entitled to them shall be named in the declaration. This has been done.

Oct. 1, 1877. THE COURT. The husband of the plaintiff, while engaged as engineer in running one of the company's trains, was killed in a collision with another train of which Jacob Bowser was conductor. It was claimed, and evidence was offered to show, that Bowser was habitually intemperate and unfit for the service in which he was engaged; that the collision was wholly the result of his general carelessness and incompetency, and that his bad habits and unfitness for the position were known to the superintendent, by whom he was employed and retained in the service of the company.

The general principles of law applicable to such a state of facts as were disclosed by the testimony were very fully and clearly presented to the jury by the learned Judge below. It cannot be doubted that one who engages in a general service, in which others are employed, assumes the risks of such service, including those which arise from the negligence of his fellow-employés; but, while this is true, a duty devolves on the employer. He is bound to use ordinary care in the selection of his employés, and if he neglects to do so, or if he retains them after he becomes aware of their unfitness or incompetency, he is answerable to the fellow-servant for his negligence in this respect. Applying the principle to this case, when it was here on a former writ of error, it was said, that, when a railroad company

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employs a conductor who is unfit for the business, and knows his unfitness, it is chargeable with the consequences of his negligence, even to one employed in the same general service; and that the knowledge of the superintendent, intrusted with the management of the road and the power of employing and discharging hands, is notice to the company. (1 Norris, 119.)

The testimony averred by the first four assignments of error was properly admitted. It tended to prove the incompetency of Bowser; that the collision was the result of his carelessness or reckless conduct; and that he was employed and retained in the service of the company by its superintendent, with a knowledge of his character and unfitness for the position of conductor. The purpose of the first offer was to prove that McKillips was held out by the company to the employés and the public as the person in charge of its business. If his name appeared on the schedules and time-tables of the road as its superintendent, and he acted as such in the management of its business, giving orders to conductors and other employés, hiring and discharging hands, etc., it was certainly competent as well as strong evidence of agency in these particulars. It is difficult to see how such agency could be more satisfactorily established than by showing that these acts were performed in a manner and under circumstances that clearly justified the inference that they were done with full knowledge and by authority of the company. It was not necessary to show that he acted under or by virtue of any special form of authority. If, in point of fact, he transacted the business with the knowledge and consent of the directors and officers of the board, and was thus held out to the public, the company was answerable for his acts, done within the general scope of the business with which he was intrusted. The second offer was to prove that Bowser was a man of known reckless and intemperate habits; that about two hours before the collision occurred he was so much intoxicated that he staggered; that Decker's death was occasioned by the recklessness and intemperance of Bowser, whose character and habits were known to the superintendent. All this testimony, as well as that introduced under the third and fourth offers, was both competent and relevant. That portion of the testimony which tended to prove the intemperate habits and character of Bowser, and that he was intoxicated shortly before and probably at the very time of the collision, was most pertinent and material. "It is certainly incumbent on railroad companies to employ none but sober men on their roads. When a habit of intoxication in a conductor is shown, it raises, in case of an accident, a presumption of negligence which stands until it is rebutted." (Penna. Railroad Co. *v.* Brooks, 7 P. F. Smith, 343.)

The fifth assignment was not presented in accordance with the rules of Court, and was not pressed on the argument. The sixth assignment, relating to the measure of damages, is not sustained. The instructions given on this subject are in harmony with the act which restricts the recovery, in cases like the present, to such compensation only as the evidence shall clearly prove to have been pecuniarily suffered or sustained. The jury were instructed that "the proper measure of damages is the pecuniary loss suffered by the plaintiff and her two children." If the children are entitled to participate in the damages recovered, it follows that the instruction was correct.

The subject of complaint in the seventh assignment is the refusal of the Court to charge that "the action having been commenced by Mary Decker alone and for her own use, there can be no recovery in this action for the use of the children, and the verdict in no case can exceed the sum of $1666⅔." This assignment is based on the state of the second, and what is claimed to be the proper, construction of the Acts of Assembly regulating actions in cases where death has been occasioned by unlawful violence or negligence. Suit was brought by the widow within a year after her husband's death, and a narr. was filed in which the children were not named. In 1875, after the cause was at issue, the declaration was amended by inserting the averment, "that the parties entitled to the damages in this action are the said Mary Decker, widow, and John R. Decker and Mamie Maud Decker, the only children of the said Adolphus Decker, deceased."

Under the Act of 1851, the right of action was given to the widow, and if the deceased left no widow, then to the personal representatives. This was followed by the Act of 1855, which provides that "the persons entitled to receive damages for an injury causing death shall be the *husband*, *widow*, *children*, or *parents* of the deceased, and no other relative; and the sum recovered shall go to them in the proportion they would take his or her personal estate in case of intestacy, and that without liabilities to creditors."

The next section requires that "the declaration shall state who are the parties entitled in such action," and that it shall be brought within one year after the death, and not thereafter. Instead of confining the right of action to the widow and personal representatives, it designates four separate parties, to one of whom, according to the circumstances of each case, the right of action is given. If the deceased leaves a husband, he alone is clothed with the right of action; if the wife is the survivor, she is entitled to bring suit; if there be neither surviving husband nor widow,

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the right of action is given to the children; and if there be neither husband, nor widow, nor children surviving, it is given to the parents of the deceased. But while the right of action is given, according to the circumstances of each case, to one of the four designated parties, it is clear from the wording of the Act that the entire sum recovered is not always to be retained by the plaintiff in his or her own right. It is to be distributed among the relatives named in the proportion they would be entitled to take the personal property of the deceased in case of intestacy; and to the end that it may appear who are entitled to participate in the damages recovered, it is required that the declaration shall state who they are. In the present case the widow had the right of action, not exclusively for her own use, but for the joint use and benefit of herself and children. She accordingly brought suit, in her own name, within the time limited by the Act. Before trial the declaration was amended by naming the parties entitled to the damages claimed. It appears to us that this is the correct interpretation of the Act, and that the proceedings were regular. The suit was properly brought in due time by the widow, and the limitation had no application to the filing or subsequent amendment of the declaration. If it had been the intention of the legislature that the children should be joined with the widow as plaintiffs in bringing suit, their names would of course appear as such, and there could be no object in requiring "that the declaration shall state who are the parties entitled in such action."

The object of the Act of 1855 was not to take away the right of action given to the widow by the Act of 1851; on the contrary, it recognizes her right and provides how the damages shall be distributed.

The subjects of complaint in the remaining assignments are the answers of the Court to the defendant's *fourth*, *fifth*, *tenth*, *eleventh*, and *twelfth* points. There is nothing in either of them that calls for special notice. They are all substantially correct.

Judgment affirmed.

Opinion by STERRETT, J.

Common Pleas—Equity.

C. P. No. 4. March 21, 1878.

Foster et al. v. The City of Philadelphia and the Trustees of the Gas Works.

Injunction—Power of the Trustees of the Gas Works to adopt and enforce reasonable regulations in the use of the service-pipe and fixtures—What is such a regulation—One deliberately violating such a regulation has no standing in a Court of Equity.

Motion to continue a preliminary injunction.

Hearing sur bill, affidavits, and counter-affidavits.

The bill alleged that the plaintiffs were the owners of the patent for an instrument known as the "De Palos Pressure-Moderator and Gas-saver," which was intended to regulate the flow of illuminating gas after leaving the meter so as to secure a uniform pressure and light, unaffected by the increased or diminished pressure in the street mains, to avoid waste and blowing at the burner, and so to control the consumption that, with the best light, the consumer will only pay for what he burns; that without this instrument from one-fourth to one-half of what the consumer pays for was wasted, and the blowing at the burner, indicating such waste, had led to serious conflagrations; that when the complainants first attached their instruments in this city, they were informed by employés of the gas works of a rule requiring that the moderators be attached at least one foot from the meter, but finding, after compliance for some time with this rule, that it was permittedly disregarded by patentees of other moderators, and believing it to be unreasonable, they disregarded it also, and for five months had continued to do so with the knowledge of the defendants; that the Gas Trust had recently announced an intention to enforce the said rule, and in pursuance of such intention had threatened to detach all, and had actually detached some of the moderators; that the form of attachment required by the Gas Trust was in many cases impossible by reason of the position of the meter, and increased the cost of the moderator to such an extent as to drive it out of the market; that the defendants were estopped by their acquiescence in the disregard of the rule; and that the rule was senseless and unreasonable. The bill prayed that the defendants be enjoined from interfering with the moderators, and from obstructing the complainants in attaching them directly above the meter.

The moderator was exhibited in Court, and its use and manner of attachment practically illus-

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trated. The plaintiffs contended for the right to attach the instrument to the service-pipe directly above the meter; the defendants' rule required that it should be placed upon a détour or by-pass, with stopcocks so arranged that, if the instrument should be out of order, the gas might be sent from the meter directly through the service pipe to the burners without first passing through the moderator

Affidavits and counter affidavits were read.

E. S. Miller, for the motion, contended that, admitting the power of the trustees to make rules, that power had been unreasonably exercised. The conformation of the ceiling or wall may not permit the attachment on a détour, the leverage would be injurious to the meter, and the additional expense would tend to drive the moderator out of the market.

R. N. Willson and *C. H. T. Collis*, contra.

The Gas Trust has entire control over the pipes from the works to the meter, and the right to regulate the use of the pipes from the meter to and through the building. The right to use gas, like that to use water, is a mere license.

Smith *v.* City of Phila., 31 Sm. 38.

Girard Ins. Co. *v.* City of Phila., 4 WEEKLY NOTES, 557.

The only possible remedy in this case would be by mandamus for a permit, but the exercise of power being discretionary, and not ministerial, a mandamus will not issue.

The trustees are but exercising their duty in protecting both the city and consumer against accidents.

[THAYER, P. J. Has it been settled that the city is responsible for the negligence of the trustees?]

It was so decided in Shuter *v.* The City of Phila. (3 Phila. 228).

The mere fact that the regulation puts the complainants to a slight extra expense is no test of its reasonableness. It is essential to the preservation of the meter and to the safety and convenience of a household that the moderator should be placed on a by-pass.

The complainants have no standing in a Court of Equity, for no property right is affected.

Audenried *v.* R. R. Co., 18 Sm. 370.

E. S. Miller, in reply.

A man has the right to turn or use any stopcock from the meter to the burners; in this case, he is but using a scientific stopcock. The question is as to where the line of reasonableness should be drawn. If the Gas Trust may hamper the use of the moderator to-day, they may forbid it to-morrow.

[THAYER, P. J. If the trustees have exercised a discretionary power in good faith, I am not clear that we should review their action.]

The Court seems to have done so in Commissioners, etc. *v.* The Gas Company (2 Jones, 318) and Vedder *v.* Fellows (20 N. Y. 126). When a municipal corporation engages in a commercial enterprise, it descends to, and places itself on the level of a private corporation.

Western Savings Fund Society *v.* City of Phila., 7 C. 175 and 185.

C. A. V.

March 30, 1878. THE COURT. The plaintiffs have acquired from the patentee, James S. de Palos, of New York, the right for the State of Pennsylvania to the invention known as the "De Palos Pressure Moderator and Gas Saver." This instrument, sometimes called a "dry governor," is intended to regulate the flow of illuminating gas after it leaves the meter, so as to render the pressure uniform and the light regular, and to prevent waste at the burners. Being desirous of introducing this invention in Philadelphia, the plaintiffs made application in the usual manner to the Superintendent of Fittings of the Philadelphia Gas Works, who granted a permit, subject to the regulations ordained by the trustees upon this subject. One of these regulations required that all governors should be connected with the gas-pipe at least one foot from the meter, and the plaintiffs admit in their bill that they had full knowledge of this rule at the time of their application, and that they received their permit subject to it.

They allege, however, that finding subsequently that some persons who supplied similar instruments were disregarding the regulation, and believing themselves that the regulation was unreasonable, they no longer complied with it, but proceeded to attach their governors directly to the outlet of the meter. They were notified by the Superintendent that they were violating the rule, and that the governors would be removed unless they were attached in the manner prescribed by the regulations. The plaintiffs then complied for a time, but finally determined that they would do so no longer, and they have come into Court now with a bill for an injunction to restrain the defendants from removing or interfering with their instruments.

After the filing of the bill renewed attention was given to the subject by the trustees, with the view of adopting some general rule upon the subject which might in their opinion adequately protect the interests of the city and the consumer, and which would at the same time be just and uniform in its effect upon the plaintiffs and the proprietors of all similar inventions. This resulted in a rule, adopted by the Board of Trustees on March 8th, 1878, directing that in future no governor or regulator shall be attached either to the meter or the pipes unless the governor or regulator shall be placed upon a by-pass, in such manner that the flow of the gas may at any time, if necessary, be directed through the pipes with-

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out passing through the governor or regulator—in other words, that the gas may, if required, be cut off at any time from the governor without being cut off from the meter and the house.

The method of annexation insisted upon by the plaintiffs makes the governor in effect a part of the meter. The former cannot be detached for repair or any other purpose without detaching the meter also, and stopping the flow of the gas. The meter is an instrument of delicate mechanical construction, easily rendered useless or incorrect in the performance of its functions by being displaced or improperly interfered with. The wet meter particularly will not act properly, except when standing on a dead level. Now the meters belong to the trustees, and are under the sole supervision and control of their inspectors and officers. They are the only means which exist for registering the amount of gas consumed. It must be plain to any one that if the governor is attached directly to the outlet of the meter the latter will be liable to serious disturbance and injury as often as persons may have occasion to remove or meddle with the former; for it must be remembered that the governor is not, like the meter, the property of the trustees, but belongs to the owner, who will claim to exercise the same control over it which he exercises over other fixtures or property belonging to him. The meters would be subject by such an adjustment of the governor to constant disturbance and injury by third persons, without the knowledge of the trustees, and much injury would in all probability be thereby occasioned, either to the consumer of gas or to the city.

Other considerations of equal importance point to the reasonableness of the regulations adopted by the trustees. If there should be an interruption at any time in the flow of gas, it would become necessary in the first place to examine the governor. In order to do that effectually it must be detached, and this cannot be done without detaching the meter also and turning off the gas from the house while the governor is being examined or repaired, or by making a new connection. It may be said, indeed, that if the consumer consents to the plaintiffs' method of attaching the governor he consents to all the consequences which follow from it, however inconvenient they may be in practice. But this answer, it is evident, is not made in the interest of the consumer, but in that of the plaintiffs. It is not for the interest of the consumer that any such imperfect and dilatory methods should be adopted. On the contrary, it is plainly for his interest that the governor should be so adjusted that if it requires repair, or if it is necessary to remove it for examination, or for any other reason, he may still receive the gas through the meter as usual, and not be deprived of light. It may also be observed that one of the principal parts of the interior mechanism of the plaintiffs' instrument consists of a diaphragm made of leather covered with tinfoil. If this diaphragm should in the course of time, through the decay of the material of which it is made, or from any other cause, become perforated and leak, the gas would immediately escape into the room where the governor is attached, through a vent which is necessarily left open in the brass shell of the plaintiffs' machine for the passage of atmospheric air into it, without which it cannot operate. Such an escape of gas, if it continued for a considerable length of time without notice in a confined place, would undoubtedly be dangerous, but if observed it could be immediately remedied, without even any temporary inconvenience to the inmates of the house, by turning off the gas from the governor, if the governor is adjusted according to the regulations adopted by the trustees; but if it is attached directly to the meter it could not be remedied without turning off the gas from the house and detaching the meter as well as the governor. The plaintiffs have no right to insist upon attaching their governor in such a manner that the meter must be detached whenever the governor is detached.

Besides, more than one hundred and forty varieties of governors have been invented, some upon one plan, some upon another. Some of these would probably be more injurious in contact with the meter than others; many of them probably more so than the plaintiffs'. Some of them contain mercury, which would be liable to escape into the meter, where it would immediately derange the machinery and render it of little value. The plaintiffs' governor does not contain mercury, but the trustees are not bound to make a different regulation for the attachment of all the various kinds of governors which have been invented and which may be applied. It is more just and reasonable that they should adopt a uniform regulation for all, one which will not be chargeable with partiality for any particular patent, but which places all upon the same footing of equality, and at the same time secures the meter from improper interference, and contributes to safety as well as convenience by providing a remedy against accidents, and by furnishing an uninterrupted flow of gas to the consumer whatever may happen to the governor. This the trustees have accomplished by the regulation of March 8.

The by-pass is a simple arrangement by which the governor is required to be fixed to the pipes by a separate adjustment from that by which the meter is attached. It does not in the least obstruct the action of the governor. It only enables the consumer or the inspector to cut off the gas from the governor when it is out of order

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without cutting it off from the meter or the house. Under all ordinary conditions the gas will pass through the governor, and the latter will perform its office with as much certainty as it could in the position in which the plaintiffs desire to place it; that is, immediately over the meter, and in direct connection with the outlet. The regulation adopted by the trustees is one which contributes both to the security and convenience of the consumer, and is at the same time a necessary precaution on the part of the trustees for the protection of the rights of the city. It is vindicated not only by the affidavits of the scientific experts which were laid before us, but by the plainest considerations of practical utility, which lie upon the very surface of the subject. This was so obvious, indeed, that the plaintiffs were able to urge but one substantial objection to it, which is that the by-pass will add somewhat to the expense of adjusting the governor. This is true, but the additional expense will not, according to the testimony of reliable witnesses and the price-lists of Messrs. Morris, Tasker & Co., exceed the sum of $2.53 in each case; an expense of small account, surely, compared with the great saving which, according to the plaintiffs' statements, is to be effected by their machine.

It was urged by the plaintiffs that the De Palos Moderator is an instrument of such exquisite perfection that under no possible circumstances can it get out of order, require repair or removal, or injure the meter, and so it ought to be made an exception to all general regulations adopted by the trustees on the subject. But we are not entirely convinced of this. Certain it is that if it possesses the quality of indestructibility, if its parts are not liable to decay and the corroding agencies which perpetually operate upon all material substances, if it alone is impervious to the tooth of time, it constitutes a very remarkable exception to all human devices and contrivances. At any rate the trustees in making their regulations can hardly be expected to act upon such an hypothesis. They must provide not only for new and perfect governors but for old and decayed ones; not only for those which may be in good order but for those which may be out of order. They must make general regulations for all such and similar appliances, and they must be of a character which will protect the city and the public against the accidents and injuries to which such instruments are in general exposed.

The regulations which are complained of do no more than this. They are reasonable and just, and if the plaintiffs will not comply with them they have no cause of complaint. When they obtained their permit they agreed to conform to the existing regulation. They deliberately violated the regulation. A plaintiff in such an attitude has no standing in a court of equity, and they have no right now to attach their governors unless they will comply with the regulation of March 8.

That the trustees have a legal right to make such regulations is too clear for argument. The authority to do so is expressly conferred upon them by the city ordinances. It is unnecessary to take up further time by a particulur citation of these ordinances. That of February 8, 1838, in particular, gave them complete control over the subject. They have an unquestionable right to adopt and enforce any regulations upon this subject, which are reasonable and just. We are of opinion that those which have been the subject of controversy in this case are of that character, and that inasmuch as the plaintiffs refuse to comply with them their complaint is without foundation.

The motion to continue the injunction is therefore denied, and the preliminary injunction heretofore granted is dissolved.

Opinion by THAYER, P. J.

C. P. No. 4. March 13, 1878.

Wehn v. Krause.

Injunction—Trade-mark—Infringement by use of complainant's word with other words—Assignment of trade-mark.

Hearing on bill, answer, and proofs.

This was a bill filed by complainant for an alleged infringement of a trade-mark for artificial stone pavement, praying an injunction to restrain the defendant from the use of the word "Lithogen."

The bill averred that the complainant had coined the word *lithogen*, and that it had been used by both complainant and defendant when in partnership, but, by virtue of certain assignments, all the property of the firm was now vested solely in the complainant. That the defendant made use of the word by placing the name *old lithogen* on metal plates in the pavements laid by him. The answer admitted the assignments, but denied the complainant's exclusive right to the word lithogen as a trade-mark, and averred that the defendant had letters-patent for the pavement under the name "Krause's Patent Old Lithogen pavement." There was no denial of the use, and competent architects testified that the words used by the defendant were calculated to deceive even experts.

Jos. C. Fraley, for the complainant, cited—

Shipwright *v.* Clements, 19 Weekly Rep. 599.

Poppen *v.* Wilcox, 14 Abbott's Pr. Rep. N. S. 207.

C. Davis, contra.

In order to justify the aid of equity there must be clear infringement.

Morse *v.* Worrell, 1 W. N. 80.

The word lithogen has become a generic term

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for this class of manufactures, and is therefore not susceptible of exclusive appropriation.

C. A. V.

March 25. Decree for complainant, enjoining the defendant from using in connection with his business the word "Lithogen," or any word so nearly resembling it as to be mistaken therefor.

C. P. No. 1. March 26, 1878.

Fourth Universalist Parish v. John Wensley.

Corporation—Equity—Trust—When a trustee who simply holds the legal title will be compelled to convey on request of the cestui que trust.

Hearing upon bill and answer.

Bill in equity to compel the execution of a deed by a trustee. The bill set forth that defendant was one of three trustees to whom a certain lot of ground had been conveyed to be held in trust for an unincorporated religious society, which had erected thereon a church, and afterwards obtained a charter of incorporation; that defendant, when requested to join with the other trustees in a conveyance of said lot to the corporation, refused to do so. The prayer of the bill was that defendant be ordered to execute a deed conveying said lot to the corporation.

The answer set forth that the society had become heavily indebted for materials, etc., used in the erection of the church, and that defendant, being personally responsible as an individual member of said society for such of its liabilities as were incurred prior to its incorporation, should not be compelled to part with its property until all such debts were paid.

John Dolman, for plaintiffs. The trust was merely a temporary arrangement, and, when defendant became trustee, it was with the implied promise that he would execute a conveyance of its property to the society, as soon as it should acquire capacity to take and hold the same. The fact that he, as an individual member, is responsible for debts of the society contracted before its incorporation only places him on a level with his brother members, and cannot be urged as a reason why he should be allowed to act unfaithfully as a trustee.

Altimus *v.* Elliott, 2 Barr, 62.
Newmyer's Appeal, 22 Sm. 121.

John A. Scanlan, contra.

Prayer of the bill granted, with costs to defendant.

Common Pleas—Law.

C. P. No. 1. March 30, 1878.

Percival v. Fuller and Jones, trading, etc.

Partnership—Service of process—Attorney and client—Judgment against the member of partnership who is not served will be opened upon affidavit of merits.

Rule to open judgment and let defendants into a defence.

This was a suit against a partnership, in which service of the summons was accepted by one of the firm, but no service made upon the other. The attorney employed by the partner accepting service entered a general appearance, and the case proceeded to issue. When it came on for trial, no one appeared for the defendants, and a general verdict was entered for the plaintiff.

The depositions in support of the present rule showed, that, the order for trial having escaped the notice of the attorney of record, neither he nor the defendants knew anything of the trial until after the judgment had been entered; that the defendant who was not served had no knowledge whatever of the suit until that time. The defendants also filed an affidavit setting forth that they had a complete defence upon the merits to plaintiff's claim.

J. B. Cox, for the rule. The defendant who knew nothing of this action until after verdict should have an opportunity afforded him to interpose his defence.

Lacy, contra. If an attorney appears for a firm and conducts all the legal proceedings of the cause to issue, the Court will not inquire into the question of his not having received authority from all the partners.

Hatch *v.* Stitt, 16 Sm. 264.
Jackson *v.* Roddy, 2 Pitts. L. J. 183.

Rule absolute as to the partner not served, and discharged as to the other.

C. P. No. 1. March 30, 1878.

Brobston v. Campbell.

Practice—Judgment for want of an affidavit of defence—Filing a declaration at the time summons issues does not prevent plaintiff from taking judgment for want of an affidavit.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit on a promissory note.

At the time the summons issued plaintiff filed a copy of the notes, and afterwards a declaration, but no rule to plead; whereupon defendant

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entered an appearance, filed his pleas, and also a suggestion of defence, which was sworn to, as follows: "that inasmuch as a declaration and pleas have been filed, the plaintiff is not entitled to judgment for want of an affidavit of defence."

Wm. A. Redding, for the rule.

Frank K. Hipple, contra. Plaintiff having elected to proceed by putting the case to issue, and thus leading the defendant to believe that it was his intention to have the question involved tried by jury, is estopped from resorting to the statutory mode of procedure, and taking judgment for want of an affidavit of defence.

C. A. V.

April 6, 1878. THE COURT. Although there may be no authority for such a course, yet it has been the practice with members of the bar, since the passage of the affidavit of defence law, to file a declaration simultaneously with the filing of the copy of the instrument of writing upon which suit is brought, so that judgment may be taken for want of an appearance in case none should be entered within the time limited by law. By this procedure no wrong is done to defendants, nor are they necessarily misled into the conclusion that a plaintiff will therefore proceed to issue according to the old practice. The fact that a copy of the instrument of writing was filed within two weeks from the return day should have been sufficient to put defendant upon his guard against having judgment taken for want of an affidavit of defence, especially since in this case the narr. alone was filed, and no rule to plead accompanied it. The rule, is therefore, made absolute.

Oral opinion by ALLISON, P. J.

Orphans' Court.

March 22, 1878.

Beck's Estate.

Orphans' Court practice—Power of amendment of record by Court—Extent of—Trustees—Not surcharged for loss except in case of negligence or for wilful default—Commissions on corpus of productive real estate not allowed—Commissions on re-investments, when not allowed.

Sur exceptions to auditor's report and petition to amend record.

William Henry Beck died in 1859, leaving a will whereby he devised the residue of his estate to trustees in trust to pay the income, or so much thereof as they might deem necessary for the maintenance of his son Charles B. Beck until he should attain the age of twenty-one years, and then to convey the same to him in fee; and if the whole of the net income should not be necessary for the purpose of maintenance, then in trust to invest the same and pay over the accumulations to his son on his attaining his majority. He appointed Henry P. Beck and J. T. Montgomery executors and trustees under his will, and guardians of his son.

On June 3d, 1872, an account was filed by Messrs. Beck and Montgomery, as executors, trustees, and guardians, which was referred to an auditor. At the audit the accountants claimed five per cent. commissions on the income, which the auditor reduced to three per cent. on the ground that a real estate agent had charge of the real estate from which the income issued, who had received a commission of five per cent. for his services. The auditor disallowed a five per cent. commission on the increment of the principal of the personal estate reinvested by them, and two per cent on the value of the corpus of the real estate, for the reason that the real estate had been under the entire and active care of their agent. To these rulings exceptions were filed by the accountants.

Pending the hearing of the exceptions a petition was filed December 13th, 1873, by Charles B. Beck, setting forth that the accountants might have obtained a larger rental for certain premises (No. 718 Market Street) than they had done, and praying that the report be referred back to the auditor to inquire as to the truth of the allegation, and whether the trustees should not be surcharged for the alleged loss of rent. To this an answer was filed by the accountants, asserting that the rent was as much as they were able to obtain, and that they had exercised due diligence; and on January 2, 1874, the Court dismissed the petition for want of evidence in support of its allegations. On April 9th, 1874, the Court granted a rule to take depositions in support of the said petition, under which depositions were taken and the report of the commissioner filed. But no order was ever made vacating the order dismissing the petition of Charles B. Beck. Charles B. Beck subsequently died, and John M. Thomas, Esq., was appointed his executor, who filed a petition setting forth the above facts, and praying the Court to amend the record, or make the order vacating said order of Jan. 2, 1874, *nunc pro tunc*.

A. S. Biddle and *G. W. Biddle*, for the exceptants, cited—

Dilworth *v.* Sinderling, 1 Binn. 494.
McNair's Appeal, 4 Rawle, 148.

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Calhoun's Estate, 6 Watts, 185.
Twaddell's Appeal, 5 Barr, 15.
Springer's Estate, 1 Sm. 342.

George Junkin and *J. A. Clay*, for J. M. Thomas, executor of C. B. Beck.

C. A. V.

March 30, 1878. THE COURT. It is not very material whether we permit the amendment to be made, and treat the case as coming before us on a rule granted in April, 1874, to vacate the order dismissing the petition filed December 13, 1873, or whether we hear it upon an application now made for that purpose, which we may unquestionably do, if upon hearing the petition and answer with the evidence, we should be of opinion that the order dismissing the petition should not have been made. We have no doubt, however, of our right to permit the amendment. Both parties proceeded for several years upon the supposition that a rule to vacate the order had been entered, and much testimony was taken for and against the application; and it is, perhaps, to be presumed, as the Court had granted a rule to take depositions, that a previous rule, which was to be supported thereby, had been granted. (See Wadhame *v.* R. R. Co., 6 Wright, 303.) But every Court of record has, irrespective of statute, a power of amendment, which may be exercised after the expiration of the term. (R. R. Co. *v.* Bunnell, 31 Smith, 414.) "It has been laid down as a principle," says Judge SHARSWOOD, in that case, "that every Court of Record has power over its own records so long as they remain incomplete, and until final judgment is rendered, and until that time it is the established practice in such Courts to regard all actions, whether on the docket of the existing or a former term, as within the jurisdiction and control of the Court. (1 Tidd's Practice, 161, note B, and cases there cited.) Any such distinctions, however, have been entirely repudiated in this State, and the general power of amendment asserted to exist in the Court, whether before or after judgment."

Treating the amendment as having been made, does the evidence show that the prayer should be granted?

The application is to refer the report back to the auditor, in order that the accountants may be surcharged with the difference between the amount of rents of certain properties which they actually received and accounted for, and what, it is asserted, during the last five years of their trust, they might have received.

The petition does not aver fraud or supine negligence; but this, it is said, is shown by the evidence.

We are of opinion that, in order to charge the accountants with a loss thus arising, it is not enough that more rent might have been received, but that it must be shown there was fraud or negligence in the selection of the agent who was employed to attend to the renting and collection of the rents of the real estate belonging to the trust. The agent thus selected was one who had long been connected with the Beck estate. He had, it is said, been brought up by the father of the testator, and had been employed by the testator himself for the very purposes for which he was retained by the accountants. He was, moreover, a responsible real estate agent, well known as such in the community, and having, or being supposed to have, a knowledge of the renting value of the properties, which the accountants could not be expected to possess. In addition to this, his employment as manager of the estate had been commended by the auditor in a previous report, and the opinion expressed that it was wise to continue him in the service of the accountants; and this report had been confirmed by the Orphans' Court.

Besides, there was the further fact that his compensation was affected by the amount of rent which he collected, and there was this additional reason for assuming that he was obtaining the greatest amount possible.

It is doubtless true that during and after the war there was a great rise in the value of real estate and in the amount of rents. For this very property the rent had been raised from $800 (the amount paid from July, 1863, to July, 1864), to $1000, and finally to $1308, which sum was paid from 1866 to 1872.

It is true that it was shown that during the period complained of (from 1866 to 1872) other properties in the same neighborhood were rented at very considerably greater rents, and that when the property in question was sold, in 1873, it was rented by the purchaser, without any repairs, for $3000. And witnesses were produced who testified, that in their opinion, from $2000 to $2400 was a fair value per year from 1864 to 1872. One of these witnesses was Mr. Gummey, a real estate agent of very great experience, who fixed the amount at from $2200 to $2400.

On the other hand, witnesses, apparently just as respectable, testified that in their opinion what had been received was as much as the property was worth; and the agent employed for the very purpose of renting this property declared that he had always tried to get the highest amount possible. And it is to be observed that the property adjoining on the east (No. 716 Market), which rented, *under a lease for five years*, from 1866 to 1873, at $2200, in 1873 was rented again at $4800; while the property in question, which until 1873 had rented at $1308, having been then sold to Mr. Seabrook, could only be rented by him at $3000, being $1800 less than paid for No. 716 Market. This shows that the latter is no criterion of value.

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There were some reasons why this property could not be rented for as much as similar properties in the vicinity. In the first place, it was important that it should produce a regular income for the support and maintenance of the petitioner, the testator's minor son, during his minority. Regularity in this respect was of paramount importance. Next, the property was old and out of repair, and it was desirable to hold it, so that whenever a favorable opportunity for sale offered, it might be disposed of. For this reason it was not deemed wise to give a lease; and this, of course, stood in the way of obtaining very large rents.

But conceding that more rent might have been obtained, the most that is established is, that their agent was inefficient. It was not the duty of the accountants to go from door to door to ascertain what other tenants in the vicinity were paying. When they employed, with the approval of the Court, one whom they believed to be competent and reliable, to discharge duties for which they had the right to suppose he was better fitted than they, it would be very hard to visit upon them, in the absence of proof of fraud or knowledge of his inefficiency, a loss of this sort.

That a trustee shall not be surcharged for a loss which has occurred, "in case he has exercised common skill, common prudence, and common caution, but only for supine negligence or for wilful default," is well settled. (Chambersburg Sav. Fund's Appeal, 26 Smith, 203; Twaddell's Appeal, 5 Barr, 15; Moore's Appeal, 10 Barr, 435; Springer's Estate, 1 P. F. Smith, 342. See, also, Hill on Trustees, 42.)

In Biddle's Appeal (3 WEEKLY NOTES, 396; S. C., 2 Norris, 340), it was attempted to surcharge the accountants with rents which they might have received; and it was shown that actual offers of higher rents, with security, were made to them directly, but the surcharge was not sustained.

The motion to vacate the order made February 28th, 1874, dismissing the petition to refer the report back to the auditor, is refused.

We come now to the exceptions to the auditor's report filed by the accountants. These relate solely to the question of their compensation.

The auditor allowed a commission of five per cent. on all income collected by the accountants themselves.

Upon the rents collected by the agent, who had charge of the real estate, and who received a commission of five per cent. thereon, a commission to the accountants of three per cent. "for the responsibility of receipt and disbursement" was allowed. He also allowed a commission of two and one-half per cent. on proceeds of sale of real estate, but disallowed a commission for reinvestment of surplus income; as he did also a claim of commissions on the value of the corpus of the real estate in their hands for final distribution.

The exceptions are to the allowance of only three per cent. upon the income collected by the agent; to the disallowance of commissions for investment or reinvestment, and to the disallowance of the commission on the value of the corpus of the real estate.

As the evidence showed that the services connected with the collection of the rents and the care of the real estate were all performed by the agent at the expense of the estate, we do not think the accountants have a right to complain of an allowance of three per cent., viz., two and a half per cent. for responsibility and one-half of one per cent. for disbursement. The disbursement consisted principally, if not exclusively, in making quarterly payments to their ward, Charles B. Beck, who resided with his grandfather Richard H. Bayard. Had the property consisted of numerous small tenements, requiring the agency of a collector, the case would have been different. As it was, there were but three buildings, yielding an average rent of $2500, and, so far as appears, the rents might have been just as easily collected by the accountants as by the agent.

That a commission on the corpus of productive real estate will not be allowed, was decided in Biddle's Appeal (2 Norris, 340), affirming the adjudication of Judge O'BRIEN in this Court. There was, it is true, there an allowance of $2000 for the services of trustees, lasting for nineteen years, in taking care of real estate worth $140,000, and yielding an income of about $ 00 per annum. The commissions on that amount were manifestly inadequate compensation for the services rendered, the property being suburban, and requiring greatly more than the ordinary amount of care, and the services, moreover, being rendered by the trustees themselves.

In the present case the property was situated in the heart of the city, was rented at what was believed to be its full value, and no special services were shown, and such as were performed at all were by the agent, whose commissions were paid by the esstate.

That a commission will not be allowed for investment or reinvestment, where made without extraordinary trouble, was decided by Judge KING, in Barton's Estate (1 Parsons, 24), and in Hemphill's Estate (Ib. 31). See, also, Hemphill's Appeal (6 Harris, 303).

The exceptions must therefore be dismissed, and the report of the auditor confirmed.

Opinion by PENROSE, J.

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WEEKLY NOTES OF CASES.

VOL. V.] *THURSDAY, MAY 2, 1878.* [No. 14.

Supreme Court.

Jan. '78, 3. Jan. 15, 1878.

The Pennsylvania Company's Appeal. Etting's Estate.

Powers of attorney to transfer stock—When prima facie evidence of sale.

A sealed power of attorney to A. to transfer stock to himself or to any other person, which is expressly irrevocable and "for value received," is prima facie a sale of the stock to A. for a present consideration, and removes from him the burden of showing that he paid for it at the time of the transfer.

Appeal from the Orphans' Court of Philadelphia County.

Appeal of the Pennsylvania Company for Insurance on Lives, etc., executors of Henry Etting, deceased, from a decree allowing the claim of Miriam G. Etting for $1000 and interest against the said decedent's estate. From the adjudication of the auditing judge the following facts appeared:—

Henry Etting died in 1876, leaving by will to his sister, the claimant, for life, the income of $40,000, which was nearly half his fortune, and the right to bequeath $5000 of the principal. Mr. Etting and his sister had lived in the same boarding house, on affectionate terms, for twenty years previous to his death, he contributing about $1000 annually to her support, and managing all her business affairs for her. About December 9, 1869, she received a legacy of $1000, which he deposited in her bank account in the Pennsylvania Company. On December 27, 1869, $1000 was drawn by her from this account, as shown by the stub and the check, to "Henry Etting's order $1000, for investment for my account." The counsel for the accountants allowed the claimant to testify that she had never received from the testator any security in which her legacy was invested, and never received any money from him; that she did not know that that money was ever invested by him for her; she did not think it was; she had spoken to her brother about it, but he had never told her in what he had invested the money, and had never paid her any interest; she had never asked him for any. It appeared from the stub of the bond book of the Lehigh Valley Railroad Company that a registered bond for $1000 was issued to the claimant on November 8, 1871. On January 23, 1872, the claimant gave the following power of attorney:—

"Know all men, etc., that I, the undersigned, for value received, do hereby irrevocably constitute and appoint Henry Etting to be my true and lawful attorney for me and in my name and behalf, to sell, assign and transfer unto himself or any other person or persons one" [Here followed the description of the above mentioned bond].

"MIRIAM G. ETTING. [SEAL.]"

Under this power the testator, the same day, transferred the bond to himself, and the transfer was made the subject of this claim.

The claimant testified that she had never owned a bond of the Lehigh Valley Company, and had never transferred any such bond to her brother. The accountants testified that they had been unable to find among the testator's papers any investment for his sister remaining in his possession at the date of his death.

The auditing judge found that the testator undoubtedly made the investment in the Lehigh Valley bond for his sister, "which fact she never, in all probability, fully understood or has forgotten, . . . and that he subsequently purchased the bond himself cannot be denied. Having done this, in the event of the interest being demanded, and the value of the bond also, by his sister, it would be incumbent on him to show that he had paid her the same. She would not be called upon to prove a negative." The Court awarded the claimant $1000 with interest from February 15, 1870; that date being six years previous to the date of the decedent's death.

Exceptions to this award were dismissed, and the Court in banc affirmed the adjudication. The accountants took this appeal, assigning for error, *inter alia*, the award of any amount to Miss Etting as creditor; the award of interest from February 15, 1870, the Lehigh Valley bond having remained in the claimant's name till February 20, 1872, and there being no proof that the testator had ever collected interest on the bond; the failure to find that the power of attorney was a transfer by the claimant to the testator, and that no liability thereunder was created.

J. G. Johnson, for the appellants.

The legacy to the claimant being of a sum larger than the alleged debt, satisfied it.

Horner *v.* McGaughy, 12 Sm. 191.

Wasco's Appeal, 2 Id. 197.

The rule is discussed in 2 Roper on Legacies, 1030. The legacy must not be of less amount than the debt; there must not be such a provision as to the time of payment as to render the legacy less beneficial than the debt; the legacy and the debt must be of the same general nature with reference to the subject of payment and the interest given; the legacy must not be given for a particular purpose; must not be contingent or

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uncertain; the debt must not be of date subsequent to that of the will. The present legacy is of $2400 a year, a sum certain, larger in amount than the debt, and the requirements of the above rule are fulfilled. Extrinsic evidence to rebut the presumption that a legacy is a gratuity is admissible.

Zeigler *v.* Eckert, 6 Barr, 63.

The testator's transfer to himself of the Lehigh Valley bond did not make him the claimant's debtor. The power is in the form usually delivered in case of sales of stocks or bonds. It is expressly "irrevocable," and "for value received," and after the lapse of time such admissions by the claimant should be conclusive.

Lewis Waln Smith, for the appellee.

Though a debt may be extinguished by a legacy, a trust cannot be so extinguished. The testator constituted himself a trustee by undertaking to invest the claimant's money. Under any circumstances the rule is sparingly applied. In Horner *v.* McGaughy and Ziegler *v.* Eckert, cited by the appellants, the Court refused to apply it, and in Wasco's Appeal it was applied only after the auditor had found as a fact that it was the testator's intention to discharge the debt by a legacy. Here the legacy was uncertain, depending upon the length of the claimant's life. It was not payable immediately, and was, in fact, no legacy at all.

2 Williams on Executors, 1026.
Alleyn *v.* Alleyn, 2 Ves. Sr. 37.
Forsight *v.* Grant, 1 Ves. Jr. 298.

It is not pretended that the instrument given by the claimant to her brother was a bill of sale, or anything but a power to transfer. It is a novel doctrine under which the testator would be acquitted from the duty of accounting for the proceeds of the transfer, and for this doctrine the appellant cites no authorities.

March 25, 1878. THE COURT. There is no dispute as to the fact that on the 29th of December, 1869, Henry Etting, the testator, received from the appellee, his sister, the sum of $1000 for investment on her account. She says in her deposition that she never received this money from him; that she did not know that the money had ever been invested for her: she did not think it had. The books of the testator contained no trace of any such investment. At the time of the receipt of the $1000 the parties were living together at a boarding house in the city of Philadelphia. It was conceded that for several years prior to his death the testator had expended about $1000 per year for the support of his sister. He also gave her by his will the income of $40,000 for life, with the right to bequeath $5000 of the principal. Whatever may be the merits of this controversy, there can be no ground to infer in the face of these facts that Mr. Etting intended any wrong to his sister. He cannot give his version of the transaction, for he is dead. The counsel representing his estate allowed the appellee, who is the claimant here, to testify as to her recollection of it. If there is a difficulty in arriving at the exact truth, it is in part at least owing to the absence of documentary proof, the result of the entire confidence between the parties. Had the case rested here, it is clear that the claim of the appellee would have been barred by the statute. But it appears that on the eighth of November, 1871, a registered bond of the Lehigh Valley Railroad Company for $1000 was issued to the appellee. The auditing judge finds that the $1000 received by the testator on the 29th of December, 1869, went into the purchase of this bond. There is nothing in the record to support this finding beyond the fact that the two sums are equal in amount. While the evidence has not been sent up, I infer from the adjudication of the Court below, that Miss Etting's statement and the stub of the bond book of the Lehigh Valley Railroad Company were all the Judge had to throw light upon this subject. He says of the former: "She says she never owned a bond of the Lehigh Valley Railroad Company, and never transferred any such bond to her brother." That she had forgotten or never fully understood this transaction, as suggested by the Court below, seems probable from the fact that on the twentieth of February, 1872, she executed a formal power of attorney to transfer the bond. Under this power the testator, the same day, transferred the bond to himself. This transfer is made the subject of the present claim, the Court below holding that the burden of proof was upon the appellants to show that Mr. Etting had accounted to his sister for the proceeds of the bond; and inasmuch as this transaction occurred within six years, that it was not barred by the statute. The paper referred to is called a power of attorney. But it is something more. It is under seal, irrevocable, and is expressly stated to be "for value received." An ordinary power of attorney to transfer stock is not irrevocable and does not purport to be for value. The instrument in question, however, is *prima facie* a sale of the bond to the person in whose favor it was made. It is precisely such a paper as is in daily use in the stock market, and is only given in case of a sale of the stock. Upon its face it imported a sale of the bond to Mr. Etting, the testator, for value, with an irrevocable authority to him to transfer it to himself. Its legal effect is precisely the same as if it had contained the words, "In consideration of the sum of $1000 I authorize Henry Etting," etc. It closely resembles the case of the delivery of a conveyance of real estate or other property containing a receipt for the payment of the purchase money. While such receipt is not

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conclusive of such payment, and may be rebutted, it has always been held to be *prima facie* evidence. The Court below held that the power of attorney was presumptive evidence that the testator had not paid value or accounted for the bond. In other words, the Court reversed the burden of proof, and held that the appellee's declaration, under her hand and seal, that she had received the value of the bond, created a presumption that she had not, this too in the face of her testimony that she had never owned such a bond. There is not enough in the case to justify a decree against the appellants. There is not sufficient light. It is easy to make a claim against a dead man's estate. It is of the highest importance that such claims when made should be scrutinized carefully. Looking at the surroundings of this case, there is nothing to commend it to our favorable consideration. It was barred by the statute when the testator died. The appellee made no claim upon him during his lifetime; nor did she ever speak to him upon the subject. It is, therefore, a stale claim, and all such claims against the estates of dead men should be rigidly scrutinized. In view of their relations—the mutual confidence—the generous conduct of the testator to his sister, it is not likely that their business intercourse was conducted upon strictly business principles, or that care was taken to preserve the evidence of payments. The memory of the appellee was evidently at fault in regard to the Lehigh Valley bond, which, although standing in her name and subsequently transferred by her, she had entirely forgotten. Her memory may have been equally defective in regard to other matters, particularly as the payment of the $1000 in controversy, its investment or application for her benefit by the testator. While this does not necessarily follow, it is suggestive of a careful scrutiny into the merit of a claim made after so great a lapse of time, and under circumstances which render it difficult to ascertain the very truth of the case.

The decree is reversed at the cost of the appellee.

Opinion by PAXSON, J.

SHARSWOOD, MERCUR, and WOODWARD, JJ., dissent.

Jan. '75, 162. Feb. 5, 1878.

Wistar v. The City of Philadelphia, to use, etc.

Municipal Claims — Sheriff's return to scire facias, when defective — Practice — Act of 11 March, 1846, sec. 3 — Designation of owners, what particularity required.

A municipal claim filed against "the heirs of A. B., deceased, owners or reputed owners, or whoever may be the owners," sufficiently designates the owners.

To a writ of *scire facias sur* municipal claim the sheriff made return, "made known by posting a true and certified copy of the within writ on the premises herein described, December 5, 1874, and by advertising the same twice a week for two weeks in the *Evening Bulletin*, a daily paper published in this city, agreeably to the Act of Assembly in such case made and provided."

Held (reversing the judgment of the Court below), that this return was fatally defective inasmuch as it neither set forth that the posting was "on a conspicuous part of the premises," nor that a "brief notice" of the writ was published in a daily paper two weeks before the return day.

Error to the Common Pleas No. 1, of Philadelphia County.

Scire facias sur municipal claim for work on a culvert in front of a certain property in Stiles Street, filed Oct. 13, 1874, by the city to the use of Mooney, to the use of Armstrong, against the heirs of Robert Wistar, deceased, owners or reputed owners, or whoever may be owner. On Nov. 21, 1874, the claimant's attorney filed a suggestion, accompanied by an affidavit of Armstrong that Lewis Wistar was the actual owner of the premises, with a known residence in Philadelphia, and that on Oct. 14, 1874, the deponent had served the original notice upon him. This notice, after stating the claim and describing the property, concluded as follows:—

"You are hereby notified to make payment of the same to the solicitor for claimant within ten days, and that if the same is not paid within said time a *scire facias* will be issued, additional costs incurred, and the property may be sold at sheriff's sale.

"C. H. T. COLLIS, *City Solicitor.*
"H. C. TERRY, *Solicitor for Claimant.*
"Solicitor's Office, No. 625 Walnut Street."

On Nov. 21, 1874, a writ of *scire facias* was issued against the heirs of Richard Wistar, deceased, owners or reputed owners, and Lewis Wistar, actual owner. To this writ the sheriff made return, "made known by posting a true and certified copy of the within writ on the premises herein described, Dec. 5, 1874, and by advertising the same twice a week for two weeks in the *Evening Bulletin*, a daily paper published in the city, agreeably to the Act of Assembly in such case made and provided, and *nihil habet* as to the defendants." The claimant, then, having filed proof of the demand for payment of the claim, as required by the Act of 23 March, 1866, and as served by Armstrong, *supra*, obtained judgment for want of an affidavit of defence, and the defendant, Lewis Wistar, took this writ of error, assigning the judgment for error in the following specifications: (1) Because this claim was filed against "the heirs of Richard Wistar, deceased." (2) Because it did not appear from the sheriff's return that a copy of the writ of *scire facias* had been posted by him "on a conspicuous part of the premises;" (3) nor that a "brief notice" of the writ had been published by him according to law; (4)

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nor did it appear that the City Solicitor had caused diligent search to be made for the owner or reputed owner before the issuing of the writ; (5) nor that notice had been served on the owner to "make payment to the City Solicitor within ten days" before suit brought; and (6) because it did appear, nothwithstanding the sheriff's return of *nihil habet*, that upon the day the writ issued the owner or reputed owner had a residence in Philadelphia known to the claimant.

Sharpless, for the plaintiff in error.

The method of the constructive service of the writ of *scire facias sur* municipal claim is prescribed by the Act of March 11, 1846, sec. 3 (Purd. Dig. 1089, pl. 25). It is obvious that in a process by which a man's property can be taken from him the requirements of the law must be closely followed. Here it neither appears that the posting was on a conspicuous part of the premises, nor that a brief notice of the writ was published in a daily paper two weeks before the return day. Even in the return to a summons the sheriff must set forth just what he did, leaving it to the Court to judge whether the law has been complied with.

Weaver *v.* Springer, 2 Miles, 42.

By the Act of March 23, 1866 (Purd. Dig. 1091, pl. 42), it is provided that before any *scire facias* shall issue on such a claim "it shall be the duty of the City Solicitor to cause diligent search to be made by an assistant or clerk for the owner or reputed owners . . . and to serve him or her with a written or printed notice to make payment to the City Solicitor within ten days."

It does not appear that the search was made by any assistant or clerk of the City Solicitor. The notice directed payment to the solicitor of the claimant, leaving it uncertain which solicitor was to be paid.

H. C. Terry, contra.

A claim filed against the heirs of A. B. is sufficiently certain.

Northern Liberties *v.* Coates, 3 H. 247.

Delaney *v.* Gault, 6 C. 67.

Every intendment is in favor of the regularity of the sheriff's return.

Cadmus *v.* Jackson, 2 Sm. 301.

City *v.* Edwards, 2 WEEKLY NOTES, 102.

Search for the property owner was made by Armstrong, who was *pro hac vice* assistant of the City Solicitor. Proof of his authority is found in the signature of the City Solicitor to the notice served by him. That this notice was also signed by the claimant's solicitor is immaterial. Payment could have been made to either. The City Solicitor may designate an agent to whom such payment may be made, and the receipt of such agent is a valid acquittance.

City *v.* Cottage Co., 9 Phila. 85.

March 11, 1878. THE COURT. On the 13th of October, 1874, the city of Philadelphia filed in the Court below, to the use of George W. Mooney, a lien against the lot described therein for the sum of $291.02 for the construction of a sewer in front thereof, authorized by ordinance of Councils, and against "the heirs of Richard Wistar, deceased, owners or reputed owners, or whoever may be owner." On the same day the lien was marked to the use of William Armstrong. On the 21st of November, 1874, the claimant's attorney filed a suggestion that Lewis Wistar was the actual owner of the lot aforesaid, and the same day a writ of *scire facias* was issued on the said lien, warning the heirs of Richard Wistar, deceased, owners or reputed owners, and Lewis Wistar, actual owner, to appear and show cause, etc. To this writ the sheriff made return, "made known by posting a true and certified copy of the within writ on the premises herein described, December 5, 1874, and by advertising the same twice a week for two weeks in the *Evening Bulletin*, a daily paper published in the city, agreeably to the Act of Assembly in such case made and provided, and *nihil habet* as to the defendants."

The claimant, having filed proof of a demand for payment of the claim due, under the Act of 23 March, 1866 (P. L. 303), proceeded to take judgment for want of an affidavit of defence. This writ of error was sued out to said judgment, and a number of assignments of error have been filed alleging irregularities in the proceedings. I will consider them in their order.

(1) This assignment is not sustained. It was held in Northern Liberties *v.* Coates's heirs (3 Harris, 245) that a municipal claim filed against the "heirs" of J. C., deceased, owner or reputed owner, or whoever may be owner, and describing the real estate against which it is claimed as a lien, is a sufficient designation of the ownership of the premises. It is not denied in the case at bar that the property is properly described, but it is alleged that the words "heirs of Richard Wistar, deceased," do not sufficiently designate the ownership. This is a proceeding *in rem*. The purpose of the description of the property and the designation of the owner or reputed owner is to give notice to the true owner. It was conceded that Richard Wistar was deceased at the time the claim was filed.

Can it be said that filing it against his "heirs" is not calculated to give such notice? It is true it does not designate any particular persons. But the heirs may be unknown to the claimant, and, as was said in the case above cited, "may be at a distance, or even in foreign countries." Land may be assessed as belonging to the "widow and heirs" of a decedent. (Wheeler *v.* Anthony, 10 Wend, 346.) The Act of 22 April, 1846, sec. 23 (P. L. 486), provides that the real estate of a decedent may be taxed in the name of the heirs generally by their designation as heirs.

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(2 and 3) These assignments allege error in entering judgment for the reason that the sheriff's return does not show a proper service. The 3d section of the Act of 11 March, 1846 (P. L. 115), provides that all such writs of *scire facias* shall be served "by posting a true and attested copy of the writ on a conspicuous part of the premises therein described, and by publishing a brief notice thereof in a daily newspaper in said county twice a week for two weeks before the return day." As before observed, this is a proceeding *in rem*. It may be carried to the extent of judgment, execution, and sale without actual notice to the real owner. It is therefore the more important that every essential requisite of the Act of Assembly prescribing the mode of service should be complied with. The return of the sheriff must show such compliance. The return in this case is fatally defective for two reasons: First. It does not show that a true and attested copy of the writ was posted on a *conspicuous* part of the premises *for two weeks before the return day*, and secondly, it does not show publication as required in a daily paper for two weeks before the return day. On the contrary, it appears that the writ was posted December 5th, which was but a day or two before the return day, and the advertisement in the *Bulletin*, for aught that appears in the return, might have been inserted after the return day. Nor is this omission aided by the additional averment of the return that it was "agreeably to the Act of Assembly." It is the duty of the sheriff to return the mode of service. The Court can then determine whether it was in accordance with the Act of Assembly. This is the rule even in case of a summons. Delaney *v.* Gault, 6 Casey, 63; Cadmus *v.* Jackson, 2 P. F. S. 295, and other cases cited by defendant in error, are not in conflict with this view. They decide that a purchaser at a sheriff's sale, under a judgment obtained in a *scire facias* on such claims, is not bound to show that the Acts of Assembly have been strictly complied with. He is protected by the judgment. But here the defendant, the true owner of the premises, comes in and asks to have a judgment entered upon a claim and process of which he had no actual knowledge set aside because service was not made in the manner required by law. The cases are radically different.

(4, 5, and 6) These assignments are not sustained. There was an affidavit filed showing a demand upon the owner for payment of the claim, and we are not prepared to say that a judgment upon a return of *nihil habet* is erroneous, even when the defendant had a known residence in the city. It might be a persuasive reason with the Court below to open a judgment entered under such circumstances, but we cannot say as a matter of law that it was erroneous.

Judgment reversed and a *procedendo* awarded.

Opinion by PAXSON, J.

Wistar v. City of Philadelphia to use, etc.

(Three cases.)

March 11, 1878. THE COURT. The judgment in each of the above cases is reversed and a *procedendo* awarded.

Opinion by PAXSON, J.

Oct. & Nov. '77, 126. Nov. 10, 1877.

City of Pittsburgh v. Biggert, adm'r.

Militia—Armory—Liability of counties and cities for rent of—Act of May 4, 1864.

It is the duty of the counties and cities of the Commonwealth, under the Act of May 4, 1869, to provide armories for the militia resident within their respective limits, for the rent of which they are entitled to be indemnified out of the "brigade fund."

Application having been made on behalf of the Duquesne Grays of Pittsburgh, a militia organization, to the mayor of Pittsburgh for an armory, he referred the matter to the police committee of the city councils, which committee appointed a sub-committee, who rented certain premises for the purpose. It did not appear that the police committee had authority to bind the city, and the city councils neither authorized nor ratified the arrangement. A portion of the rent was paid out of the "brigade fund," and assumpsit brought against the city for the balance:

Held, that, it being the duty of the city to provide such armory, it was liable therefor in an action for use and occupation.

Error to the Common Pleas No. 1, of Allegheny County.

Assumpsit, by F. C. Biggert, administrator of Rody Patterson, deceased, against the City of Pittsburgh, for the rent of certain premises occupied as an armory by a battalion of militia resident in the city.

At the trial, before COLLIER, J., it was proved that in 1870 the commanding officer of the Duquesne Grays of Pittsburgh, a portion of the militia of the State, organized and acting under the State militia laws, made application to the mayor of Pittsburgh for an armory for the use of said organization. This application was made under section 64 of the Act of May 4, 1864 (P. L. 221, Purd. Dig. 1049, pl. 84), which provides as follows:—

"The commissioners of counties, or mayor and councilmen of cities, shall provide for each company of militia, within the limits of their respective places, a suitable armory or place of deposit for the arms, equipments, and equipage furnished it by the State. When a company is formed from different places, the location of such armory or place of deposit shall be determined by a majority of its members, the rent of which armory shall be paid out of the brigade fund."

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The mayor brought the matter up before the police committee of councils, who appointed a sub-committee of three to attend to the matter. This sub-committee leased certain premises from the plaintiff's decedent for a term of three years, at $1800 per annum, and reported their action to the police committee. The premises were occupied as an armory by said organization. One year's rent was paid, the money therefor being provided out of the "brigade fund," as provided for in the above Act.

This suit was subsequently brought, in 1876, to recover the rent for the remainder of the term.

The defendant's counsel asked the Court to instruct the jury to find for the defendant, (1) because the city councils had not authorized the renting of the premises; and (2) because, under the 64th section of the Act of May 4, 1864, the city was in any event merely the agent of the State for the disbursement of the brigade fund, out of which the plaintiff's claim is payable. *Refused.* The Court charged the jury, if they believed the evidence on the part of the plaintiff, to find for him.

Verdict and judgment accordingly for plaintiff, for $4428. The defendant took this writ, assigning for error the refusal of its points and the charge of the Court as above stated.

The case was submitted on paper books, without oral argument.

Thos. S. Bigelow, city solicitor, for the plaintiff in error, in his printed argument contended that the mayor and city councils should have acted conjointly by ordinance before any liability for the rent could be fixed on the city.

Act of May 4, 1864, section 64, *supra.*

The militia is an organization created under general laws for the advantage of the whole State, and it was never intended that any particular city or county should bear more than its proportionate share of the burden of its maintenance. It was necessary that some one act for the State in renting armories, etc., and while the officers of each company or regiment might have been designated for this purpose, the legislature no doubt thought that this duty could be better performed by the commissioners of counties and the mayor and councilmen of cities; but their acts create no liability on the part of the respective corporations.

The 64th section of the Act of May 4, 1864, *supra*, expressly provides that the rent of armories "shall be paid out of the brigade fund."

Thos. M. Marshall, contra.

Jan. 7, 1878. THE COURT. By the 64th section of the Act of the 4th of May, 1864, it was directed that "the commissioners of counties, or the mayor and councilmen of cities," should "provide for each company of militia within the limits of their respective places, a suitable armory, or place of deposit for the arms, equipments, and equipage furnished by the State, ... the rent of which armory should be paid out of the brigade fund." Under this statutory provision an application for quarters was made to the mayor of Pittsburgh on behalf of a military organization, described in the testimony indifferently as a "company" and a "battalion" known as the Duquesne Grays. The mayor referred the application to the police committee of the city councils, and three members of that committee were appointed a sub-committee to make the required selection. They concluded an arrangement with Rody Patterson for the occupancy of the second and third floors of a building on Fourth Avenue for three years, at an annual rent of eighteen hundred dollars. The premises were occupied by the organization throughout the term. Rent was paid for one year, and this suit was brought to recover the arrears.

It is shown by the evidence that the sub-committee reported to the police committee the agreement they had made. But there is nothing in the paper books tending to prove that any action was taken by the city councils. They neither authorized nor ratified the agreement. And it does not affirmatively appear that the right to bind the city by their contract was within the scope of the police committee's powers. It was insisted on at the trial and in the argument here, that, on this ground of the entire failure of evidence of participation by the councils, the plaintiff could not recover. If it were clear that the action was on the express contract, the view of the counsel might be sustainable. But for aught that appears it may have been brought for the use and occupation of the premises. All that the docket entries set out are the issuing of a summons in case and the filing of a plea, without reciting it or indicating its character. Ample evidence that possession of the rooms was taken and retained for three years was produced. Some of the witnesses testified to facts from which the jury could infer that the possession was of a kind to give it public notoriety. No objection was made during the term on behalf of the city to the agreement the police committee had entered into. Eighteen hundred dollars on account of the rent were paid out of the brigade fund to Mr. Patterson. And, above all, the organization was legally entitled to an armory which the city was legally bound to provide. Assuming in the absence of the pleadings, as it is due to the judge who tried the cause to assume, that the nature of the action was such as to warrant the submission of the facts to the jury, it was not error to charge that, if the plaintiff's evidence was believed, he was entitled to a verdict.

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As another ground of defence, it was urged that the Act of 1864 made the mayor and councils the mere agents of the State in contracting for the armory, and that no liability for rent beyond the amount to be realized from the brigade fund could be charged on them. But the city officers were required to "provide" an armory. They could do this by leasing, purchasing, or erecting a proper building, or by appropriating to military use some building belonging to the municipality. They would be entitled to reimbursement out of the brigade fund in either case. That was a source of compensation to which the Act certainly could not have intended to relegate the lessor. To do that would be to cast the duty of providing the armory, not on the city, but on him. This "brigade or county military fund," as it is described in the Act of the 7th of April, 1870, is made up of taxes duly assessed, collected by the officer who collects the general taxes, and paid into the county treasury, to await the order of the board of officers of the proper brigade. Its amount can be readily ascertained, and information as to the extent of the demands upon it can always be furnished by the members of the military board. With such means of knowledge there should be no embarrassment in securing adequate provision of armories for their military companies by the municipal authorities. Their expenditures can easily be made proportionate to the amount the law has dedicated to their reimbursement. But if they provide accommodations for any organization by contract with an individual property owner, they are bound to comply with its stipulated terms. The brigade fund was designed to be an indemnity to them, and not means of payment within the property owner's reach.

Judgment affirmed.

Opinion by WOODWARD, J.

Jan. '78. March 7, 1878.

Mary Finkbone's Appeal.

Statute of limitations—Deposit of money not within the operation of, until after demand—Acknowledgment of claim, by subsequent writing upon the same paper with receipt for money deposited.

The statute of limitations does not begin to run until the cause of action has accrued.

F. deposited money with W. who gave a receipt as follows: "Received of Mary Finkbone, at different times since 1862, $475 for safe keeping, which is to be returned to her in such amounts as she may want. Penrose Wiley." Subsequently, within six years of bringing suit for this sum, W. wrote a similar receipt for $30 upon the same paper with the former. More than six years had elapsed from the date of the first receipt before demand or claim was made by F. upon it:

Held, that the first receipt was for a deposit to be returned on demand, and that the statute could not run until after demand was made.

Held further, that the giving of the second receipt, upon the same paper with the first, amounted to a restatement of the account between the parties, and was a sufficient acknowledgment to bar the statute.

Laforge *v.* Jayne, 9 Barr, 410 overruled.

Girard Bank *v.* Bank of Penn Township, 3 Wr. 92, affirmed and followed.

Appeal from the Common Pleas of Berks County.

Appeal of Mary Finkbone from a decree confirming the report of an auditor appointed to audit and distribute the assigned estate of Penrose Wiley.

The following were the material facts: Dr. Penrose Wiley made an assignment for the benefit of his creditors, on September 2, 1874. He died April 19, 1875. His assignee filed an account of his trust, April 7, 1876. Before the auditor appointed to audit this account appeared Mary Finkbone, who had frequently left different sums with Dr. Wiley for safe keeping. She presented, together with several others of later date, the following receipts, both being written upon the same piece of paper:—

Received of Mary Finkbone at different times since 1862, four hundred and seventy-five dollars—for safe keeping—which is to be returned to her in such amounts as she may want. PENROSE WILEY.

$475.00. Leesport, May 15, 1868.

Received October 11, 1869, of Mary Finkbone, thirty dollars, to be kept and returned to her whenever she shall want it.

$30.00. PENROSE WILEY.

The auditor refused to allow the claim for $475 on the ground that it was barred by the statute of limitations. To this ruling of the auditor Mrs. Finkbone filed exceptions. The Court dismissed the exceptions and confirmed the report of the auditor (LASSAMAN, A. L. J., giving the opinion).

Mrs. Finkbone took this appeal, assigning for error the decree of the Court.

A. G. Green, for the appellant.

The sum claimed by the appellant must be regarded as a deposit subject to be drawn at the pleasure of the depositor. The contract between the parties was for payment on demand, and no cause of action occurred until such demand was made. The cases show that demand need not be made within the six years.

Girard Bank *v.* Bank of Penn Township, 3 Wr. 92.

Thorpe *v.* Booth, 21 Eng. C. L. Rep. 468.

The writing of the second receipt upon the same paper with the first, was a sufficient acknowledgment of the debt to bar the statute.

Johns *v.* Lantz, 13 Sm. 324.

McClelland's Ex'r *v.* West., 20 Sm. 183.

Patton's Ex'r *v.* Hassinger, 19 Sm. 311.

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Garret B. Stevens, contra.

The paper in question was evidently intended for a due bill; and, where a demand is necessary to complete a plaintiff's cause of action, it must be made within six years.

Morrison *v.* Mullin, 10 Casey, 12.
Campbell *v.* Boggs, 12 Wr. 524.

There was no acknowledgment to bar the statute.

Burr *v.* Burr, 2 Casey, 234.
Barclay's Appeal, 14 Sm. 69.

March 25, 1878. THE COURT. The questions presented for our consideration are, (1) Whether the paper, executed by Dr. Wiley to the appellant, is of such a character as to bring it within the operation of the statute of limitations? (2) Affirming this proposition, was there such a subsequent acknowledgement of the claim as relieved it from the bar of that statute?

The paper under consideration is in the words and language following, to wit: "Received of Mary Finkbone, at different times since 1862, four hundred and seventy-five dollars, for safe keeping, which is to be returned to her in such amounts as she may want. $475.00. Leesport, May 15, 1868. Penrose Wiley." On the same piece of paper, and immediately under the above receipt, is the following: "Received, October 11, 1869, of Mary Finkbone thirty dollars, to be kept and returned to her whenever she shall want it. $30.00. Penrose Wiley."

It is obvious that the obligation, first above stated, is not in the nature of a due bill, but rather in the nature of a bailment for safe keeping, or of a deposit, to be returned on demand.

It was due and payable only from the time when demand was made, and until such demand no suit would lie for its recovery. Such being the fact, the case is brought directly within the ruling of the Girard Bank *v.* The Bank of Penn Township (3 Wr. 92), wherein it was held that the bank could not defend against a claim for a deposit, on the ground that no demand had been made therefor within six years.

This decision is put upon the ground that the engagement by the bank, with the depositor, was not to pay absolutely and immediately, but only when payment should be required, and that it followed that no right of action existed, nor did the statute begin to run, until after demand made. It is also noteworthy that the case of Thorpe *v* Booth (1 Ry. & Moody, 388) is approved, in which the same rule is applied to a note payable on demand given by one private person to another.

Were there no other Pennsylvania authority bearing upon this subject, we might consider the question as authoritatively settled, but we have Laforge *v.* Jayne (9 Barr, 410), which would seem to adopt a principle the very converse of that above stated. It was there held that a promise to return a specific sum on demand, borrowed in Pike County checks, was barred by the statute if demand were not made within six years from the date of the promise, and Codman *v.* Rogers (10 Pick. 112) was cited in support of the ruling. Now, it is remarkable that Judge STRONG, who delivered the opinion in the Girard Bank case, does not mention Laforge *v.* Jayne, though it was cited by the counsel for the plaintiff in error, but he does refer to Codman *v.* Rogers, on which it was based, in order to show that this latter case was not authority for the rule adopted. The two cases do indeed present some differences by which they might have been distinguished; but it was no doubt felt that any effort of that kind must be regarded as but a fictitious attempt to exhibit a difference in cases which, though slightly variant in fact, were not so in principle, therefore the case itself was passed *sub silentio*, whilst its doctrine was overruled.

We feel warranted in adopting the later case, not only because it was the more carefully considered, but also because it accords better with the general rule that the statute cannot begin to run until the cause of action has accrued.

In addition to the reason thus stated, there is yet another why the statute does not operate as a bar in this case. As has already been stated, Dr. Wiley wrote the subsequent receipt of October 11th, 1869, upon the same piece of paper and directly under the former.

It is very certain, therefore, that the claim in controversy was, at that time, not only before his eyes, but in his possession; when, therefore, he wrote the subsequent receipt upon it and redelivered it, what was that but an acknowledgment, in the most distinct and unequivocal manner, that on the 11th of October, 1869, he held, for the use of Mary Finkbone, four hundred and seventy-five dollars, plus thirty, or a gross sum of five hundred and five dollars It amounts to a restatement of the account in which thirty dollars are added to the former indebtedness. It is precisely, in its effect, as though Dr. Wiley had delivered to the appellant, at the date of the last receipt, an account stated setting forth the receipt of $475.00 on the 15th of May, 1868, and of $30.00 on the 11th of October, 1869. Under this view of the case we need hardly add that the statute formed no bar to the claim in controversy, and that that claim ought not to have been rejected.

The decree of the Court of Common Pleas is reversed, costs to be paid out of the assigned estate, and a redistribution ordered.

Opinion by GORDON, J. WOODWARD, J., absent.

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Oct. & Nov. '76, 230. Oct. 22, 1877.

Parkinson for use, etc., v. The City of Parker.

Pleading—Bond made by corporation—Presumption of authority—Usury—Effect of charge of interest higher than legal rate—Non-suit—Practice.

Where pleas admit the due execution of a bond declared on, the plaintiff has a *prima facie* case, and the entry of a compulsory non-suit is error.

Where the plea *non est factum* is required by rule of Court as well as by general practice, the plea *nil debet* is demurrable.

The seal of a corporation to a bond is *prima facie* evidence of the authority of the corporation to make it.

The fact that a bond calls for eight per cent. interest does not invalidate the obligation, it is only void as to the excess over the legal rate of interest.

Berks and Dauphin Turnpike *v.* Meyers, 6 S. & R. 16; approved.

Error to the Common Pleas of Armstrong County.

Debt on a bond bearing date November 21, 1872, for $500 with eight per cent. interest, by John Parkinson for the use of Oveng and Colter against the city of Parker. The bond was signed by the burgess and clerk of the borough of Lawrenceburg and sealed with its corporate seal. The pleas were *nil debet*,* want of consideration, and specially "that the consideration of the bond sued on was a note executed and delivered, etc., by the Parker's Landing Water Company," etc.

On the trial (before McDermitt, P. J.) the plaintiff put in evidence the bond, the record of the Court of Quarter Sessions incorporating the borough of Lawrenceburg, and the Act of Assembly of April 7, 1873 (P. L. 193), incorporating the city of Parker, defendant, and including therein the borough of Lawrenceburg, and making the city liable for its debts.

Counsel for the defendant moved for a non-suit, on the ground that "the plaintiff has shown no authority for the issuing of the bond in suit." Whereupon the Court entered a non-suit, and, after argument, refused a motion to take it off.

Plaintiff took this writ, assigning as error the action of the Court.

J. V. Painter (with whom was *E. S. Golden*), for plaintiff in error.

It is clear that under the plea of *nil debet* the due execution of the bond was admitted.

Barrington *v.* Bank, 14 S. & R. 405.

Smith *v.* Weld, 2 B. 55.

Zeigler *v.* Sprenkle, 7 W. & S. 179.

It was error to require the plaintiff to prove the authority of the borough of Lawrenceburg to issue the bond in suit. The seal was *prima facie* evidence of due execution, and if it were affixed by persons having no authority, the proof of that fact is matter of defence.

Berks and Dauphin Turnpike *v.* Meyers, 6 S. & R. 16.

Com'th *v.* Pittsburgh, 5 Wr. 284.

J. Gilpin, for defendant in error.

Under the plea of *nil debet* nothing was admitted, but the mere physical execution of the bond; the plaintiff did not demur, he had upon him therefore the burden of proving his whole case.

Brubacker *v.* Taylor, 26 Sm. 87.

Zeigler *v.* Sprenkle, 7 W. & S. 179.

Moyer *v.* Fisher, 12 H. 516.

The burgess and clerk of a borough cannot bind it by giving a bond in its name unless authorized so to do by a resolution of its council.

Gest *v.* Pittsburgh, 7 Wr. 395.

The bond in this case which calls for the "just and full sum of five hundred dollars with *eight* per cent. interest, etc.," is not regular upon its face, but is, on the contrary, void.

Jan. 7, 1878. The Court. This action of debt was upon a bond executed by a municipal corporation and *prima facie* regular on its face. The only question is whether the Court was right in entering judgment of non-suit, after the bond had been given in evidence, in connection with other testimony introduced by the plaintiff. The pleas were *nil debet*, want of consideration, set-off, and specially, that the consideration of the bond was a certain overdue and unpaid note, executed by the officers of the Parker's Landing and Lawrenceburg Water Co. The 65th rule of the Common Pleas provides that "in debt on specialty and covenant, the plea of *non est factum* shall operate as a denial of the execution of the instrument sued on, in point of fact only; and all other matters, including those which make the instrument void or voidable in law, must be specially pleaded, or be particularly set forth in a specification filed before or with the plea of the general issue." Under this rule, as well as according to the general practice, *nil debet* was not a good plea, and if a demurrer had been interposed it would have been declared bad; but, inasmuch as the plaintiff chose to go to trial without objection, it could not be treated as a nullity. The greatest advantage that the defendant could claim was that it let him into any defence that he might be able to prove. It did not, however, impose on the plaintiff the onus of proving that the bond was executed and delivered by the borough for whose debts the corporation defend-

* Rule No. 65 of the Court of Common Pleas of Armstrong County provides that "in actions of debt upon specialty and covenant, the plea *non est factum* shall operate as a denial of the execution of the instrument;" all other matters must be pleaded specially.

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ant was made liable by the terms of its charter. The pleading must be considered as admitting the execution of the bond, and the plaintiff had a right to read it in evidence to the jury. (1 Chitty's Pleading, 6th ed. 518, 519; 1 Troubat & Haley's Prac. 458; Zeigler *v.* Sprenkle, 7 W. & S. 179, and authorities there cited.) Having given in evidence the record of the Court of Quarter Sessions, incorporating the borough of Lawrenceburg, the charter of the city defendant, and the bond executed by the borough under the corporate seal, he had a *prima facie* case. As remarked by Chief Justice GIBSON in The Berks and Dauphin Turnpike *v.* Meyers (6 S. & R. 16), "the seal itself was *prima facie* evidence that the contract had been duly entered into by the corporation." The right to borrow money within the prescribed limits, and issue certificates therefor, bearing interest, was conferred by the general borough law; and the fact that the bond in this case calls for eight per cent. interest does not invalidate the obligation. It is only void as to the excess over the legal rate of interest. The power, says Mr. Justice STRONG, in Commonwealth *v.* Pittsburgh (5 Wright, 284) "to execute and issue bonds, contracts, and other certificates of indebtedness, belongs to all corporations, public as well as private, and is inseparable from their existence. It is for this they hold a common seal. No one will doubt that for a legal and authorized debt a municipal corporation might give its bond under its general corporate powers. If a bond given by such an obligor be void, it is not because of the form of the instrument, nor because general corporate powers do not warrant giving bonds, but because the debt for which the bond has been given was created without authority, against law or without law."

Whether the bond in controversy was issued without consideration, or the debt for which it was given "was created without authority, against law or without law," are questions which might have arisen if the defence had been developed, and such testimony introduced as would have been admissible under the pleadings; but none of these questions are now before us. It is sufficient to say that when the plaintiff rested he had a *prima facie* case, which entitled him to go to the jury; and the learned Judge therefore erred in entering the judgment of non-suit.

Judgment reversed and a *procedendo* awarded.

Opinion by STERRETT, J. AGNEW, C. J. and SHARSWOOD, J., absent.

July, '77, 20. Feb. 13, 1878.

Domestic Sewing Machine Co. v. Saylor.

Set-off—Act of 1705—Unsettled account arising out of a separate and distinct cause of action—Joint and several contract—Liability of surety thereon.

An unliquidated account, not between partners, may be set off under Act of 1705, although arising out of a separate and distinct cause of action.

In an action by A. against B., for goods sold and delivered, B., to establish a set-off, offered in evidence a joint and several contract whereon C. was principal and A. surety, and alleged an unsettled indebtedness of A. to him:

Held (reversing the judgment of the Court below), that the contract being joint and several, B. could have sued A. without joining C., and it was therefore error to charge the jury "that if they found that the account between B. and C. was unsettled, there could be no set-off as against A."

Error to the Common Pleas No. 1, of Philadelphia County.

Assumpsit by Saylor against the Domestic Sewing Machine Co., for goods sold and delivered.

Pleas, *non-assumpsit*, payment, set-off with leave, etc. Notice of set-off was given as under a joint and several bond executed by plaintiff and others to the defendants.

Upon the trial, before BIDDLE, J., the plaintiff proved that the defendants were indebted to him for $1800, the contract price for thirteen wagons sold and delivered. The defendants offered in evidence, under the plea of set-off, a joint and several instrument in writing, signed by the plaintiff, together with S. Aschenbach, whereby they became sureties to the defendants for the faithful conduct of one Hippard as agent. The plaintiff objecting that the instrument, not being under seal, was inadmissible as a bond described in the notice of special matter, the defendants filed a special plea, under which the instrument was admitted. The defendants also offered in evidence three promissory notes due and unpaid of Hippard to the Company, and also alleged a further indebtedness of Hippard over and above the amount of the promissory notes. Plaintiff denied the indebtedness. It was conceded that the evidence did not establish a settled account between the defendants and Hippard, resulting in a balance which they agreed on.

The plaintiff presented the following point: Such set-off cannot be allowed, because the account between the Company and Hippard, its agent, for whose liability, it is alleged, the plaintiff is liable under the writing in evidence, has not been settled and adjusted. Hippard alleges that the Company is indebted to him; this the Company denies, and it cannot now be said with certainty how the account stands.

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The Court charged thereon as follows: "Unless you believe that there was a final adjustment between Hippard and the Company, and a balance struck between them in favor of defendants, you must disregard the question of set-off." And further charged, *inter alia*, that "the defendants also, in answer to plaintiff's claim, present a counter claim or set-off against him, arising from an instrument of writing, which amounts to an agreement by the plaintiff to become surety for Hippard for indebtedness due or to be incurred by him to the defendants. The surety has a right to be satisfied that there is a debt owing before he can be called on to pay. There must be a settlement and adjustment of accounts between Hippard and the defendants, before Saylor can be held responsible, and you must be satisfied that there was a settlement of accounts and balance struck, before you can give defendants a verdict."

Verdict and judgment for the plaintiff.

Defendants took this writ, assigning for error the answer of the Court to plaintiff's point, and that portion of the charge above quoted.

E. Coppée Mitchell, for plaintiffs in error.

Unliquidated damages arising from any bargain may be set off whenever they are capable of liquidation, by any known legal standard.

Act of Assembly, 1705, Purd. Dig. 487, pl. 1.
Hunt *v.* Gilmore, 9 Sm. 450.
Phillips *v.* Lawrence, 6 W. & S. 152.

Matters *ex contractu*, arising out of a different transaction from the one in suit, may be proved by way of set-off.

Halfpenny *v.* Bell, 1 Norris, 128.
Speers *v.* Sterrett, 5 Casey, 192.
Hunt *v.* Gilmore, *supra*.

The question here is, could the Sewing Machine Company have maintained an action upon their bond against Saylor, without first ascertaining the exact amount due them by Hippard? The Court charged the jury that they could not. This was error. The obligation given by Saylor and others to the defendants is expressly joint and several by its terms; on breach of condition either one of the obligors might be sued.

Walter *v.* Ginrich, 2 W. 204.
McCaraher *v.* Commonwealth, 5 W. & S. 21.
Beyerle *v.* Hain, 11 Sm. 226.

Josiah Funck (*W. H. Livingood* with him), for defendant in error.

A surety cannot be made liable on an unliquidated account set up against his principal. Debts which can be set off are such as are due in the same right.

Ex'rs of Darroch *v.* Adm'rs of Hay, 2 Yeates, 208.
Potter *v.* Burd, 4 W. 15.
Carman *v.* Garrison, 1 H. 159.
Russell *v.* Miller, 4 Sm. 155.

In this action between Saylor and the Company, it is attempted to settle an account between Saylor and Hippard, and use it as a set-off against Saylor. The doctrine of set-off has never been carried to this extent.

Milliken *v.* Gardner, 1 Wr. 456.
McCracken *v.* Elder, 10 Ca. 239.

March 11, 1878. THE COURT. This record presents but a single question. John L. Saylor brought suit against the Domestic Sewing Machine Company (defendants below) to recover the contract price for thirteen wagons which he alleges he constructed for them. The defendants claimed a set-off, and gave in evidence a joint and several contract in the form of a bond, signed by Saylor with other parties, the condition of which was "that if the above bounden Emanuel Hippard, his heirs, executors, and administrators, shall well and truly pay, or cause to be paid, any and every indebtedness or liability now existing, or which may hereafter in any manner exist, or be incurred on the part of the said E. Hippard to the said Domestic Sewing Machine Company, whether such indebtedness or liability shall exist in the shape of book accounts, notes, renewals, or extensions of notes or accounts, acceptances, indorsements, or otherwise . . . . then this obligation to be void; but otherwise to remain in full force and virtue." This instrument, although in form a bond and designated as such in defendants' notice of set-off, was not sealed, and was objected to for that reason.

The defendants then changed their pleas to meet the exigencies of their defence, and introduced evidence tending to show consideration. It was then properly admitted in evidence. The plaintiff denied that Hippard was indebted to the company, and there was conflicting evidence upon this point.

The learned Judge practically withdrew the question of fact from the jury by instructing them that: "The surety has a right to be satisfied that there is a debt owing before he can be called upon to pay. There must be a settlement and adjustment of accounts between Hippard and the defendants before Saylor can be held responsible, and you must be satisfied that there was a settlement of accounts and balance struck before you can give defendants a verdict." We think this instruction was erroneous. It would undoubtedly have been more convenient for the purposes of the trial had there been a settlement of accounts between Hippard and the company and a balance struck. This, however, is but an *argumentum ab inconvenienti*, as such prior settlement is not required by any rule of law. It was not a question between partners, where a balance can only be ascertained by a settlement or an action of account-render. The contract being several as well as joint, the company could have sued Saylor upon it, either with or without joining the other parties. That he was a surety can make no

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difference in this respect. Whether a surety can be proceeded against in the first instance depends to some extent upon the form of the obligation which he signs. If, then, the company could have sued Saylor and recovered for the indebtedness of Hippard, there seems no good reason why they may not avail themselves of the same cause of action by way of set-off. The practical difficulties upon the trial could be no greater than in the case of unliquidated damages for breach of contract, and it has been repeatedly held that such damages may be set off. (Shaw *v.* Badger, 12 S. & R. 275; Steigleman *v.* Jeffries, 1 Id. 477; Hubler *v.* Samney, 5 Watts, 51; Nickle *v.* Baldwin, 4 W. & S. 290; Thomas *v.* Shoemaker, 6 Id. 179; Phillips *v.* Lawrence, Id. 152; Ellmaker *v.* Fire Insurance Company, Id. 439; Speers *v.* Sterrett, 5 Casey, 192; Hunt *v.* Gilmore, 9 P. F. S. 450; Halfpenny *v.* Bell, 1 Nor. 128.) Our defalcation Act is very broad in its terms. It allows the defendant to give any "bond, bill, receipt, account, or bargain in evidence." But, I do not propose to discuss this Act at length. It has been in force since 1705, and ought by this time to be generally understood. Here, in answer to the suit the defendants allege that the plaintiff is indebted to them upon his bond. That such indebtedness may be set off is too plain for argument.

Judgment reversed, and a *venire facias de novo* awarded.

Opinion by PAXSON, J.

July, '77, 82. Feb. 28, 1878.

Merchant v. The Brig "Odorilla."

Attachment of vessels—Acts of June 13, 1836, and April 16, 1838—The lien of "vendors of copper sheathing" not to be extended by construction to the vendors of bolts and rings.

The Act of April 16, 1838, extended the lien provided by the Act of June 13, 1836, relating to the attachment of vessels to "vendors of copper sheathing." A vendor of copper sheathing filed a libel against a vessel for certain rings and bolts furnished by him to her, which formed part of his regular trade, but which had no connection with copper sheathing and was not manufactured by him:

Held, that the lien given to vendors of copper sheathiug could not be inferentially extended to the case of rings and bolts merely because they formed part of the ordinary business of the libellant.

PER CURIAM. This would be legislation in fact, by extending the lien to a new class of subjects. It is too plain that the lien in the Act stated is given to the vendor or seller of a particular *subject*, not to a *tradesman* in a particular business.

Error to the Common Pleas No. 1, of Philadelphia County.

This was a proceeding *in rem* by libel and attachment under the Act of June 13, 1836, entitled "An Act relating to the attachment of vessels" (P. L. 616, Purdon's Dig. 94), by Clarke Merchant, trading as Merchant & Co., against the brig "Odorilla," owned by Cain and others.

The libel set forth that Merchant & Co., "vendors of copper sheathing, etc.," had furnished certain material consisting of 63 bars of "T" metal for the building, fitting, and furnishing of the "Odorilla," and that there was due the libellants therefor $559. That the vessel was still in port, and had not proceeded upon her voyage. The libel prayed that she might be attached, and her master and all others concerned summoned to answer. Upon the filing of this libel, the vessel was attached.*

The answer of the owners averred that the material furnished had been ordered by the contractors having in charge the building and equipment of the vessel, and not by the respondents; also, that, at the time the greater part of the material was furnished, she was being built and equipped, not within the limits of this Commonwealth, but in the State of Delaware. The libellants filed a replication to this answer denying its averments.

Upon the trial (before ALLISON, P. J. and PEIRCE, J.) it appeared that, although the libellants were vendors of copper sheathing, the material furnished to the brig was neither copper sheathing nor anything connected with it, but consisted of bolts and rings of yellow metal, always sold by vendors of copper sheathing, and part of their regular trade. They were not manufactured by the libellants, but sold by them for the manufacturers upon commission.

The Court instructed the jury to find a verdict for the defendant. Verdict accordingly.

The libellant took this writ, assigning for error the instruction of the Court.

J. Warren Coulston, for the plaintiff in error.

The words "vendors of copper sheathing" are words descriptive of a class of merchants, and are not limited in their application to those who sell the specific article of copper sheathing and that only.

It was proved that the articles furnished formed part of the regular trade of a vendee of copper sheathing, and it would be as unjust to restrict this merchant in the enforcement of a lien to one article, as a ship chandler who deals in various articles and has a lien for all.

Henry Flanders, contra.

A special privilege given by the Legislature

* The Act under which the libel was filed was that of April 16, 1838 (P. L. 634, Purd. Dig. 95), as follows: "All the provisions contained in the Act of June 13, 1836, entitled 'An Act relating to the attachment of vessels,' are hereby extended to vendors of copper sheathing."

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cannot be extended by construction. It is sufficient to say that no lien has been given to the *vendors of rings and bolts*.

March 11, 1878. THE COURT. By the Act of 16 April, 1838, the lien given by the Act of 13 June, 1836, relating to the attachment of vessels, is extended to the vendors of "copper sheathing." (1 Brightly Dig. 94, 95.) It is argued that this lien is to be inferentially extended to rings and bolts, because they are also sold by the plaintiff as a part of his business. This would be legislation in fact, by extending the lien to a new class of subjects. It is too plain that the lien in the Act stated is given to the vendor or seller of a particular *subject*, not to a *tradesman* in a particular business. In the latter case, the trade or business would be the subject of the legislative intent, and would cover all that is customary in that particular calling or business. For example, a lien given to blacksmiths would cover all articles furnished, ordinarily belonging to this trade and made by blacksmiths. But when not given to the trade or calling, it is evident that one who sells a certain article is merely a vendor of that particular thing, and, although he may sell other articles, the law cannot be made to reach these different subjects of sale. For example, if the vendor of copper sheathing dealt also in anchors or in tinware, it would be a patent piece of judicial legislation to say that the anchors or the tinware were included in the lien for copper sheathing. It might be well said that copper bolts, rivets, or nails to fasten the sheathing was within the legislative intent, for, in fact, when the sheathing is on the vessel, they would constitute a part of it. But when a step outside is taken, and we are asked to say that rings and bolts, having no relation whatever with the sheathing, are the subject of lien, merely because the vendor also deals in them, it is evident the step is outside of the legislative intent also. A lien given to the vendors of paints (if there were such a lien) might as properly extend to a chest of medicines, or to stationery, because druggists deal in all these articles.

Judgment affirmed.

PER CURIAM.

Common Pleas—Equity.

C. P. No. 4. March 23, 1878.

Buchanan v. Streper et al.

Injunction—Pending an action of ejectment between joint occupants of the property in dispute the defendant will be enjoined from molesting the plaintiff in his customary occupation of the premises—Injunction affidavit—Competent evidence under the Acts of April 15, 1869, and April 9, 1870.

Motion to continue preliminary injunction, sur bill and depositions considered as an answer.

The complainant's bill averred that she had resided in the house No. 529 N. 20th St., in the city of Philadelphia, for fourteen years; that the defendants were the widow and children of one O. G. Streper, deceased, an uncle of the complainant, and resided in the said house by her permission; that the said house was purchased in the year 1864 with the money of the complainant, through the agency of the said Streper, and subject to a yearly ground rent which had always been paid by the complainant as owner of the house; that either through fraud, mistake, or accident, the deed for the house had been executed to the said Streper, although he had paid no consideration therefor other than the money furnished him by the complainant for the express purpose of purchasing the house for her, and that he had in his lifetime recognized the title of the complainant, but, when called upon to make her a legal conveyance thereof, put her off from time to time with sundry excuses; that the defendants had, when called upon, similarly avoided the discharge of the duty cast upon them, and had recently asserted a right to said house, in consequence whereof the complainant had brought an action in ejectment, which suit was at issue and ready for trial; and that the defendant had, since the commencement of the said action, threatened wrongfully to eject the complainant from said house under a claim of title made shortly before the commencement of said action, and that the said action would deprive her of her property and so change the relations of the parties as to hinder the prosecution of the said action.

The bill prayed that the defendants might be enjoined from ejecting the complainant, and for an account for rents and profits due her for use and occupation of the premises.

The complainant made the injunction affidavit, alleging the facts set forth in the bill, and further, that the defendants had, since the death of the said Streper, acknowledged that she had paid the consideration money for the said house.

Upon the hearing, affidavits were read on

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behalf of the defendants, denying all the material allegations of the bill.

George Biddle, for the motion.

The complainant has established: (1) A prima facie title; (2) that actual danger to that title is threatened. These facts constitute a sufficient claim to the protection of a court of equity.

Kerr on Injunctions, 196.
Rutherford *v.* Metcalf, 5 Haywood, 58.
Thomas *v.* Oakley, 18 Ves. 184.

Where a suit has already been begun and the proper legal means have been taken to enforce a real or supposed right to property, that right shall not be rendered any more precarious by any action of the person contesting it during the pending of litigation.

Bispham on Equity, 460.
Kerr on Injunctions, chap. 15.

Horn R. Kneass, contra.

The complainant has no evidence to support her bill; her injunction affidavit cannot be received because she is rendered incompetent by the Acts of April 15, 1869 (Purd. Dig. 624), and April 9, 1870 (Ibid. 625).

Karns *et al. v.* Tanner, 16 Sm. 297.
Diehl *et al. v.* Emig, 15 Id. 320.

[BRIGGS, J. Her affidavit is competent evidence in this proceeding, whatever objection there may be to her evidence in the ejectment suit.]

The defendants deny every material allegation of the complainant's bill.

THE COURT. Motion granted, and injunction continued.

Common Pleas—Law.

C. P. No. 1. March 9, 1878.

Mechanics' National Bank v. West Phila. Pass. R. Co.

Affidavit of defence law—Corporations—Promissory notes of a corporation are not required to be under seal—The officers of a corporation have an implied authority to issue notes—Where the directors of a company have for a long time tacitly permitted the officers to deal with the company's bank account as they saw fit, they cannot avoid the responsibility of the company for note issued by such officers, by questioning their authority.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit on a promissory note for $15,000 made by The West Philadelphia Passenger Railway Company, payable to the order of John S. Morton.

The note was signed by the president and treasurer, and was indorsed by the payee, John S. Morton; it was also stamped with a scroll stamp in the same manner as the company was in the habit of stamping their checks for deposit in bank. The note had been discounted by the plaintiffs, with whom defendant kept its bank account.

The affidavit of defence set forth that the note was not given under the defendant's corporate seal; that it was not made nor issued by the corporation, nor with its knowledge or consent, or by its authority; that under the by-laws of the defendant, the president and treasurer have no right to issue notes or other securities unless authorized by a vote of the board of directors, and they were never authorized to issue the present note; that it was the plaintiff's duty to inquire whether such authority had been given; that the issue and indorsement of notes was not in the line of defendant's business; that the plaintiff knew or ought to have known that the defendant was solvent and in a prosperous condition, and had no need to borrow money, and therefore should have been on its guard and have inquired as to the purpose of the president and treasurer in issuing said note; and, further, that the plaintiff is not an innocent holder for value without notice of the fraud of the officers, inasmuch as the bank suffered the said officers to use defendant's bank account for their own benefit, and permitted such irregularities therewith as accepting as cash checks of the officers, thereby making defendant's balance appear larger than it really was, and this without notifying the directors.

J. Sergeant Price, for the rule.

The making of notes for raising money is a reasonable incident to the defendant's business.

Barry *v.* Merchants' Exchange Co., 1 Sandf. Ch. 280.
Mott *v.* Hicks, 1 Cowen, 513.

Where there is nothing to show what the note was given for, and nothing on its face to create suspicion, one who discounts it is presumed to be a *bona fide* holder.

Safford *v.* Wyckoff, 4 Hill, 447.

[BIDDLE, J. Is not the allegation of fraud alone sufficient to carry the case to a jury?]

Where it is specified, as here, wherein the fraud consists, it becomes a question for the Court to determine whether the acts set forth constitute fraud or not.

The note is valid without the corporate seal.

2 Kent Comm. 280 to 291, and notes.

The plaintiff was not bound to know the precise powers given by the defendant's by-laws to

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its officers, but may presume that they have such authority as their positions ordinarily imply.

Fay *v.* Noble, 12 Cush. 1.

J. R. Rhoads, contra.

This note was not given in the ordinary course of the defendant's business, and, therefore, it was the duty of the plaintiff to inquire whether the acts of Morton and Huhn were authorized by a vote of the board of directors.

1 Parsons on Bills and Notes, 172.
Angell and Ames on Corporations, § 271, 280.
Martin *v.* Manufacturing Co., 9 N. H. 51.
Dana *v.* Bank of United States, 5 W. & S., 246
Turnpike Co. *v.* Craver, 45 Pa. 386.
Custer *v.* Tompkins County Bank, 9 Barr, 27.
Hardimann *v.* Philadelphia Association, 2 W. N. C. 440.

The plaintiff, having allowed irregular dealings with the defendant's bank account, is charged with constructive notice of the fraud.

The defendant suffered great losses in consequence of the plaintiff's negligence, and these it is entitled to recoup against the plaintiff's claim.

Harper *v.* Kean, 11 S. & R. 280.
Leech *v.* Baldwin, 5 Watts, 446.
Ellmaker *v.* Franklin Ins. Co., 6 W. & S. 439.
Hunt *v.* Gilmore, 9 Sm. 450.
Pownall *v.* Bair, 28 Id. 403.
Biswanger *v.* Stocker, 2 W. N. C., 407.
Stover *v.* Hotel Co., 3 Id. 156.

March 16, 1878. THE COURT. (After stating the arguments of the defendant.) There are times when the apparent balances in the bank account of every large corporation would assume a shape like that which is called fictitious and fraudulent in this case. From the facts set forth in the affidavit of defence, we cannot infer that the plaintiff had notice of the fraudulent conduct of Morton and Huhn. The directors of the defendant company have tacitly allowed this system of dealing with their bank account to go on since 1872, and they cannot now avoid responsibility by questioning the authority of their own officers.

Rule absolute.

Oral opinion by ALLISON, P. J

C. P. No. 3. April 20, 1878.

Posey v. Loutey.

Practice—Execution—Act of April 9, 1849—Appraisement—Watchmen and messengers in the sheriff's office are not disinterested persons within that Act.

Rule to set aside an appraisement under the Act of April 9, 1849 (Purd. Dig. 636, pl. 20).

The depositions taken under this rule showed that the appraisers appointed were two watchmen and a messenger in the sheriff's office, the latter of whom was not a householder and owns no property. The appraisement certifies that the appraisers were sworn by "R. J. Lennon, Deputy Sheriff;" but the appraisers testified that they were never sworn by Lennon, but by A. A. Laws, deputy sheriff. There were a number of goods on the premises not appraised. The plaintiff testified he would give double the appraisement for the goods.

Sloan, for the rule.

The Act of April 9, 1849, *supra*, provides that—

"The sheriff, constable, or other officer charged with the execution of any warrant issued by competent authority for the levying upon and selling the property, either real or personal, of any debtor, shall, if requested by the debtor, summon three *disinterested* and *competent* persons, who shall be sworn or affirmed, to appraise the property which said debtor shall elect to retain under the provision of this Act."

And the Act of April 8, 1857 (Purd. Dig. 638, pl. 25) provides:—

"It shall be lawful for the sheriff, deputy sheriff, or constable of any county or township to administer the oath or affirmation required to be administered to appraisers under the Act to which this is a supplement."

Neither of the Acts has been complied with. The watchmen or messengers of the sheriff's office are not competent and disinterested parties within the meaning of the Act; nor was the oath administered by the proper deputy. The valuation is grossly inadequate. The Court can and will set aside an appraisement under these circumstances.

Sleeper *v.* Nicholson, 1 Phila. 348.
Chestnut *v.* Meace, 3 WEEKLY NOTES, 240.
Staples *v.* Wells, 2 WEEKLY NOTES, 139.

Ledyard, contra.

THE COURT. Deputy sheriffs, messengers, watchmen, etc., employed in the sheriff's office, are not such "disinterested" persons as the act requires, and should not be appointed appraisers. The sheriff is, as it were, a party to the execution, and none of his employés are disinterested.

Rule absolute.

Oral opinion by LUDLOW, P. J.

C. P. No. 3. April 6, 1878.

Foulds v. Haubert.

Opening judgment—Construction of agreement—Usury.

Rule to open judgment, stay execution, and let defendant into a defence.

Plaintiff loaned to defendant $650 to be used in the purchase of a hearse, defendant agreeing to pay $2 for each time the hearse might be used, and giving his judgment note to plaintiff for $650, payable in six months, with interest. Plaintiff also received from defendant a bill of sale for the hearse, whereby he could claim pos-

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session at any time on default of payment. It was also provided that the agreement might be at any time discontinued by Foulds upon giving three months' notice in writing, and thereupon the note should be paid by Haubert, with interest, and with all moneys due for hire. Under the agreement plaintiff received $137 for the use of the hearse, after which judgment was entered up without giving the three months' notice in writing provided for.

Worrell, for the rule.

Being simply a loan of money, this attempt to obtain hire as well as interest was an effort to evade the usury law. The want of notice provided for in the agreement was sufficient to stay the execution.

Shallcross, contra.

Rule absolute.

C. P. No. 3. March 20, 1878.

Raine v. Gordon et al.

New trial—Practice—Rule of Court No. 1, sec. 2—The affidavit of defence does not obviate the necessity of an affidavit denying partnership, where this is the subject of a plea—After-discovered evidence.

Rule for new trial.

Assumpsit against Gerald Gordon, Gordon Smith, and Charles H. Kirk, trading as Gerald Gordon & Co., for advertising done in plaintiff's newspaper. On the day of the trial, as the jury were being called, defendant's counsel filed at bar a special plea to the effect that Charles H. Kirk was not a member of the firm of Gerald Gordon & Co., of Baltimore, by whom said obligation was incurred; the firm of which he was a member being restricted to the States of New York, New Jersey, Pennsylvania, and Delaware, and that the said advertising was ordered by Gordon Smith, who had no authority in Maryland to bind said firm. These facts appeared substantially in the affidavit of defence filed.

The plea was not sworn to, but simply signed by counsel. On trial, after plaintiff had proved his case, defendant's counsel offered Charles H. Kirk to prove the matter set forth in the special plea.

Objected to under rule of Court 1, sec. 2. Objection sustained. Verdict for plaintiff

Defendant moved for new trial because of the rejection of this testimony, and took the deposition of Gordon Smith in support of his rule.

W. H. Hepburn, for the rule.

The obligation under the rule has been obviated by the affidavit of defence, which denies the liability of the firm in Baltimore. The after-discovered residence of Smith tends to show that the contracting party had notice from him of the want of power to bind the firm; for Smith explained to him the nature of the agency in Baltimore, and the points of difference between it and the partnership articles concerning the four States named.

Latta & Megargee, contra.

Even though the business was carried on in Baltimore under somewhat different auspices than the partnership in the four States named, the fact of the firm-name being made use of entirely, and with the consent of all members, binds the firm, unless there be proof of notice to the contracting party that it was an individual debt.

Brewster *v.* Sterrett, 8 C. 115.
Hogg *v.* Orgill, 10 C. 344.
Sedgwick *v.* Lewis, 20 Sm. 217.

The after-discovered evidence is the testimony of parties defendant to the suit. It is at variance with the practice of the Courts to grant new trials where the injury arose from the negligence of a party to the suit.

Harris *v.* Govett, 3 WEEKLY NOTES, 560.

Rule discharged.

C. P. No. 3. March 19, 1878.

Baker v. North Penna. R. R. Co.

Common carrier—Liability for loss of baggage of passenger—Articles other than wearing apparel—Baggage to be forwarded beyond the road of defendant—Question of special contract and of limitation by notice is for the jury—Act of April 11, 1867—Constitution, Art. III. sec. 21.

Rule for new trial.

Assumpsit to recover damages for loss of the plaintiff's trunk and contents.

On the trial, before LUDLOW, P. J., it was proven that plaintiff on September 21, 1876, purchased a through ticket at the North Penna. R. R. Depot from Philadelphia to Detroit. She read it to see whether it was a through ticket, but did not see any notice about baggage on it. She examined it as carefully as she usually did tickets. Shortly before the train started, she went to the baggage master to inquire about the trunk which she had given to an expressman at her hotel, but it had not yet arrived.

He told her that he knew who the expressman was, and that it would soon come; that if she would give him the expressman's receipt he would "double check" the trunk to Detroit, saying, "You need give yourself no trouble, your trunk will reach you more safely than if you had the trunk yourself."

Plaintiff left on the evening train, and the next morning the trunk was checked to Detroit, but was never delivered.

The defence put in evidence an Erie Railway ticket, with some proof that it was similar to the

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one purchased by plaintiff. On the face of the ticket was printed, *inter alia*, the following:—

Issued by the Erie Railway Company.

"This company assumes no responsibility for passengers or baggage beyond its own line. One hundred pounds of baggage free, but in no case exceeding $100 in value except by special agreement."

They proved that the trunk was delivered at Bethlehem, the terminus of the North Penna. R. R., to the Lehigh Valley Railroad, but offered no evidence to show where the trunk was lost. The contents of the trunk were valued at $875, of which $161 represented centennial souvenirs and similar articles, and the balance wearing apparel.

LUDLOW, P. J., charged, *inter alia*, that, if the plaintiff could recover at all, she was entitled to the value of the necessary and usual wearing apparel of a lady in her station of life, and submitted the evidence to the jury to find: (1) Was there a contract? (2) With whom was it made? (3) Was the contract limited? (4) Was notice of the limitation of the contract brought home to the plaintiff? If in absence of knowledge of contents of ticket the agent of defendant contracted to deliver her trunk at Detroit without limitation, defendant is bound. If an unrestricted contract was made, plaintiff can recover.

Verdict for plaintiff for $875.

The defendant filed numerous reasons for a new trial, being mainly that the verdict should have been restricted to wearing apparel—to $300, under the Act of April 11, 1867; that it was against the evidence and the law, and that the charge as quoted above misled the jury.

Charles B. McMichael showed cause.

The verdict for the whole contents of the trunk is in accordance with the law.

McGill *v.* Rowand, 3 Barr, 451.
Porter *v.* Hildebrand, 2 Har. 129.

By selling plaintiff a through ticket, by checking her trunk through, and by expressly promising to deliver it at Detroit, the defendants made a special contract with plaintiff; and they had a right to make such a contract.

Steamboat Co. *v.* Brown, 54 Penna. 77.
Penna. R. R. Co. *v.* Berry, 68 Penna. 272
Chouteaux *v.* Leech, 6 Har. 224.
Peters *v.* Ryland, 8 Har. 497.
Weed *v.* R. R. Co., 19 Wend. 534.
Camden & Am. R. R. Co. *v.* Forsyth, 11 Sm. 81.
Kyle *v.* R. R. Co, 10 Rich. S. C. 382.
Foy *v.* R. R. Co., 24 Barb. 382.
Hart *v.* Rensselaer, 4 Selden, 37.
R. R. Co. *v.* Copeland, 24 Ill. 338.
Cary *v.* R. R. Co., 29 Barb. 35.
Barter *v.* Wheeler, 49 N. H. 30.
Smith *v.* R. R. Co., 43 Barb. 225.
Thornton Check *v.* R. R. Co., 2 Disney, 237.

The Act of April 11, 1867 (Purd. Dig. 1229, pl. 83), is expressly repealed by Sec. 21, of Art. III., of the Constitution.

Wm. Rotch Wister (with him *J. K. McGregor Gibb*), for the rule.

The plaintiff can recover only for her necessary and reasonable wearing apparel, while the verdict is for the whole contents of the trunk.

Angell on Carriers, § 115.
Wharton on Negligence, § 607.

The ticket is the sole evidence of the contract, and the face of the ticket purchased by plaintiff, was sufficient notice to her that the defendants were acting as the agents of the Erie Railway Co., and as such they were responsible for the trunk only so long as it remained on their own line.

Penna. R. R. *v.* Schwarzenberger, 9 Wr. 208.
Farnham *v.* R. R. Co., 5 Sm. 58.
Ellsworth *v.* Tartt, 26 Ala. 733.
Cheney *v.* R. R. Co., 11 Met. 121.
Dietrich *v.* R. R. Co., 21 Sm. 434.
Oil Cr. & A. R. R. R. Co. *v.* Clark, 22 Sm. 231.
Bennet *v.* R. R. Co., 7 Phila. 11.

The verdict should have been restricted to $300, according to the provisions of the Act of April 11, 1867 (Purd. Dig. 1229, pl. 83).

C. A. V.

March 23, 1878. THE COURT. We left the question of contract to the jury, and they found for the plaintiff. By Sec. 21 of Art. III. of the Constitution, no limitation can be made by Act of Assembly in regard to the amount to be recovered for injuries to persons or property. The verdict, however, is too high, as the trunk contained other articles besides ordinary wearing apparel. We reduce the verdict, therefore, to $500, and, upon a *remittitur* being filed by plaintiff's counsel for all over that amount, we direct that the rule be discharged, otherwise made absolute.

Oral opinion by LUDLOW, P. J.

C. P. No. 4. March 14, 1878.

Le Van v. Penna. R. R. Co.

Common carriers—Railroad companies—Reciprocal rights and duties of carriers and passengers—Right of carrier to establish reasonable regulations for the government of its passenger business—Right of company to eject passenger who refuses to comply with regulation—Damages—Inconsistent verdict—New trial.

Rule for a new trial.

This was an action on the case to recover damages for an alleged wrongful ejectment of the plaintiff by the defendant's employés from its train. Plea, "not guilty." Upon the trial, the following facts appeared:—

On the night of November 13, 1868, the plaintiff bought a first-class ticket from Harrisburg to Philadelphia, and, upon boarding the train and passing through it, found all the seats occupied. He complained to a station employé, and was directed by him to take a seat in a car which was about being attached, and which proved to be a sleeping car, comparatively empty,

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in one end of which a few berths were made up. Shortly after the train started, the sleeping car conductor, learning that the plaintiff's destination was Philadelphia, told him that he would have to pay $1.50 extra or leave the car. This the plaintiff refused to do until he was provided with another seat. In a few moments the sleeping car conductor returned with the train conductor, and substantially the same conversation ensued, the train conductor adding that upon reaching the next station, "Middletown," there would be vacant seats in the adjoining car.

From this stage of the evidence the testimony of the plaintiff and defendant was conflicting. The plaintiff testified that he remained in his seat after the train left Middletown, and that in about half an hour the conductor returned with two passengers, announcing his intention to eject him from the train; that he was seized hold of and forced on to the front platform, refused permission to remain there until the train reached Lancaster; that the train was stopped at a place where there was no station, and he was hustled to the ground and pinned there while his baggage was thrown out, and he was prevented from getting on the train as it started again. The plaintiff then proceeded to describe the difficulties and sufferings endured in a three hours' walk to Lancaster by night, and the aggravation of a disease by which he had been affected for many years.

The defendant's witnesses testified that the conductor, accompanied by the two passengers, returned to the plaintiff as the train approached the station of Landisville and told him to move into the adjoining car, where there were over thirty vacant seats; that the plaintiff became angry and refused to do so; that they took hold of him and forced him from his seat, and the plaintiff saying "let go of me, I will go out," walked to the front platform, and, learning that the train was in the act of stopping at a regular station, alighted of his own free will; and that he was undoubtedly prevented from getting on the train again while it was in motion.

THAYER, P. J., after reviewing the evidence, charged the jury as follows: "Undoubtedly carriers of passengers on railroads have a right to establish reasonable regulations for the government of their passenger traffic and for the regulation of their business. Such regulations are absolutely necessary for the preservation of order, and indeed necessary for the preservation of the safety of passengers, and it is unquestionably the duty of a passenger to comply with those rules wherever they are reasonable, just, and proper in their character. A passenger is bound to know what are the ordinary and usual regulations applicable to the running of such a train; that is, for example, he is bound to know what train his ticket entitles him to ride upon. A passenger cannot buy a ticket and expect to ride upon any train he chooses, for it is well known that there are distinctions made in the prices of tickets for various trains, the tickets for some trains being placed at a higher rate than others. A passenger is bound to know what train his ticket entitles him to ride upon, and he is bound to know of the existence of regulations which have been adopted relative to sleeping cars; and if he does not know the regulations pertaining to sleeping cars, and he enters a sleeping car without any right to go there, he is bound to comply with the regulations governing them or be compelled to take a seat in another car. A man has no right to buy a ticket for what is technically termed a set-up car, an ordinary passenger car, and then claim a right to ride in a sleeping car, because every one knows who has ever ridden upon a railroad, that an extra price is always charged for accommodations in a sleeping car. Sleeping cars belong ordinarily to another company, although they are under the control of the company which furnishes transportation. Now, although the employés of the company furnishing transportation are just as responsible for their misconduct or wrongful acts, whether they occur in the sleeping car or any other car of the train, nevertheless, a passenger is bound to inform himself of the prescribed regulations relating to the travel; and if he goes into a sleeping car either because he is directed to do so by one of the hands, as Mr. Le Van says he was in the present case, or for any other reason, he has no right to be there without paying an extra charge, and it is unquestionably his duty, upon the request of the conductor of the train, to remove into another car. He has no right to be there unless he has paid for the privilege; and I might add that a passenger who wilfully, deliberately, and persistently refuses to comply with regulations which are reasonable and just has no right to claim the privilege of riding at all. If a passenger should go into a ladies' car where smoking is not permitted, and after repeated warnings should persist in smoking in that car, the conductor would be perfectly justifiable in stopping the train and putting him off; and so I am bound to say in this case, that if Mr. Le Van, being in the sleeping car where he had no right to ride, was notified repeatedly to transfer himself to another car in which there were accommodations for him, and in which he could be furnished with a seat, if he obstinately refused to do so, and persisted in remaining in the sleeping car, after he had been so notified by the conductor, then the conductor had a right to put him off the train, because he could not continue to violate the regulations of the company, and because he had no right to ride in a car for the privilege of which he had not paid, and therefore the only remedy was to put him off the train.

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"If that is the position of the plaintiff, even though he was put off the train by the defendant, he was lawfully put off. If you find that fact, of course your verdict must be for the defendant. On the other hand, if you find that he was put off the train in the manner in which he relates, or if you find that without being notified to go into the other car, and without any explicit notice that he would be put off if he refused to go into another car, the conductor came and told him he would put him off the train because he had not already complied with the previous intimation that there might be seats in the other cars when the train reached Middletown, or if you find that the conductor, without any notice of what he was going to do, seized him and put him off the train, as Mr. Le Van says he did, without asking him to go into the other car at all, then undoubtedly there was a trespass of a most wrongful and oppressive kind; and if you find this to be the case, I am bound further to say that the defendant is responsible for that trespass, because the company is responsible for the wrongful acts of their employés, which may be committed in the ordinary course of the business. A company is responsible not only for the negligence of its employés, but for the wrongful acts of its employés, if those acts are committed in the performance of the ordinary duties and powers intrusted to their servants and employés. It would be preposterous to hold that a company should be responsible for the negligence of an employé resulting in an injury, and yet that they should not be responsible for the wrongful acts of their employés performed in the line of the duties which are intrusted to them. Unquestionably the tendency of the law in modern times is, to treat corporations just as individuals are treated relative to their liability. It has even been held that a corporation may be sued for publishing a libel. They have been held responsible for a malicious prosecution, and for many other wrongful acts committed by their agents and servants. I do not doubt at all that they are responsible for a trespass committed by their employés when that trespass is committed in the line of duty which the employés of the company are intrusted to perform. Of course, if he is not engaged in that duty, but is engaged in something else, the company would not be responsible; but I entertain no doubt whatever that a corporation is responsible for the wrongful acts of its employés which are committed in the course of the employment intrusted to them; and, therefore, I say, if the plaintiff was wrongfully put off of this train by force, and in the manner in which he describes, without any previous notice to take another seat or to go into another car, and without notice that he would be put off if he refused to comply, then the defendant is responsible for that act, and is just as responsible as the men who assisted in the perpetration of it; indeed, the men who assisted in the perpetration of that act might have been joined as defendants in this action.

"If you find that such a wrong was committed, the damages to be awarded must rest in the sound discretion of the jury, who have heard all the facts—a discretion to be deliberately and conscientiously exercised. Of course, jurors, who are acting under the obligations of oaths, are not expected to run into extravagances or to be carried away by their passions, or to do anything that is absurd, or to impose anything upon the defendant which is disproportionate to the character of the case. Nevertheless, you have a right to consider all the circumstances under which this wrong, if it was committed, was inflicted, and to assess the damages at a sum which you deem a proper compensation for the commission of this wrongful act. You are to consider whether the plaintiff's health was seriously impaired in consequence of this act. Whatever was the natural result of this wrongful conduct, if it took place, is a proper consideration for you in assessing the damages.

"You will also take into consideration the injury it may have occasioned to his feelings, the indignity which was placed upon him, the circumstance of his having been put out of the train at midnight in a lonely place, if he was so ejected. In considering these circumstances I doubt not that you will exercise your judgment as reasonable men in arriving at a result. If you find that the plaintiff left the train voluntarily, you ought to find a verdict for the defendant. If you find that he was put off the train by force, then you ought to inquire whether he was lawfully ejected from the train; that is, whether he was put off for refusing to obey the reasonable regulations of the company, and after distinct notice that he would be put off if he refused to comply with those regulations, and, if he was, then you ought to find a verdict for the defendant. But if you find that he was put off the train by force without any justification, contrary to law and in violation of his rights, then you ought to find such a verdict in his favor as will fully compensate him for the injury he has suffered, and justly mark your own appreciation of the character of such a wrong."

The jury rendered a verdict for plaintiff—one cent damages. The plaintiff having obtained a rule *nisi* for a new trial, on the ground that the verdict as to damages was against the charge—

Chapman Biddle showed cause. The question resolves itself into a reasonable construction of the verdict of the jury. There are three ways of looking at it: (1) The jury may have considered it as a clean verdict for the defendant. (2) It

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may have been a compromise verdict to satisfy the obstinacy of some one or more of the jury. (3) The jury may have wished to save the plaintiff his costs, believing that, although legally not entitled to recover, he was sincere in the belief of his right, and it would be harsh to make him pay the costs.

It is not conceivable that the jury deliberately violated the plain instructions of the Court on the damages. The verdict was in mercy to the plaintiff.

E. Hunn Hanson, for the rule.

The jury found for the plaintiff, yet chose to disregard the binding instructions of the Court on the question of damages. The verdict is inconsistent and illogical. There has been a mistrial. C. A. V.

March 26, 1878. Rule absolute.

[For report of this case on a rule for a new trial sur former verdict, see 3 WEEKLY NOTES, 496. See, also, Thorpe *v.* N. Y. C. & H. R. R. R., 1 Reporter, 464.]

C. P. No. 4. March 23, 1878.

Cole v. Bowden, deft., and Westergaard & Co., garnishees.

Attachment execution—In an attachment execution, the defendant will not be permitted to come in and contradict the answers of the garnishee.

Rule for judgment for amount admitted by the garnishees to be due.

The garnishees, in answer to the usual interrogatories, admitted an indebtedness to the defendant of $166.50.

On the calling of the rule for argument, the defendant filed an affidavit alleging that he was a member of a firm, and that the sum attached belonged to said firm, but that every dollar thereof was due to employés of said firm, who did the work which earned the money.

Geo. P. Rich, for the rule.

This case presents the bare aspect of the garnishees saying that they have money due the defendant, and the defendant asserting the contrary; but the defendant has no standing in Court.

McCormac *v.* Hancock, 2 B. 311.

An attaching creditor stands in the debtor's shoes.

Patten *v.* Wilson, 10 C. 299.

Even if this partnership exist, a payment to one partner is a payment to all

J. Alex. Simpson, contra.

The defendant should have his day in Court. Suppose the defendant to be a trustee, and the money to be deposited in bank to his individual credit, he has the right to notify the bank that the money does not belong to him; and if so, he should have the right to protect that money, and not be remitted to the garnishees for compensation for their tortious conduct.

THE COURT. If the garnishee chooses to render himself liable to pay this money twice, he ought to have that privilege. The plaintiff is entitled to judgment.

Rule absolute.

Per THAYER, P. J.

[See Ruff *v.* Ruff, *ante*, 181.]

Orphans' Court.

March 19, 1878.

Murray's Estate.

Will—Power of appointment—Execution of power—Property of testator subject to a power of appointment by will does not pass under a general bequest in a will made before the creation of the power.

Sur exceptions to adjudication.

Edward Murray, by will dated March 12, 1875, bequeathed as follows:—

"I order and direct that the sum of ten thousand dollars be put at interest in legal securities, and my daughter Eliza to draw the interest of said ten thousand dollars semi-annually during her natural life, and at her death she may dispose of said ten thousand dollars as she may think proper."

The testator died in August, 1875. Eliza Murray died in 1877. By her will, dated August 22, 1874, she bequeathed as follows:—

"I will and bequeath to St. Joseph's Convent, at Chestnut Hill, all my real and personal estate whatsoever and wheresoever situate"

At the audit of the account of her executor (before ASHMAN J.) the fund in the hands of the accountant was awarded to the legal heirs of Eliza Murray. The St. Joseph's Convent filed exceptions to the award of the auditing judge.

P. Duffy and *A. A. Hirst*, for exceptant.

G. W. Thorn, for accountant.

March 30, 1878. THE COURT. That a will made in August, 1874, by which testatrix gave all her property to St. Joseph's Convent was not an execution of a power conferred upon her by the will of her father, dated March 12, 1875, we think is clear both on reason and authority. (See Fry's Estate, 4 WEEKLY NOTES, 408; Bingham's Apl., 14 Sm. 349.) The exceptant has no right to complain of the distribution.

Exceptions dismissed.

Per PENROSE, J.

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WEEKLY NOTES OF CASES.

VOL. V.] *THURSDAY, MAY 9, 1878.* [No. 15.

Supreme Court.

Jan. '76, 40. March 15, 1878.

Central R. R. of New Jersey v. Green and Wife.

Railroad companies—Action against, for excluding colored persons from cars—What sufficient evidence of motive—Practice—Trial and its incidents—Province of Court and jury.

In an action by A., a colored woman, to recover a penalty for exclusion from a railway car, the evidence of exclusion, though strong, was positively denied by witnesses for the defence. Testimony on the part of the defence was introduced to the effect that the husband of A., who accompanied her, was smoking, and that the exclusion (which was not denied as to him) was upon this ground. The Court, although assuming in portions of the charge that the exclusion of the wife was conceded, instructed the jury that "of the exclusion there can be no doubt if the testimony be true."

Held, that this was a substantial submission to the jury of the disputed fact.

PAXSON, J., concurring, was of the opinion that there was not sufficient evidence that the plaintiff was excluded on account of race or color, but that there being no exception or assignment of error which raised this question, the judgment which had been entered upon a verdict for the plaintiff must stand affirmed.

The Act of March 22, 1867, was intended to secure to colored persons the same rights in travelling as are enjoyed by others. But it does not give them superior privileges, nor warrant an interference with reasonable police regulations of railroad companies, one of which is to designate the car which travellers shall enter, without being obliged to give any reason for the selection.

Error to the Common Pleas of Luzerne County.

This was an action of debt by John W. Green and Martha Green his wife, in the right of the said Martha, to recover a penalty of $500 for an alleged exclusion of the said Martha from a car of the defendants, under the provisions of the following Act of Assembly of March 22, 1867 (P. L. 38).

"Any railroad or railway corporation within this Commonwealth, that shall exclude, or allow to be excluded by their agents, conductors, or employés, from any of their passenger cars, any person or persons, on account of color or race, or that shall refuse to carry in any of their cars thus set apart, any person or persons on account of color or race, or that shall for such reason compel or attempt to compel any person or persons to occupy any particular part of their cars set apart for the accommodation of people as passengers, shall be liable in an action of debt to the person thereby injured or aggrieved in the sum of five hundred dollars; the same to be recovered in an action of debt, as like amounts are now by law recoverable."

Pleas, *nil debet*, payment with leave, etc. Issue was joined, and the jury called on February 6th, 1875. The following facts appeared in evidence:—

On December 26th, 1873, Green and his wife, being in Wilkesbarre, went to the defendants' station for the purpose of taking the train to return to their home at Parsons Station (about two miles distant). The train, consisting of a baggage and smoking car and two passenger cars, having arrived, the plaintiff, having previously purchased tickets, attempted to enter the rear car by the front platform, but was prevented from so doing by the brakesman, who, however, did not assign her color as the reason. There was abundant evidence that other persons (white), both male and female, some of them passengers for Parsons, were admitted to the rear car after the refusal to admit the plaintiff. The plaintiff then got on the rear platform of the car in front (the train meanwhile having started), while her husband endeavored to force an entrance into the rear car. The brakesman thereupon put up the chain and locked the door, and the plaintiff passed into the front car and remained there until the train arrived at Parsons.

The rear car was called the New York car and the car in front the Philadelphia car. They were so called because they had *come from* New York and Philadelphia, respectively. But they were destined for the same place (Scranton), and were not detached from the train or from each other until they had arrived there.

Three witnesses for the defence, all employés of the defendant company, denied any refusal to admit Mrs. Green into the rear car, and swore positively that the only controversy was as to John W. Green, who, the witnesses alleged, was smoking, and was directed to the smoking car for that reason only. Two other witnesses testified that Green was smoking. The plaintiff's witnesses denied that Green was smoking. There was no further testimony upon the subject of Mrs. Green's exclusion.

The Court (HARDING, P. J.) charged the jury, "That Mrs. Green was excluded there can be no doubt, if the testimony of the plaintiff's witnesses be true [and that she was excluded from the car is conceded even by the testimony that has been produced here on the part of the defence. . . . Mrs. Green was behaving in a very proper manner, so far as the testimony shows, and it is conceded on all sides that she was excluded]. . . . If this company excluded this woman from a particular car of their train, as it is conceded on all sides they did, and if such exclusion was on account of her color, then she is entitled to recover the sum of $500.

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"The defendants' counsel has asked us to charge you that, in order to entitle the plaintiff to a verdict, the jury must be satisfied under the evidence that the plaintiff not only was excluded from the car of the defendants, but that such exclusion was because she was a colored woman; in other words, the jury must be satisfied that she was excluded because of race or color, and for no other reason. We affirm that point, and [have already charged to that effect]."

Verdict and judgment for plaintiff. Defendants took this writ, assigning as error, *inter alia*, the portions of the charge inclosed in brackets.

The argument upon the writ of error was heard March 16, 1876, and on March 27, 1876, the Court announced that the Justices being equally divided in opinion the judgment of the Court below would stand affirmed (reported 2 WEEKLY NOTES, 590). A petition for a reargument was subsequently granted by the Court.

Stanley Woodward, for plaintiffs in error, submitted the case upon paper books. (No paper book was received by the reporter.)

Wm. H. McCartney (*Merriman* with him), for defendant.

The charge of the learned Court was as strongly in favor of the defendants below as it could be made. The jury was instructed that the mere fact that the plaintiff was excluded would not entitle her to recover; that they must expressly find that she was excluded "on account of her color and for no other reason." The defendants offered no other hypothesis, and the question of exclusion was fairly submitted; and this being found in favor of the plaintiff, the defendants' liability was at once fixed.

It was quite open to the defendants below to show why Martha Green was excluded if it was not on account of her color; there might have been scores of reasons, but the burden was upon them.

March 25, 1878. THE COURT. It is very clear from the whole evidence on both sides that Mrs. Green, the plaintiff, was excluded from the rear car of the train. Her husband made repeated and ineffectual attempts to put her in. The brakesman pushed her off the step as she attempted to enter, gave no reason, but said go into that car, pointing to the car ahead. She stepped upon the rear platform of the forward car and attempted to cross to the platform of the rear car. The brakesman put up the chain; her husband took down the chain and he attempted to get his wife across; the brakesman locked the door. During all this time a controversy was going on. These facts are not controverted or disproved. In all these facts Green and his wife are distinctly corroborated. The Judge below recounted them, and said: "The fact that the company did exclude her is not enough to entitle the plaintiff to recover. That she was excluded there can be no doubt, if this testimony be true; and that she was excluded from the car is conceded, even by the testimony that has been produced here on the part of the defence. Did they exclude her because of her color?" This statement is strictly true. Then on what principle can it be said that the Judge took the facts from the jury? The defendant did not controvert the exclusion, but put it on the ground that Green had a cigar in his mouth and was smoking. The testimony is clear that this was the only reason. The fact of smoking was denied stoutly, and Mr. and Mrs. Green's testimony on this point was thoroughly corroborated. It was the contested fact of the case and was fully and fairly submitted to the jury, including the credibility of the witnesses, and especially of Green. The case went to the jury on the pivotal question of the case, whether the exclusion of Mrs. Green was on account of her race or color.

Here, too, we find ample evidence to go to the jury. Indeed the point put to the Court by the defendants concedes the sufficiency of the evidence by requesting the Court to charge the jury that the exclusion must have been because she was a colored woman, or because of race or color. No point was made and no error assigned as to the sufficiency of the evidence on this ground.

Green had tickets for himself and his wife. They started to go into the rear car where other passengers were entering. Two white ladies immediately in front of them entered, and as Mrs. Green stepped up, the brakesman pushed her back and pointed to the front car. She was in advance, her husband following. The brakesman did not ask them to show their tickets, and said nothing except that she should not go into that car; told her to go to the next car. She then got on the platform of the front car to step on to that of the rear, and the brakesman put up the chain. The husband took it down and tried to get his wife on. The brakesman locked the door. While the controversy was going on, two white ladies came and were let into the rear car. One of these passengers lived at Parsons, the same place where the Greens lived, and got off there. Shortly afterwards Judge Handley and other white persons were permitted to enter the rear car. These facts were fully corroborated by James Thomas, Mrs. Thomas, and Miss Thomas, all white. Now, in the absence of all other reason than their color, and in view of the permission to white persons to enter, and the very determined and effectual means used by the brakesman to prevent entrance, what other probable inference could be drawn than that it was because of their color they were prevented? The only ground set up was that Green was smoking. But

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this was fairly submitted to the jury as a sufficient ground to exclude Green himself, and found against the defendants. The verdict of the jury, and perhaps the weight of the evidence is against *this* excuse, so that it was clearly a question for the jury, what was the cause of exclusion. The evidence is clear that these persons were respectable, decent persons and well dressed, and it is scarcely possible to conceive of any ground of exclusion on the evidence except their color, the smoking being negatived.

We perceive no error in the record, and therefore the judgment is affirmed.

PER CURIAM. SHARSWOOD, J., dissents.

Concurring opinion by PAXSON, J. While I concur in the judgment in this case I do not agree to that portion of the opinion in which it is asserted that there was ample evidence to go to the jury of the exclusion of Mrs. Green from the car on account of color. The sufficiency of the evidence upon this point was really not before us, as no such question was made in the Court below. Its discussion here might well have been omitted.

The Act of 22 March, 1867 (P. L. 38), should receive a reasonable construction. It was manifestly intended to prevent railroad companies making distinctions between passengers on account of race or color. In other words, to secure to colored persons the same rights in travelling as are enjoyed by others. All fair-minded people must concede that this is entirely proper. But I do not think it was intended by this Act to give them superior privileges, or to so interfere with the reasonable police arrangements of railroad companies in operating their roads and moving their cars, as to enable a colored man to force himself into a car where, by reason of such police regulations, a white man may not enter. An ordinary traveller takes his seat in such car as may be pointed out to him by those in charge of the train. In doing so he recognizes the undoubted right of the company to designate the car which he shall enter. He has a right to a seat, but not to a seat in any particular car. There are sufficient reasons why this should be so. Trains are often made up of way cars and through cars. Sometimes there are one or more cars attached occupied by private parties, excursions, etc. Of necessity those in charge of the train must have the right to assign a particular car to the passenger when he gets on the train. Nor do I think they are obliged to give any reason for the selection, otherwise needless discussions might arise in seating the passengers to the delay of the train and the annoyance of all reasonably disposed travellers. I am unable to see that the mere fact of Mrs. Green's exclusion from a particular car was evidence that such exclusion was on account of race or color. She was directed to enter a car in which white persons were seated, and which was the equal in every respect of the car from which she was excluded. One was a New York car, and the other was a Philadelphia car. There was no other point of difference. Had she been forced to enter a smoking car, or a car set apart for colored persons, there would have been a clear violation of the Act of 1867, and this verdict would have been entirely proper. As no such indignity was offered her, I am of opinion that the case is wholly devoid of evidence to show her exclusion on account of race or color. As, however, this point was not raised, the judgment must be affirmed.

I refer to it merely to avoid the appearance of concurring in views which I regard as not only unsound, but as unnecessary to the disposition of the case.

[In the late case of Hall *v.* DeCuir (5 Otto, 485), the Supreme Court of the United States has held a statute of Louisiana whose provisions are substantially the same as those of our Act of 22 March, 1867, to be unconstitutional so far as it applies to common carriers whose routes extend through two States; and it is immaterial that the aggrieved negro purposed a journey entirely within the boundaries of one State. The ground of the decision was that the power to regulate inter-state commerce is vested by the Constitution in Congress alone, and all State legislation which hampers the operations of those engaged in it is unconstitutional. WAITE, C. J., in delivering the opinion said:—

"No carrier of passengers can conduct his business with satisfaction to himself or comfort to those employing him, if on one side of a State line his passengers, both white and colored, must be permitted to occupy the same cabin, and in the other be kept separate. Uniformity in the regulations by which he is to be governed from one end to another of his route is a necessity in his business, and to secure it Congress, which is untrammelled by State lines, has been invested with the exclusive legislative power of determining what such regulations shall be. . . . . We think it may safely be said that State legislation which seeks to impose a direct burden upon inter-state commerce or to interfere directly with its freedom does encroach upon the exclusive power of Congress. The statute now under consideration in our opinion occupies that position. It does not act upon the business through the local instruments to be employed after coming within the State, but directly upon the business as it comes into the State from without or goes out from within. While it purports only to control the carrier when engaged within the State it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. His disposition of passengers taken up and put down within the State, or taken up within to be carried without, cannot but affect in a greater or less degree those taken up without and brought within, and sometimes those taken up and put down without. A passenger in the cabin set apart for the use of whites without the State must, when the boat comes within, share the accommodations of that cabin with such colored persons as may come on board afterwards, if the law is enforced. It was to meet just such a case that the commercial clause of the Constitution was adopted."

In the case reported, Mrs. Green attempted to enter the New York car which had come from New Jersey into

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Pennsylvania, and it is difficult to distinguish her case from that recently decided by the Supreme Court of the United States.

See next case.]

March, '76. March 16, 1878.

Central R. R. of N. J. v. John W. Green.

Fines and penalties—Recovery of damages under a penal statute a bar to a second recovery for the same Act—Act of March 22, 1867, P. L. 38—Penal statutes—Penal statutes must be construed strictly.

The damages awarded by the Act of March 22, 1867, P. L. 38 (relating to the exclusion of colored persons from railway cars), are in the nature of a penalty against the railroad company, and not compensation to the person aggrieved; and a recovery by one person thus excluded in contravention of the provisions of the Act is a bar to a future recovery by another person excluded at the same time.

Where a husband and wife (colored) were refused access to a particular car upon a railroad train, at the same time and by the same employé of the company:

Held, That the exclusion of the two constituted a single offence, and that a recovery in an action by the husband and wife in the right of the wife was a bar to a recovery in a subsequent action by the husband in his own right.

Hill *v.* Williams, 14 S. & R. 287, recognized.

Error to the Common Pleas of Luzerne County.

Debt, by John W. Green against the Central R. R. of New Jersey, to recover a penalty of $500 for an alleged exclusion of the plaintiff from one of the cars of the defendant company.

The plaintiff was co-plaintiff with his wife in the case of Central R. R. Co. of N. J. *v.* Green (reported *supra*), and the action was founded upon the same acts of exclusion, the testimony being substantially the same as in that case.

On the trial (before HARDING, P. J.) the defendants requested the Court to charge:—

(1) That under the Act of Assembly of 22 March, 1867, but one recovery can be had of five hundred dollars penal sum for a single act of excluding one or more persons from the car of a corporation, and where such exclusion is jointly of several persons, the one aggrieved within the meaning of the statute is that one among the persons jointly excluded who shall first sue for the five hundred dollars imposed by the statute.

(2) As it appears from the evidence in this case, a recovery has already been had in this Court by the present plaintiff and his wife, in right of said wife, against the company defendant, for the five hundred dollars penalty, no further or other recovery of another penalty by the husband alone can be had.

Which points were answered as follows:—

"I must negative these points. Considering, in the first place, the exclusion of this plaintiff and his wife from the car in question as a tort, manifestly a recovery could be had for any particular injury sustained by either. To illustrate: Had a gun loaded with shot been fired at them by a bystander, some of the pellets taking effect in one and some in the other, in that case two actions could certainly be maintained. Again, considering their exclusion as an act for which the law prescribes a penalty, the rule as to recovering the penalty would be the same as that applicable to other statutes imposing penalties. For instance, a child may give notice to the vender of intoxicating liquors not to sell to his father and mother, both of whom are habituated to drinking to excess; but the vender nevertheless makes the sale, and the father and mother drink and die as a consequence. Can but one penalty be recovered? Shall the child after recovering for the injury sustained by the loss of the father, be denied his action for the greater injury, perhaps, occasioned by the loss of his mother?"

Verdict and judgment for plaintiff.

Defendants took this writ, assigning as error, *inter alia*, the answer of the Court to the above points.

Stanley Woodward, for plaintiffs in error, submitted the case upon paper-books.

The words which define the offence for which the defendants below were sought to be held liable cannot be held to justify a second recovery for the same offence; for they declare very plainly that the offence may be an act committed against one person or more persons than one taken collectively, a singular and a plural word being both used, and used disjunctively. The offence is to consist of an act which may be directed against several persons at once as well as one person, and nothing in the language indicates a generic definition inclusive of as many specific offences as there are persons aggrieved. The word "persons" is plainly a collective term; if it were not so the word "person," which precedes it, would be surplusage.

The whole of the statute should be considered together.

Holl *v.* Deshler, 21 Sm. 301.

And, the statute being strongly penal, nothing is to be taken by intendment.

Bartolett *v.* Achey, 2 Wr. 277.
Jones *v.* Estis, 2 Johns. 380.
Collins *v.* Relief Society, 23 Sm. 196.

Our view of the law is sustained by the rulings of this Court upon statutes similar to the present one.

Hill *v.* Williams, 14 S. & R. 287.
Commonwealth *v.* Borden, 11 Sm. 272.

This is likewise the law in England and in other of the United States.

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Hardyman *v.* Whitaker, 2 East, 573, *n.*
Rex *v.* Bleasdale, 4 Term, 809.
Pike *v.* Madbury, 12 N. H. 262.
Beadleston *v.* Sprague, 6 Johns. 101.

The penalty, being out of all proportion to the private injury in any ordinary case, was imposed for reasons of public policy as a police regulation for the management of railroad lines. And let it be borne in mind that if the plaintiff below suffered any damage he is still entitled to recover in an action on the case.

The argument for a single penalty applies with peculiar force in the present instance, where the plaintiff below is the husband of the plaintiff who recovered the penalty for the same offence.

Wm. H. McCartney, for the defendant in error.

It is very easy to assume that there has been a recovery of a penalty for this act of exclusion, but it must be remembered that the execution of the judgment in Mrs. Green's case has been superseded by a writ of error, which is still pending. This style of recovery is not satisfactory to the successful party.

The law prohibits the exclusion of colored persons by reason of their color, and gives the right of action to the person aggrieved. How aggrieved? "Thereby" aggrieved. That is to say, by the prohibited exclusion. One hundred are excluded, and one hundred are "thereby" aggrieved. Yet, ninety-nine have no right of action. The fallacy of the argument that reaches such a conclusion begins with the first point of the plaintiff in error wherein it is assumed that the exclusion of two persons was a "single act," and that this corporation is not liable to the two persons aggrieved by that "single act." But, if one by a single cast throws poison into the wells of two of his neighbors, he must answer to both well owners therefor. And the poisoner cannot answer to the suit of one well owner, that he has become liable to pay damages to the other. The doctrine of strict construction is undoubtedly applicable to actions of this character. But, quoting that part of Judge THOMPSON'S decision in Bartolett *v.* Achey (2 Wright, p. 277), which the plaintiff in error omits, "strict construction is not the same thing as construing everything to defeat the action." Again, the first point of the plaintiff in error assumes that the exclusion of John W. and Martha Green was a joint act; and that John, or Martha, is the person aggrieved, just as the one or the other happens to sue first for the penalty. In other words, the liability of this corporation for a violation of the law depends not on its own acts, but on the course pursued by the persons affected by its criminality. The words "person or persons," used in this act, apply to the party aggrieved, not to the offender. As to this corporation, the exclusion was, physically, perhaps, only a "single act." But as to John W. Green and Martha Green it was dual in its consequences, operations, and effects; was a violation of the rights of both, and gave rise to liabilities to both.

As to the "results from the statute," that "were intended by those who made it," it cannot be assumed that the Legislature anticipated a violation of its law, or the commission of crime; and it cannot be supposed that the law-making power entered into a computation as to the number of dollars its criminality would cost this, or any other corporation.

The Legislature passed an act creating an offence, and it is to be presumed that they left the consequences to the offenders.

March 25, 1878. THE COURT. The plaintiff below brought an action of debt to recover the penalty of five hundred dollars under the first section of Act of 22 March, 1867 (P. L. 38), for excluding him from a particular car of the defendant corporation. It was alleged by the plaintiff, that himself and wife were prevented from entering one of the passenger cars of the defendants at Wilkesbarre, on the 26th of December, 1873, by one of the employés of the company, and compelled to take another passenger car of the same train, in order to proceed to their home, a distance of two miles.

There was neither allegation nor proof that the car they were compelled to enter was inferior in any respect to the one from which they were excluded, nor that it was a car set apart for colored people. It was contended, however, that they were not allowed to enter the particular car by reason of their color, and the jury have established this fact by their verdict. The case comes up to us upon the single question, whether a former verdict and judgment in a suit brought by the plaintiff and his wife, in right of the wife, for the same act of exclusion, is a bar to this suit.

The Court below held that the former recovery was not a bar, upon the principle that the act of the company's employé in refusing to allow the plaintiff and his wife to enter a particular car was in the nature of a tort, and that either or both could recover for an injury resulting therefrom. If this were an action to recover damages resulting from personal injuries occasioned by the act of the company's servant, the reasoning of the learned judge would not be inaccurate. In such case a verdict in favor of the wife for injuries sustained by her would be no answer to a suit by the husband for injuries sustained by him. It was not an action for damages at all. It is not even contended that any damages were sustained.

The action is for the penalty imposed by the Legislature upon railroad companies who should compel colored persons to ride in a particular car.

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The object of the act was to punish such corporations for making such distinctions. The exclusion of the plaintiff and his wife was a single act, done at the same time, and by the same person. To punish the company twice for the same act would be unreasonable, and against the spirit and meaning of the Act of Assembly. This is plain from an examination of the second section, which provides: "that any agent, conductor, or employé of any railroad or railway corporation within this commonwealth, who shall exclude, allow to be excluded, or assist in the exclusion, from any of their cars set apart for the accommodation of passengers, any person or persons on account of color or race, or who shall refuse to carry such person or persons on account of color or race, or who shall throw any car from the track, thereby preventing persons from riding, shall be deemed guilty of a misdemeanor, etc."

Thus we have two sections relating to this subject, the first imposing a penalty of five hundred dollars upon any company which shall exclude any person or persons, by reason of color or race, from any particular car, or which shall be done by any agent, conductor, or employé; and the second, punishing by fine and imprisonment any agent, conductor, or employé who shall be guilty of such act. It certainly could not be seriously contended that the employé by whom the plaintiff and his wife were excluded could be twice prosecuted and convicted under the second section. It was a single act, and when once punished according to law, he could not be punished again. So, under the first section, the company, after having once paid the penalty for their unlawful act, cannot be called upon to pay it again. And this because the penalty is given by way of punishment to the offender, rather than by way of compensation to the party aggrieved. For any injury he may have sustained, he would have his right of action independent of the penalty. I do not see that he would be bound thereby. The fact that several persons may be aggrieved by the commission of a single offence affords no ground to justify an inference that each may have his suit for the penalty imposed upon its commission, where the plain object of the law is to punish or repress a public wrong rather than to compensate a private injury. The penalty imposed by the Act is so disproportioned to any supposable injury in any ordinary case that we are bound to presume it was intended as a police regulation for the management of railroads, and to have been induced from motives of public policy. Indeed this clearly appears from the title of said Act, which describes it as "An Act making it an offence for railroad corporations within this Commonwealth to make any distinction with their passengers on account of race or color, and punishing said corporations and their agents and employés for the commission of such offence."

We cannot give a loose construction to an Act so severely penal as this. Had the Legislature intended to give an action to each person aggrieved by a single act of an employé of the company, it would probably have used appropriate language to express such intent, and said any, or each, or every person aggrieved, shall have his, her, or their action, etc. On the contrary, we have an offence defined, which, by the terms of the Act, may be committed against one or several persons, and an action of debt for the penalty given "the *person* thereby injured or aggrieved." Again, the statute gives but five hundred dollars for the exclusion of any person or persons from the car. How, then, can it be possible for a single act to recover a double penalty? I do not think it necessary in so plain a case to encumber this opinion with any extended citation of authorities, especially in view of the fact that it must be decided to a great extent upon the proper meaning and construction of the Act of Assembly. Yet the case of Hill *v.* Williams (14 S. & R. 287) is so like this in principle that a brief reference to it may not be unprofitable. There the action was against a Justice of the Peace to recover the penalty of fifty pounds under the Act of 14th of February, 1729–30 (Smith Laws, 180), to prevent clandestine marriages. Both of the parties joined in marriage by the Justice were minors. The father of the female infant brought his action under the statute, and recovered; subsequently the father of the male infant brought a similar suit against the Justice, and it was held that but one penalty could be recovered, and that the first judgment was a bar to the second suit. It was said by TILGHMAN, C. J., in delivering the opinion of the Court: "The object of the law was not so much to make a compensation to the injured parents (for in many cases fifty pounds would be no compensation) as to deter all persons from being accessory to these clandestine marriages. For this purpose a certain penalty was thought to be the best remedy, and a penalty in money being inflicted, no person was so proper to receive it as the party grieved, if he thought it advisable to sue for it. But if he declined suing for the penalty, I see nothing to hinder him from suing for damages under the original Act. Penal laws should be held to a strict construction, and it would certainly require very clear expressions to double the penalty.

"The argument in favor of a double penalty is founded on the expression in the second section, he shall forfeit the sum of fifty pounds, to be recovered by the person or persons grieved. But what is to be recovered? The sum of fifty pounds, and no more, for no other sum is men-

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tioned. The word *persons* is often applicable to one party. For instance, a minor may have several guardians, or several masters who are in partnership. In such case all the guardians or both the masters bring suit as one party. But if the word persons is applied to a case like the present, where the parents of both man and woman are grieved by the marriage, it is much more reasonable to say that both may join in the action and share the penalty, than that the Justice shall pay one hundred pounds where the law has said that he shall pay fifty pounds."

The inclination of the Courts against multiplying penalties is strong. (Com. *v.* Borden, 11 P. F. Smith, 272; Hardyman *v.* Whitaker, 2 East, 573; The King *v.* Bleasdale, 4 Term, 809; Pike *v.* Madbury, 12 N. H. 262; Beadleston *v.* Sprague, 6 Johns. 101.)

We need not pursue the subject further. We are of opinion that it was error to decline to affirm the first and second points of the defendants. Each of said points should have been affirmed without qualification.

Judgment reversed.

Opinion by PAXSON, J. GORDON, J. dissents.

Oct. & Nov. '76, 114. Oct. 26, 1877.

Gilbert's Appeal.
Tarr's Estate.

Wills—Construction of—Intention of testator—What will make legacies a charge upon land.

Legacies may be made a charge upon land without direct expressions; it is sufficient if the intention of the testator to create such charge appear by natural and obvious implication from the provisions of the will.

A devise "to my son James at thirty-three dollars an acre, the proceeds thereof to be divided into eight equal shares and distributed equally among my sons and daughters," held to create a charge upon the land.

Hart *v.* Homiller, 8 H. 248, approved.

Appeal from a decree of the Court of Common Pleas of Westmoreland County, confirming the distribution awarded by an auditor of the fund arising from a sheriff's sale of the property of James R. Tarr, Sr. The following facts appeared:—

James R. Tarr, Sr., by his last will, dated December 13, 1864, devised, *inter alia*, as follows:—

. . . . "I give and bequeath the same to my son, James R. Tarr, at thirty-three dollars per acre, and the proceeds thereof to be divided into eight equal shares, including his own, and distributed equally among my sons and daughters, Rose Husband, Catharine Tarr, Gasper Tarr, Sarah Gilbert, Matilda Bovard, Melker Tarr, and Francis Tarr, my son, James R. Tarr, to have possession of the said real estate immediately after my just debts are paid, and in one year after he shall get possession of the same, he shall commence paying annually the share of each, commencing with Rose Husband, and in one year following the time when Rose Husband's share is due, he shall pay Catharine Tarr her share, and so on with the rest, paying each one his or her share." . . . .

Two other pieces of land were given to other children at a valuation of thirty dollars an acre. The executors were required to rent the real estate until the testator's debts should be paid, and possession by the devisees was postponed until such payment should be made. Some lots of land, with the household furniture and "hogs and sheep," were devised to his wife for life, and after her death to be sold and the proceeds divided, etc. Certain specific pecuniary legacies were then given: to Irwin W. and Mary Ann twenty-five dollars each, and Ann Eliza one hundred dollars. The remainder of the testator's estate was given to his nine children.

The premises in question having been levied upon as the property of James R. Tarr, Jr., were sold at sheriff's sale, and the fund arising therefrom ordered into Court for distribution. The claimants upon the fund were the creditors of James R. Tarr, Jr., on the one hand, and on the other the legatees under the will of James R. Tarr, Sr., who contended that their legacies were charged upon the land.

The auditor, upon the authority of Brandt's Appeal (8 W. 198), was of opinion "that, in order to make a legacy a charge upon land, it is necessary that it should be declared so by express words, or that it may be inferred from the whole will that such was the intention of the testator." He was further of opinion that no such intention could be gathered from the will of James R. Tarr, and that, therefore, the legacies were not charged upon the land. He therefore awarded the fund to the creditors of James R. Tarr, Jr.

Exceptions were filed on behalf of the legatees, which, after argument, were overruled by the Court (LOGAN, P. J.), and the report of the auditor was confirmed. The exceptants thereupon appealed, assigning as error the action of the Court.

Henry P. Laird, for appellants.

To determine whether a legacy is charged on land the whole will must be taken together.

English *v.* Haney, 2 R. 305.
Tole *v.* Harvey, 6 Cow. 333.
Ripple *v.* Ripple, 1 R. 389.

The land in question is devised at thirty-three dollars an acre, and the devisee is to commence paying the legacies after the testator's debts have been paid out of the rents. Can it be contended that the testator intended the devisee to have the enjoyment of the land except upon the condition of his paying the legatees the amount named? The intention to create a charge is plain.

Field's Ap., 12 C. 11.

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Knecht's Ap., 21 Sm. 343.
Hart *v.* Homiller, 8 H. 248.

Henry D. Foster, for appellees, presented no paper book.

The inclination of the Courts is to prevent a multiplicity of liens, and a charge upon land will not be decreed except in a clear case.

Wright's Ap., 2 Jones, 257.
Hackadorn's Ap., 1 Jones, 86.

Jan. 7, 1878. THE COURT. James R. Tarr, Sr., by his will dated the 13th day of December, 1864, devised to his son, James R. Tarr, Jr., a tract of land, described in the proceedings for the sheriff's sale as containing seventy-four acres, more or less. The following were the terms of the gift: "I give and bequeath the same to my son, James R. Tarr, at thirty-three dollars per acre, and the proceeds thereof to be divided into eight equal shares, including his own, and distributed equally among my sons and daughters;" seven of whom, in addition to the devisee, the testator then mentioned. Two other pieces of land were then given to his daughter, Rose Husband, and another son, Melker Tarr, both at a valuation of thirty dollars per acre. The executors were required to rent the real estate until the debts of the testator should be paid, and possession by the devisees was postponed until such payment should be made. Some lots of land in and adjoining the village of Bethany, and his household furniture, cows, hogs, and sheep, "just as it now is," in the language of the will, were given to the widow, Mary Tarr, during her life, and at her death a sale was ordered of all that property, the proceeds to be distributed amongst the children of the testator. Irwin W. Tarr, a son, was to receive twenty-five dollars; a daughter, Ann Eliza Tarr, one hundred dollars; and another daughter, Mary Ann Buttermore, twenty-five dollars. The residue was to be divided amongst his eight other children. The concluding clause of the will gave "the remainder" of the testator's estate to nine of his children, eight of them being those designated to receive the proceeds of the real estate, and the ninth being Mrs. Mary Ann Buttermore.

It is apparent that the devises and bequests preceding the concluding gift of "the remainder" had embraced the entire estate of Mr. Tarr. Directions for the sale and distribution had been given, of the real and personal property which Mrs. Tarr was to take for life. That there was no other personal fund is clear from the provision for the payment of debts from rents afterwards to accrue.

The residuary clause could have application, therefore, to nothing except the lands devised to James R. and Melker Tarr and Mrs. Husband, in the event that either of them should refuse to accept the devise in his or her favor at the valuation fixed. It is true that Mrs. Buttermore was brought in to share in the property in such an event, but it is obvious, nevertheless, that the clause must have been designed to have the operation attributed to it, or it could have no operation at all.

It was the plain purpose of this will to furnish to the legatees, for the amount of the valuation of the land devised to James R. Farr, Jr., the security of the land itself. He was to take it "at thirty-three dollars per acre," and the proceeds were to be divided and distributed. A specified sum of money was not to be paid to each legatee; each was to have a share of the purchase-money, which was to be "the proceeds" of the land. While the order, amounts, and periods of payments after the devisee should obtain possession were defined, yet the language of the will makes this a different case from those where a gift of land to a child has been accompanied or followed by a direction that he should pay certain specified and enumerated legacies. Such a devise, without more, if accepted by the devisee, would make him personally liable; but a charge upon the land would not be created. But where, from the entire body of a will, an intention on the part of the testator to make the property the security of the legatees is manifest, it will remain subject to the charge.

While in order to make legacies a charge on land, it must be found that such was the testator's intention, still it is not necessary that its ascertainment should rest on direct expression. It is enough if the intention appear by natural and obvious implication from the provisions of the will. No form of words is necessary to produce the effect, and, where the intent is manifest, Courts are bound to carry it into execution. (GIBSON, C. J., in Ripple *v.* Ripple, 1 Rawle, 386.) There a testator had devised three-fourths of a tract of land to his son, followed by this direction: "My son Philip is to keep and provide for my beloved wife, and my eldest daughters, Catherine and Elizabeth, during their natural lives." It was held that, although land devised is not expressly charged with the maintenance of infirm children of the testator, yet if such an intention can be clearly collected from all the parts of the will, considered in reference to the testator's circumstances, the charge will attach upon the land, and follow it into the hands of subsequent purchasers.

In Hoover *v.* Hoover (5 Barr, 351) a devise by John Hoover to his son David, "yielding and paying out of the same $7250, in instalments of $700," was held to charge the land; and BELL, J., said that "in a will no precise form of words is necessary to create a condition; any expression denoting such an intention will have that effect." Thus a devise "to A, he paying,"

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or "he to pay £500 within one month after my decease," would be a condition for breach of which the heir might enter. (2 Powell on Devises, 251.) Where, as here, the devisee was to take the land "at thirty-three dollars per acre," and the legacies were to consist of "the proceeds" derivable out of it, for the distribution of which provision was made, the condition that the land should be made subject to the amount of the valuation would seem to be a natural and necessary implication.

At the argument the counsel for the appellees relied on the authority of Hackadorn's Appeal (1 Jones, 86), and Wright's Appeal (2 Jones, 256). In the first of these cases the testator, after devising different parcels of land to his sons, directed the selection of appraisers, the valuation of the lands, and payments out of the valuations to his daughters in order to equalize the shares of his sons and daughters, with the qualification that the share of each son should be twenty-five dollars more than that of either of the daughters. The will contained this exceptional provision: "The divide that my daughters may have received out of the proceeds of my personal estate to be counted to them out of their share." The payments, besides, were to be made by the sons whose lots should be most valuable. Of course, no land could be charged, for no land could be designated. The properties the devisees of which were to become liable could only be ascertained by the appraisement to be made after the testator's death. In Wright's Appeal, all that is shown in regard to the will was the statement by the reporter that Carson had devised land to his son Thomas; that if he chose to accept, he was to pay $1700 to different persons; and that he accepted. In a contest between his alienee and one of the legatees, it was held that the land was not charged. In the later case of Hart *v.* Homiller (8 Harris, 248), after giving his son Samuel the use of certain real estate during the life or widowhood of his wife, at a yearly rent of fifty dollars to be paid to the wife, the testator directed that, upon her death or marriage, a division of the property should be made, and thereupon devised to Samuel, and his heirs and assigns, the store-room he then occupied, and the lot of ground back as far as the slaughter-house, at a valuation to be made by six respectable bricklayers and carpenters. This valuation was included in the residue of the estate, which was given to the testator's six children, of whom Samuel was one. The interest of Samuel was sold at sheriff's sale, and afterwards sold to Hart under a judgment against the first purchaser. It was held that the terms of the will made the amount of the valuation a charge on the land, and that the purchaser at the sheriff's sale held it subject to the charge. Hackadorn's Appeal and Wright's Appeal are precedents to govern cases presenting precisely identical facts; but for the settlement of this litigation Hart *v.* Homiller furnishes a better and safer rule.

The decree is reversed, at the costs of the appellees; and it is now ordered and decreed that the fund remaining in Court be applied in payment of the shares of Sarah Gilbert and Matilda Bovard in the valuation of the land of James R. Tarr, Jr., as established by the devise to him in James R. Tarr, Sr.'s, will.

Opinion by WOODWARD, J. AGNEW, C. J., and SHARSWOOD, J., absent.

Jan. '75. 225. Feb. 4, 1878.

McMurray and Wife v. Davis. Davis's Appeal.

Decedents' estates—Orphans' Court—Jurisdiction of—When not exclusive—Equity—Fraud—Assignment when set aside.

The Common Pleas in Equity has jurisdiction to declare void an assignment of all interest under a will, obtained by fraud from a legatee by the executrix, even though the legatee had previously petitioned the Orphans' Court for a citation against the executrix to compel her to file an account. The proceedings in equity in such a case are against the executrix in her individual capacity, those in the Orphans' Court in her representative capacity. One proceeding does not exclude the other.

Dundas's Estate, 23 Sm. 474, explained.

Certificate from the late Court of Nisi Prius.

Bill in equity, filed March 22, 1870, by William McMurray and Anna his wife, in right of the wife, against Anna M. Davis, her mother, to set aside an assignment made to the defendant by Mrs. McMurray, before her marriage, of all her interest in certain real and personal estate, devised under her father's will, upon the ground that the assignment was procured by fraud.

The defendant denying the alleged fraud, in her answer, the case was referred to Samuel C. Perkins as Master, who found the following facts: S. Davis died in 1844, leaving a widow, Anna M. Davis, the defendant, and three children, one of whom, Anna, is now the plaintiff. By his will he gave his estate to his widow for life, and after her death to his children. His widow was appointed executrix. In January, 1870, the plaintiffs petitioned the Orphans' Court for a citation upon the executrix for an account. In her answer to this citation the executrix set up the assignment to her by the plaintiff before referred to. No further proceedings were taken in the Orphans' Court. The plaintiffs then filed this bill in equity.

At the time of the execution of the assignment Anna McMurray was twenty-eight years of age,

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unmarried, of sound mind, and under no legal disability. She was, however, engaged to be married, as was well known to her mother, and three days after the execution of the assignment was married to William McMurray. The paper was prepared by T. Passmore Hanbest, who had been the professional adviser of the defendant for many years, and whose relations to the defendant were those of great personal intimacy and confidence. This paper was signed in Hanbest's office, in his presence alone. There was some conversation as to the omission of the recital of "natural love and affection" as part of the consideration for the assignment, in addition to the money consideration, and this omission seems to have been owing to the carelessness of the copyist. The assignment was not mentioned to William McMurray, who was not aware of its execution until after his marriage. The consideration of $100 named therein was never, in fact, paid. The complainant had never, at or prior to the execution of the assignment, seen her father's will or a copy of it. She had no professional adviser separate from Hanbest, her mother's attorney, who never explained or attempted to explain to her her father's will, nor to communicate to her its contents and effect, or to instruct her in any way as to her rights and interests under it. The will had never been read to her and she had never read it. Her sole knowledge of its contents and construction was derived from her mother, in whom she placed entire confidence, and whose influence over her was great.

Upon these facts the Master was of opinion that the assignment could not be supported, citing—

Huguenin *v.* Baseley, 14 Vesey, 273.
2 White & Tudor's L. C. in Equity, 406 and notes, and the cases there mentioned.
Phillips *v.* Mullings, L. R. 7 Ch. 244.
Turner *v.* Collins, Ib. 329.

The Master reported, *inter alia*, as follows: It was further contended on behalf of the defendant that the Orphans' Court had exclusive jurisdiction of the matter in controversy, or if not exclusive, at least concurrent jurisdiction, and as they had first obtained jurisdiction, that Court was the proper forum for the disposition of the whole case. But this bill is not filed against the executrix of the estate of Sargent Davis, either to compel an account or the settlement or adjustment of any other matters relating to or connected with his estate. The bill is against the widow of the decedent personally, to set aside an assignment to her individually, by her daughter, of all the interest of the latter under the will of her father. Notwithstanding the seemingly broad and comprehensive language of the Act of 16th June, 1836 (P. L. 792) relating to the jurisdiction of the Orphans' Court, the jurisdiction is not exclusive in every case which may incidentally bear upon the settlement of a decedent's estate.

Van Dyke's Appeal, 10 Sm. 481.
Wickersham's Appeal, 14 Ib. 67.
Geddis *v.* Irvine, 5 Barr, 508.

This case is ruled by

Sergeant's Executors *v.* Ewing, 6 Casey, 75.

Upon the whole case the Master reported that the assignment of November 19, 1866, should, as to Mrs. McMurray, be decreed to be void; that the defendant be decreed to execute a reconveyance to the complainant of all the interest and estate to which she is entitled under the will of Sargent Davis; that the defendant should be perpetually enjoined from transferring or conveying to third parties any interest of the complainant, under the will of the testator, in the real estate, and from setting up the assignment either as an answer to any proceedings in the Orphans' Court or otherwise, as a bar to any claim of the complainant under the will of Sargent Davis.

To this report the defendant excepted on the ground, *inter alia*, that the Master erred in reporting that the assignment could not be supported, and that the Orphans' Court had not exclusive jurisdiction. On December 30, 1874, the Court (SHARSWOOD, J.) sustained the Master's report, dismissing the exceptions (no opinion filed). Whereupon the defendant took this appeal, assigning for error the decree of the Court dismissing the exceptions and confirming the Master's report.

F. Carroll Brewster, for the appellant.

The jurisdiction of the Orphans' Court has attached. If the jurisdiction of the Orphans' Court and the Nisi Prius is only concurrent, this bill falls, for in all cases of concurrent jurisdiction the Court which has first possession of the subject of controversy must adjudicate.

Memphis *v.* Dean, 8 Wallace, 64.
Green's Adx. *v.* Creighton, 23 Howard, 90.
Peale *v.* Phipps, 14 Ib. 368.
Smith *v.* McIver, 9 Wheaton, 532.
Mallett *v.* Dexter, 1 Curtis, 178.
Ex parte Robinson, 6 McLean's Rep. 355.

But the jurisdiction of the Orphans' Court is exclusive.

Campbell's Appeal, 30 Sm. 298.
Cowan's Appeal, 24 Sm. 329.
Dundas's Appeal, 23 Ib. 474.

The Orphans' Court is essentially a court of chancery. Where it has jurisdiction it is exclusive, and where a court of equity takes cognizance of a litigation it will dispose of every subject embraced within the circle of contest, whether the question be of remedy or of distinct yet connected topics of dispute.

Gibson's Appeal, 1 Casey, 191.
McGowin *v.* Remington, 2 Jones, 63.
Shollenberger's Appeal, 9 Harris, 340.
Wapple's Appeal, Pittsburgh L. J., Aug. 27, 1873.

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The authorities relied upon on the other side are inapplicable, because in this case the grantor was *sui juris;* knew the effect of the paper; her act was voluntary; she was under no undue influence; the consideration was not inadequate; she was not of tender years, and the assignment was not attacked for four years.

Similar settlements have been upheld in—

Tendril *v.* Smith, 2 Atkyns, 85.
Brown *v.* Carter, 5 Vesey, Jr. 862.
Tweddell *v.* Tweddell, 1 Turner & Russell, 1.

George Junkin and *R. Rundle Smith*, for the appellee, relied upon the Master's report.

February 11, 1878. THE COURT. This case had the benefit of an elaborate examination of an able Master, whose findings are supported by the evidence, and therefore no error of fact appears.

We do not think the Orphans' Court had at any time exclusive jurisdiction of the question upon the validity or invalidity of the assignment to Mrs. Davis. The petition of Mrs. McMurray to the Orphans' Court was for an account, merely, by Mrs. Davis as executrix. Mrs. Davis, in order to prevent the petition from being received and acted upon by the Court, set up an assignment by Mrs. McMurray to herself, individually. The purpose was to show that Mrs. McMurray had no interest in the estate of the testator, and therefore no standing to give the Orphans' Court jurisdiction to call her to an account. Mrs. McMurray, instead of submitting herself to the Orphans' Court, abandoned her petition, and went into the Supreme Court, by bill in equity, against Mrs. Davis, personally, to set aside the assignment, on the ground of fraud and inadequacy of consideration. It is clear therefore that the Orphans' Court never acquired jurisdiction of this question, while it is equally clear the Supreme Court did acquire it, under its equity powers. (Campbell's Appeal, 30 P. F. S. 298.) This case differs essentially from that in Dundas's Estate, (23 P. F. Smith, 474). The ground of that decision is not clearly, perhaps scarcely accurately stated by the learned Master, though this is not a matter of surprise, as the petition was overloaded with much irrelevant matter. The true ground of that case was that the petitioner went into the Orphans' Court seeking for and giving jurisdiction upon his principal ground of relief, which was a prayer for payment of a legacy, or full share under the will. He therefore came into the Orphans' Court on his own submission to its jurisdiction for a purpose which the opinion shows was within one of the express powers conferred by law, viz.: to recover a legacy, a distributive share under the will. Jurisdiction thus attaching upon the principal ground, the Orphans' Court acquired jurisdiction of a matter standing directly in the way of a decree for the legacy, to wit, the assignment set out in the petition as invalid. An examination of the opinion will show that the jurisdiction was based on the prayer for payment of the legacy, or share under the will, and that the question upon the assignment necessarily arose as an obstacle to be put out of the way before a decree could be made.

We discover no error in the record, and the decree is therefore affirmed with costs, to be paid by the appellant, and the appeal is dismissed.

PER CURIAM.

Oct. & Nov. '77, 244. Oct. 29, 1877.

Myers and Kohne, Adm'rs, v. Scully.

Pledge of stock by decedent—Paymen. of assessments thereon by estate—Distribution of roceeds of.

Decedent pledged some bank stock as collateral security for an indorsement. At the time of his death he had paid assessments thereon amounting to seventy-five per cent. of its par value; and the balance, twenty-five per cent., being over-due, the bank retained sufficient to pay the same out of moneys due to his estate. The indorser having lifted the note, upon a sale of the stock the Court below awarded the whole of the proceeds to the payment of his claims:

Held (reversing the decree), that one-fourth of the proceeds belonged to the legal representatives of the estate, to be distributed by them according to law.

Appeal from the Common Pleas No. 1, of Allegheny County.

Bill in equity filed by John D. Scully against E. H. Myers and Frank Kohne, administrators of John R. Bingler, deceased.

The bill set forth, *inter alia*, that the decedent had pledged some stock of the Homestead Bank and Life Insurance Company to the plaintiff, as collateral security for an indorsement; that the plaintiff had lifted the note; that the administrators claimed to have no funds with which to redeem the stock; and prayed the Court to decree that the stock be sold and that the proceeds be applied to the payment of the plaintiff's claim.

The administrators, admitting these averments, made answer that at the time of his death the decedent had paid assessments upon the stock amounting in all to seventy-five per cent. of its par value, leaving a balance of twenty-five per cent. due and unpaid; that the decedent had, in the same company, an insurance upon his life, payable to his estate; and that upon his death the company retained out of the insurance money sufficient to pay this balance; wherefore the administrators claimed that they, the legal representatives of the estate, were, in any event, entitled to one-fourth of the proceeds of the stock.

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The stock having been sold, the Court made a decree awarding the whole of the proceeds to the plaintiff; whereupon the administrators took this appeal, assigning the decree for error.

Archie Cummins and *A. M. Brown*, for appellants.

Scully's rights became fixed by Bingler's death, and no act of the administrators could change them.

Scott *v.* Ramsey, 1 Binn. 221.
Deichman's Appeal, 2 Whart. 395.
Bosler's Adm'rs *v.* Exchange Bank, 4 Barr, 32.

Their powers are strictly those of settlement.

Brightly's Equity, 273.
Fluck *et al.* Adm'rs *v.* Hager, 1 Sm. 459.
Wilhelm *v.* Folmer, 6 Barr, 296.

The Homestead Company was itself a trustee of the estate.

Bayard *v.* Farmers' and Mechanics' Bank, 2 Sm. 232.

If Scully was affected at all by the transaction of the company, he became chargeable as trustee of the fund in dispute.

Hill on Trustees, p. 164, 3d Am. ed. 246.
Abbott *v.* Reeves *et al.*, 13 Wr. 494.

M. W. Acheson, contra.

Jan. 7, 1878. THE COURT. This case comes to us from the decree of the Court below, on distribution after sale, on petition of John D. Scully, of some two hundred and ten shares of the Homestead Bank and Life Insurance Company, which belonged to John R. Bingler in his lifetime. It seems that, about the 30th of May, 1876, the appellee indorsed, for Bingler's accommodation, a note of ten thousand dollars, which was discounted at the Diamond Savings Bank. As collateral security for this indorsement, Bingler transferred to Scully the shares of stock above stated. During the life of the decedent the note was renewed from time to time, and was paid down to $8769.51, which balance was paid by Scully. Also, during this time, Bingler had paid assessments upon the said stock, amounting to seventy-five per cent. of its par value, leaving twenty-five per cent. unpaid and due, and owing the Homestead Bank and Life Insurance Company. Bingler, before his decease, had, from this same company, taken a risk upon his life of ten thousand dollars; and, on his death, from the insurance money thus falling due to his estate, the sum of $5250 was retained by the said company as the balance due it on the shares of stock above stated. The proceeds of this stock, sold by order of Court, were not sufficient to cover the amount of Scully's claim.

Now this is the contention between the parties to this suit. The administrators of John R. Bingler claim twenty-five per cent. of the money arising from the aforesaid sale, since that proportion of the par value of the stock was paid for by the money of the estate, and which, but for the superior equities of the bank, would have come into their hands. Scully, on the other hand, claims the whole amount of said proceeds, because, as he alleges, the whole amount of said stock having been pledged to him, he is entitled to hold the same, not merely as it was when assigned to him, or as it was at the time of Bingler's death, but as improved by the funds of the estate after that event. It is for us to determine as to the soundness of this claim. What was assigned to Scully? Certainly only seventy-five per cent. of the par value of the stock, for that was all Bingler had to assign. Had the money, therefore, due to the administrators not been appropriated to the payment of the remaining twenty-five per cent., the sale would have realized but three-fourths of what is now in court, and the appellee would have had no more than the appellants contend he should have. Now, had there been no insurance on Bingler's life, or had the policy been procured from some other company, the above would have been exactly the condition of affairs, for it would hardly be contended that the representatives of the estate would have been obliged to pay the amount due upon the stock in order to improve the collaterals in Scully's hands. If, however, he had no claim on the estate for a preference of this kind over other creditors, why shall he have such a claim as matters now stand? As we have said, the money of the estate was appropriated to the balance due on the stock subscriptions only in consequence of the company's equity so to appropriate it; it was so done by force of that equity and not by the will of the administrators. It was, therefore, but a conversion of the funds of the estate from cash to stock; but they remained, in this form, not the less assets of the estate. Admitting, however, that this appropriation was made by the company with the assent of the administrators, and that it could not otherwise have been done, it does not follow that it was so done for Scully's benefit, for the property thus acquired could only be disposed of according to the legal rules governing the distribution of the estates of decedents. Even had the administrators so intended, they could not thus give the appellee a preference over other creditors. It is said, however, that it nowhere appears that there are other creditors to be affected, there being no allegation that the estate is insolvent. But it is alleged, and not denied, that the administrators had not the means to redeem the pledged stock; in other words, to pay the note Scully was obliged to lift. It follows, necessarily, if the estate is not able to pay its debts it must be insolvent; aside from this, if it be not so, then is the appellee's contest profitless, for his claim will be paid in full and his collaterals are of no account. But it has been urged that there can be but little if any doubt

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that the agreement between Bingler and Scully was, that the stock should be paid in full by Bingler in order that his indorser might have the security unencumbered; and that the administrators, by permitting the payment thereof, did but carry out such agreement. Be this as it may, there was certainly the prior agreement that Bingler should pay the note for which Scully became liable; but what of that? There is such a contract with every creditor, and Scully had no superior equity which entitled him to a preference over others, or which gave him a right to seize the assets of the estate and apply them to his own use.

These belong to the legal representatives of the estate, and it is their right and duty to possess themselves of, and distribute them as the law directs.

The decree of the Court of Common Pleas No. 1, of Allegheny County, is reversed, at the costs of the appellee. And it is ordered, that the money now in court, being the one-fourth part of the net proceeds of the sale of certain shares of stock of the Homestead Bank and Insurance Company, formerly belonging to John R. Bingler, deceased, be paid into the hands of the administrators of the estate of the said John R. Bingler, deceased.

Opinion by GORDON, J. SHARSWOOD, J., absent.

Jan. '77, 148. March 12, 1878.

Buck Mountain Coal Co.'s Appeal.

Equity practice—Injunctions—Preliminary and perpetual—When a decree dismissing a bill erroneous.

It is an improper practice for a Court to dismiss a bill in equity before an answer or demurrer is filed, upon a hearing upon the bill and affidavits on a motion to continue a preliminary injunction.

Appeal from the Common Pleas of Luzerne County.

Bill in equity by the Buck Mountain Coal Company against the Lehigh Coal and Navigation Company.

The bill set forth that the plaintiffs are a company duly incorporated for the purpose of mining coal; that for that purpose they had run a line of track from the mountain in which their mines were situated over and across other of their lands to the place of shipment, the said track being what is known as a "gravity railroad;" that the defendants, an incorporated company under and by virtue of an Act of Assembly (March 4, 1863, P. L. 99), were proceeding to construct a tract to cross the plaintiff's track at right angles at grade; that this course was contrary to the provisions of the Act of February 19, 1849 (P. L. 84), and would be very injurious to the plaintiffs in their use of their own track, by reason of the difficulty of stopping the cars impelled by the force of gravity, etc.

The bill prayed an injunction until further hearing, and perpetually thereafter, and further relief.

The ordinary five day injunction was granted.

The defendants filed affidavits denying that their proposed plan was contrary to law or would injure the plaintiffs in any way.

After hearing upon the bill and affidavits, on a motion to continue the special injunction, the Court (HARDING, J.), entered a decree dissolving the special injunction theretofore granted, and dismissing the bill.

The plaintiffs appealed, assigning as error the action of the Court.

J. V. Darling, for appellants.

[AGNEW, C. J. What right had the Court below to dismiss the bill before final hearing?]

It is the practice with us, and though the bar has protested against it, we have not been able to effect a change.

Andrew T. McClintock, for appellees.

March 18, 1878. THE COURT. Whatever may be the final disposition of this case—a result which we shall not anticipate by an opinion at this time—it is clear the Judge below committed a palpable error in dismissing the plaintiffs' bill.

The only question he had before him was that of continuing the special injunction until final decree. The merits of the bill were not in question upon demurrer, or answer and proof. On the question of the right to an injunction, the plaintiffs were entitled to a full hearing, on a state of the record which would involve the right. Had there not been a final dismissal of the bill the plaintiffs' appeal would have been quashed, there being no appeal from an interlocutory decree refusing a special injunction.

So much of the decree as dismissed the bill is therefore reversed and the bill restored, and the record ordered to be remitted for further proceedings.

PER CURIAM.

July, '75, 13. **Long's Appeal.** Jan. 30, '77.
Murphy's Estate. Feb. 4, '78.

Decedents' estates—Married woman's will—How executed—Invalidity of, under Act of April 11, 1848, P. L. 537—Incomplete present gift—Declaration of trust, how created.

M., shortly after his marriage in 1830, received from his wife $1150 of her own money, which he, a few years

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before his death, invested as her money in United States bonds. In 1871, at the request and dictation of his wife, then ill and expecting to die, he wrote out a paper, by which the sum of $1150 was distributed, in the name of his wife, among certain of her relations and friends, the appellants, to which distribution M. added the words: "I, J. M., I will ancer this bill in one year after the decease." M. died in 1873, a few weeks after the death of his wife, having frequently expressed his intention of paying the sums mentioned to the appellants, and having spoken of the money as his wife's. The auditor, to whom was referred the executor's accounts, allowed the appellant's claim under the paper written by M. in 1871. Exceptions were taken to this decree, which were sustained by the Orphans' Court:

Held (affirming the decree of the Court below), that, as the paper was inoperative as a present gift, or as a testamentary disposition of the wife's property, the husband's promise, in the absence of any legal liability to pay the money to the appellants, did not amount to a declaration of trust binding upon him and enforceable in a court of equity.

Appeal from the Orphans' Court of Philadelphia County.

This was an appeal by John Long and others from a decree of distribution entered upon the account of the executors of the will of John Murphy, deceased.

The facts in evidence before the auditor, to whom was referred the said account, were as follows:—

John Murphy, the decedent, married Martha Long, Feb. 25, 1830. At that time she possessed personal estate amounting to the sum of $1150, which decedent, two or three years before his death, invested in United States bonds as her money. In 1871, Mrs. Murphy, being dangerously ill, requested her husband to write a paper, which was intended by her as her last will and testament. The paper, in the handwriting of John Murphy, was as follows:—

'Phila., June 22, 1871.

"I, Mrs. Martha Murphy, i am not in Good helth. i wish to make A devide of what I have Past me to my friends.

My Brother John Long	$400.
Jane, my sister	100.
Margaret, my sister	350.
Margaret Jane Brady	100.
Martha Lodge	100.
Samuel Collins	100.

"I, John Murphy, I will Ancer this Bill in one year after the Decease."

Shortly after the writing of this paper, the decedent, by a codicil to his will, bequeathed to his wife a legacy of $1150, besides an annuity and certain real estate.

In 1873, Mrs. Murphy died, and the decedent survived her but three or four weeks. During his life, both before and after his wife's death, in conversation he frequently referred to the paper written by him at her request, and to the amount of money mentioned therein as his wife's money, promising to pay it if his life was spared. He stated to different persons that he would "settle that account," that the money should be paid; also that he had invested *his wife's money* in bonds. The decedent made no alteration in his will upon the death of his wife.

The auditor to whom was referred the account of the executors of the decedent, reported that the claims of the persons named in the paper of June 22, 1871, should be allowed, and that they were entitled to be paid out of the estate of the decedent the sums therein given to them. To this report the executors, and those claiming under the will of the decedent, filed exceptions.

The Orphans' Court (HANNA, J., delivering the opinion) sustained the exceptions, saying: "From the testimony taken before the auditor, and sent up to us upon the application of the exceptants, it is clearly shown that if the testator received any money from his wife at the time of the marriage, he not only reduced it into possession, but used and appropriated it for his own purposes, perhaps forty years before his death. It was never considered by either of them in the nature of a loan, or to be held by him in trust for her. This being the case, and the receipt of the money by the husband having been prior to the statute of April 11, 1848, without any contemporaneous declaration or admission that he received and held the same in trust for her, is sufficient to work a change of ownership. (Gocheneur's Estate, 11 Harris, 460.)

"No ante-nuptial agreement by parol was shown whereby the parties agreed that the money should remain the property of the wife. This settlement, followed by the disposition and use of the money during marriage, consistent therewith, would have been binding upon the death of decedent. (Gackenbach *v.* Brouse, 4 W. & S. 546.) Nor was any post-nuptial contract for a valuable consideration proven or attempted to be proven. (Duffy *v.* Insurance Co., 8 W. & S. 432.) A positive and clear declaration at the time of receiving the wife's chose in action (previous to 1848) may be sufficient to establish the husband as a trustee for the wife; but loose declarations of an intention to repay the money are not enough. (Johnston *v.* Johnston's Admr., 7 Casey, 450.)

"Before the Act of 1848, the husband, by marriage, acquired a right to his wife's choses in action, if he reduced them to possession during coverture. (Tritt's Admr. *v.* Colwell's Admr., 7 Casey, 228.)

"In the present case the testator mingled the money received from his wife with his own, and used it either in his business or otherwise, as he saw proper; he never promised to repay his wife, nor did she demand it. We are unable to discover any setting apart by the testator of the money received from his wife; his assets did not

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disclose any investment in her name or his as her trustee, or even any securities corresponding in amount to the sum received from her.

"For the reasons given, we are of the opinion that the money received by testator from his wife became, not only from the intention of the parties, but by operation of law, absolutely his property."

The Judge, after saying that the auditor was in error, also, in supposing that the paper of June 22, 1871 (*supra*), was a valid declaration of trust by the decedent in favor of John Long and the other persons therein named, continued:—

"The words, 'I, John Murphy, I will ancer this bill in one year after the decease,' do not constitute any obligation for the non-performance of which the testator or his estate would be liable. It was a promise without consideration, and the persons named in the paper are but volunteers. If this paper constituted a declaration of trust, had the wife survived her husband, she would probably have been entitled to both her legacy and the like amount as *cestui que trust*. This certainly was not intended by the testator.

"The auditor, to a great extent, relied upon the promises of testator after the death of his wife, but these were merely declaratory of an intention never performed, and an agreement and undertaking without consideration.

"It is almost unnecessary to cite authorities to sustain the views entertained by us in disposing of the question submitted. In Hill on Trustees, pages 91 and 126, the fundamental principle is laid down, that in order to fasten a trust on property of any description, by means of parol declarations, the expressions used must amount to a clear and explicit declaration of trust. Loose and indefinite expressions, and such as indicate only an incomplete and executory intention, are insufficient for this purpose. The declaration of trust must be complete and unequivocal. (Hill on Trustees, page 134.)

"Again, it has long been an established principle with courts of equity that they will not interfere to perfect the title of a party claiming merely as a volunteer. To determine who are or who are not regarded as volunteers, it is settled that a *valuable* consideration is requisite to put the Court in motion. (See note to p. 129, Hill on Trustees.) However, it has been held that a blood consideration was sufficient to support an executory trust in equity, at least where the instrument was under seal. (See above.) But in this State, in Campbell's Estate (7 Barr, 100), it was held that natural love and affection was not sufficient consideration for an equitable assignment. And the evidence to establish a parol trust must be clear and positive. (Emerick *v.* Emerick, 3 Phila. Rep. 94; Capehart *v.* Capehart, 2 Phila. Rep. 134. See also Reybold *v.* Reybold, 8 Harris, 308.)

"The facts shown in Gray's Estate (1 Barr, 328), disclose admissions and promises similar to those of the testator in the present case. There the decedent, Gray, four or five years before his death, admitted, on different occasions, that he had some five hundred dollars of his wife's money, and that it was his intention to pay it back again; that it should not be said that he had any of his wife's money. On another occasion, when told by an acquaintance that he thought the money obtained from Ireland should go to Mrs. Gray and her children, the decedent said 'they should have it,' and he did not intend to claim it as his own. And again, when another acquaintance 'put it at him' that he had the money of Mrs. Gray, he admitted it, and said she and her children should have it. Mrs. Gray claimed this five hundred dollars from her husband's estate, and the auditor awarded her the amount, with interest. This was excepted to by the heirs of decedent, but the Orphans' Court confirmed the report of the auditor. This decision, upon appeal, was reversed by the Supreme Court.

"For the reasons stated, we think the auditor was in error in awarding payment of the claims presented before him, and therefore sustain the exceptions. The report is recommitted to the auditor for correction, in accordance with this opinion."

John Long and the other claimants took this appeal, assigning for error the action of the Court in sustaining the exceptions and disallowing their claims.

The case was argued January 30, 1877, WILLIAMS, J. being absent.

Feb. 12, 1877. THE COURT. The Judges of this Court being equally divided in opinion in this case, the decree of the Orphans' Court stands affirmed.

PER CURIAM.

A re-argument was subsequently ordered, and the case was again heard Feb. 4, 1878.

Aaron Thompson, for the appellants.

Undoubtedly, before the act of 1848, a husband could become the absolute owner of the wife's personal property placed in his hands. But clear proof that the husband disclaimed intention to make the property his own, will preserve her right. In this case the husband expressly and frequently asserted and assumed the trust, and his declarations are sufficient to repel the presumption of personal acquisition by him, and establish the relation of trustee for the wife.

Ann Ziegler's Appeal, 4 WEEKLY NOTES, 453.
Moyer's Appeal, 27 Sm. 482.
Dellinger's Appeal, 21 Sm. 425.

Admitting that the money of the wife was absolutely her husband's after its transfer to him,

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yet the paper of January 22, 1871, although simple and informal, was a declaration of trust in favor of the appellants.

Lewis D. Vail, contra. This paper the appellants sought to establish as a will; now they seek to establish it as a declaration of trust.

[SHARSWOOD, J., referred to Bond *v.* Bunting (28 Sm. 210), and remarked that it was a nice question whether the written declaration of Murphy did not raise a trust, although a voluntary one.]

Moyer's Appeal (27 Sm. 482) differs essentially in the facts from this case. The declarations and admissions there relied on were explicit and strong, not as here unfulfilled promises.

Where the character of the paper is testamentary, it is impossible to enlarge or convert it into a declaration of trust.

Warriner *v.* Rogers, L. R. 16 Eq. 353.
Heartley *v.* Nicholson, L. R. 19 Eq. 242.

March 25th, 1878. THE COURT. The auditor found as a fact that John Murphy, the decedent, did not convert to his own use the sum of $1150 received by him as a part of his wife's estate; that he held it as a trustee for his wife, invested it in government bonds as his wife's money two or three years prior to his death, and repeatedly recognized his obligation to pay it. The Court below reversed this finding of the auditor. Upon a careful examination of the evidence, we are by no means sure that he was so clearly wrong that his finding of the facts should have been reversed.

It must be conceded that the decedent had the right to convert the money. It was evidently the proceeds of property derived by Mrs. Murphy from her parents at the time of her marriage with the decedent in 1830. At that time there was no statute protecting the separate estates of married women, and his right of conversion was clear.

But there was evidence, not overwhelming, it is true, but sufficient to go to a jury in a common law proceeding, and to sustain a verdict, that the decedent did not convert, and never intended to convert, the money to his own use.

The finding of the auditor upon an issue of fact being like the verdict of a jury, ought not to be set aside, because it might have been the other way. Unless it ought to have been the other way, and was clearly wrong, it should not be disturbed. But if we were to reverse the decree upon this point, it would not help the appellants, assuming that there had been no conversion, and that the decedent held the $1150 in trust for his wife; that it was her money, to dispose of as she saw proper, have the appellants any valid claim upon it? The answer to this question depends upon what Mrs. Murphy did to confer such right.

It is very plain that any promise made by the decedent not based upon a valid disposition of the money by his wife would be without consideration and void. The facts are that in the year 1871, his wife being ill at the time, the decedent, at her express direction, wrote down on a piece of paper the following words:—

"Philadelphia, June 22, 1871.

"I, Mrs. Martha Murphy i am not in good health i wish to make a devide of what i have past me to my friends

My Brother John Long	$400
Jane, my sister	100
Margaret, my sister	350
Margaret Jane Brady	100
Martha Lodge	100
Samuel Collins	100

"I, John Murphy, I will Ancer this Bill in one year after the Decease."

This is all there is in the case to show a disposition of her money by Mrs. Murphy. What is the effect of this paper? Was it intended as a present irrevocable gift to the parties named therein, or was it intended as a testamentary paper merely?

There was nothing to indicate that it was a present gift. She had no idea of parting with the money during her life. The contrary intent appears upon the face of the paper. She speaks of not being in good health, and wishing "to make a devide of what I have past me to my friends."

Then her husband adds to the paper "I, John Murphy, I will ancer this Bill in one year after the decease." Whose decease? Evidently the decease of Mrs. Murphy. Mrs. Collins testifies that Mrs. Murphy "asked Mr. Murphy to write down how she wished her property to be distributed, and he wrote then this paper at her dictation." The paper was evidently intended as a will. It was a rude attempt on the part of Mrs. Murphy to dispose of her property after her death. It is needless to say that the paper possessed none of the statutory requirements of such an instrument.

The right of a married woman to make a will of her separate estate rests upon statute, and its provisions must be strictly complied with. It was contended, however, that although the paper is invalid as a will, it nevertheless creates a trust in favor of the appellants; that the decedent as her trustee was bound to execute it, and had in fact promised to do so. Undoubtedly if Mrs. Murphy had created a valid trust of this money, assuming it to be her separate estate, her husband in his lifetime, and his personal representatives since his death, could have been compelled to execute it. But this paper creates no trust that equity would enforce. Had it been in the nature of a present

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gift to the appellants, the case might have been different. In such event there would have been plausibility at least in the argument that it was a change in the uses of the trust. But a paper which is evidently of a testamentary character, which was intended to operate as a will, and which is wholly invalid, cannot be turned into a declaration of trust, so as to operate as a will, and defeat the statute prescribing how the will of a married woman shall be executed. If then the paper is inoperative either as a present gift, or testamentary disposition of Mrs. Murphy's money, it does not need an argument to show that the declaration of the decedent that he would "Ancer the Bill," or pay the money to the appellants amounts to nothing. In the absence of any legal liability or duty to pay, his promise to do so was a mere *nudum pactum*.

The decree is affirmed, and the appeal dismissed at the cost of the appellants.

Opinion by PAXSON, J.

SHARSWOOD, MERCUR, and WOODWARD, JJ., dissent.

Oct. & Nov. '76, 264. Jan. 7, 1878.

Chartiers Railway Co. v. Hodgens.

Railroad company—Subscriptions to stock—Whether the terminal points, as laid down in the charter, are fundamental conditions of contract—Sale of road under a mortgage—Subscribers to the new company stock bound by the description in the mortgage—Evidence—Representations made by those employed to solicit subscriptions not admissible.

In a suit by the C. Railway Co. to recover a subscription to its stock, it appeared that the C. V. Railroad Co. had, in 1853, been chartered to build a railroad from Pittsburgh to the borough of Washington; that in 1856 it executed a mortgage "of all and singular the railroad of said company extending from its point of junction with the Pittsburgh and Steubenville Railroad to the borough of Washington." In 1866 the C. V. Railroad was sold under the mortgage, and the purchasers were chartered under the Act of April 8, 1861, as the C. Railway Co., and defendant subscribed to the stock of this latter company. The railroad was constructed to Mansfield, eight miles from Pittsburgh, where it formed a junction with what was formerly the Pittsburgh and Steubenville Railroad; its other terminus was a short distance outside of Washington Borough as it existed in 1853, but was within the borough as it was at the date of the mortgage. Defendant refused to pay his subscription on the ground that the company had not completed their road to the terminal points designated in their charter:

Held (reversing the judgment of the Court below), that the functions of the C. Railway Co. were only such as attached to them as purchasers under the mortgage, and the subscription of defendant was to the stock of the railroad therein described, and not to the one designated in the original charter.

To introduce a new term into a written contract, the evidence of the agreement of the parties to do so must be clear and distinct, and that the contract was executed upon the faith of such collateral agreement.

Error to the Common Pleas of Washington County.

Assumpsit by the Chartiers Railway Company against Robt. A. Hodgens, to recover $120, being the balance unpaid upon a subscription by defendant to four shares of the capital stock of said company, with the statutory interest thereon of one per cent. a month for default of payment.

The plaintiff company is the successor of the Chartiers Valley Railroad Company, incorporated by an Act of Assembly of Feb. 7, 1853 (P. L. p. 42), to construct a railroad from Pittsburgh to the borough of Washington, with power to connect with the Pittsburgh and Steubenville Railroad on such terms and under such restrictions as might be agreed upon by the officers and directors of said company. They were also authorized to connect with the Hempfield Railroad, whose terminus is within the borough of Washington. In 1855 an agreement, dated April 27 and May 26, was made with the Pittsburgh and Steubenville Railroad Company, whereby that part of the road of the latter company extending from Mansfield to Pittsburgh was to be for the joint use of the two companies.

On the 1st of January, 1856, the Chartiers Valley Railroad Company executed a mortgage to J. Edgar Thompson and John Graham of "all and singular the railroad of said company, extending from its point of junction with the Pittsburgh and Steubenville Railroad, in the county and State aforesaid, to the borough of Washington, in the county of Washington and State aforesaid, with all the privileges and appurtenances, estate, real and personal, rights, liberties, and franchises, whatsoever and wheresoever thereunto belonging; and also of all the rights, liberties, privileges, benefits, and emoluments secured to the said company by certain articles of agreement between them and the Pittsburgh and Steubenville Railroad Company, dated on the 27th of April and the 26th of May, A. D. 1855." In October, 1866, under a power of sale contained in the mortgage, the Chartiers Valley Railroad was sold to W. J. Howard. Esq., who proceeded to organize the Chartiers Railway Company under the Act of April 8, 1861 (P. L. 259).

The contract of subscription on which this suit was brought was to this latter company, and in these words:—

"We, whose names are hereunto subscribed, do promise to pay to the Chartiers Railway Company the sum of fifty dollars for each and every share of the capital stock of said company set opposite our respective names,

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in such proportion and at such times, not exceeding five dollars per share in any period of thirty days, as shall be determined by the president and directors of said company."

Affixed to the subscription book was a copy of the following letter:—

"Philadelphia, Oct. 15, 1868.

To the President and Directors of the Chartiers Railway Company.

Gentlemen: Upon your receiving the right of way and real estate, free of cost to your company, and necessary for the constructing and operating of your railway, except depot grounds at or near the termini, and expending not less than $250,000, which sum shall be received from sales of your capital stock, in grading the same from a point on the Pittsburgh, Cincinnati, and St. Louis Railway at or near Mansfield, in Allegheny County, to or near Washington Borough, in Washington County, the Pennsylvania Railroad Company will purchase the first mortgage bonds of your company to an amount sufficient to enable you, with the proceeds thereof, to complete your route with single track and sidings, ready for cars and equipment. Very respectfully yours,

J. EDGAR THOMSON,
President Pennsylvania R. R. Co."

The Pittsburgh and Steubenville Railroad had been sold at judicial sale, and the Pittsburgh, Cincinnati, and St. Louis Railway above referred to succeeded to all its property, rights, franchises, etc. The defendant Hodgens first subscribed to two shares of stock of the Chartiers Railway Company under a form of subscription, one of the terms of which was that the road should connect with the Hempfield Railroad. He subsequently, on Jan. 16, 1869, signed in lieu thereof the form of subscription given above for four shares, and on this subscription he paid $80. The railroad was finally completed from Mansfield to Washington, and the termination at the latter place located on what is known as the Shirls farm, no connection being made with the Hempfield road. The limits of the borough of Washington were extended in 1854, and the railroad terminus is within the extended limits, but outside of the boundaries as they existed in February, 1853. Hodgens refused to pay any further on his subscription, and on Jan. 28, 1874, this suit was brought.

Hodgens filed an affidavit of defence, the substance of which was that the Chartiers Railway Company was incorporated to build a railroad from Washington, in Washington County, to Pittsburgh; that, "while claiming to have completed its road, it had not extended it to either of the terminal points, but had terminated it on the north at the town of Mansfield, some eight miles distant from Pittsburgh, and had finally abandoned the construction of its road in the direction of said city; and on the south at the Cumberland road, on the farm of Catharine Shirls, two thousand feet, or thereabouts, distant from the terminus fixed by its charter;" that therefore he, the defendant, was released from his contract of subscription. Plaintiff moved for judgment against defendant for want of a sufficient affidavit of defence. The motion was refused and the plaintiff took a writ of error, assigning for error the action of the Court in refusing to enter judgment as moved for. The Supreme Court, on February 1, 1875 (SHARSWOOD and GORDON, JJ., dissenting), dismissed the writ of error, being of opinion that the facts set forth in the affidavit constituted *primâ facie* a good and valid defence to the action, and accordingly sent back the case to "be tried precisely as it would have been if no writ of error had been taken." (Chartiers Railway Co. *v.* Hodgens, 27 Sm. 187.)

At the trial (before ACHISON, P. J.) evidence was given, under objection and exception, to show that, at the time defendant subscribed to the contract sued on, representations were made to him by the persons obtaining the subscription that the Chartiers Railroad was to be constructed to a point of connection with the Hempfield Railroad. Further evidence was given, also under objection and exception, to show that the officers of the Chartiers Railway Company were informed that subscriptions to the stock had been made on the faith of the representations that said railroad would be extended to and connected with the Hempfield road, and had authorized witness to give assurance to all parties interested that such was the intention of the company.

The Court charged the jury, *inter alia*, as follows: "By the Act of incorporation the city of Pittsburgh was designated as one terminus, and the borough of Washington as the other terminus of the plaintiff's road. These terminal points formed part of the conditions which entered into the contract made between the company and the defendant; the company was bound to construct its road from and to these points, and an abandonment of either would be an illegal abuse of the authority delegated to the company, for which it would be responsible to the defendant as well as to the State."

Verdict for defendant. Plaintiff took this writ, assigning for error, *inter alia*, the admission of the evidence objected to and the portion of the charge given above.

John Dalzell (with him *John H. Hampton* and *A. M. Todd*), for plaintiff in error.

The Court below entirely lost sight of the fact that the Chartiers Valley Railroad Company and the Chartiers Railway Company were not identical. The functions of the latter company were only such as attached to them as purchasers at judicial sale on foreclosure of a mortgage on a railroad extending from its point of junction with the Pittsburgh and Steubenville Railroad, at Mansfield, to the borough of Washington.

That the evidence as to the representations

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made by those selling the stock of the company in order to induce subscriptions should not have been received, see—

Cass *v.* Pittsburgh, Virginia & Charlestown R. R. Co., 30 Sm. 31.
Custer *v.* Titusville Gas & Water Co., 13 Sm. 381.

D. S. Wilson (with him *Braden* and *Miller*), contra.

A subscription to stock is a contract between the subscriber and the company, and is impregnated with the description of the enterprise given in the charter, for the very object of the subscription is to furnish aid to that particular work. The refusal of the company to build the road to either terminus is a departure from the terms of the contract, and releases the subscribers from their obligations.

Custer *v.* Titusville Gas & Water Co., 13 Sm. 381.
P. & C. Railroad Company *v.* Byers, 8 Casey, 22.
Plank-road Company *v.* Arndt, 7 Casey, 317.
Commonwealth *ex rel. v.* Pittsburgh, 5 Wr. 282.
Everhart *v.* West Chester & Phila. R. R. Co., 4 Casey, 339.
Gallagher *v.* Fayette Co. R. R. Co., 2 Wr. 102.
Caley *v.* Phila. & Chester County R. R. Co., 30 Sm. 363.

Jan. 7, 1878. THE COURT. It will be entirely unnecessary to consider the numerous assignments of error in this case, as there is one point which is decisive on the whole controversy, upon which the judgment might be reversed.

The Chartiers Valley Railroad Company was incorporated by an Act of Assembly approved February 7, 1853 (Pamph. L. 42), "with power to construct a railroad from the city of Pittsburgh, in the county of Allegheny, by way of Cannonsburgh, to the borough of Washington, in Washington County."

Had the defendant been sued upon a subscription to the stock of this company it may be that these terminal points were fundamental conditions of the contract, and an abandonment of them and the adoption of others short of them by the corporation would have released the defendant from his subscription. Upon that question we express now no opinion.

The Chartiers Valley Railroad Company, on the first day of January, 1856, executed a mortgage to J. Edgar Thomson and John Graham of "all and singular the railroad of said company extending from its point of junction with the Pittsburgh and Steubenville Railroad, in the county and State aforesaid, to the borough of Washington and State aforesaid, with all the privileges and appurtenances, estate, real and personal, rights, liberties and franchises whatsoever and wheresoever thereunto belonging, and also of all the rights, liberties, privileges, benefits, and emoluments secured to the said company by certain articles of agreement between them and the Pittsburgh and Steubenville Railroad Company, dated April 27 and May 26, 1855." Under a power of sale contained in this mortgage the railroad thus described was sold to William J. Howard, and the same was duly conveyed to him. He proceeded, under the Acts of Assembly, to organize a corporation under the name of the Chartiers Railway Company. It was to the stock of this last-named corporation that the defendant below was a subscriber. The contract of subscription was a simple, unconditional one, with no description of route or termini. The articles of agreement with the Steubenville and Pittsburgh Railroad Company, referred to in the mortgage, secured to the Chartiers Valley Railroad Company the use of that part of the Pittsburgh and Steubenville Railroad "from a suitable point of junction at or near Mansfield to the south side of the Monongahela River, opposite Pittsburgh, so constructed as to accommodate the business of both companies." It is to be remarked also that while in 1853 the railroad stopped short of the limits of the borough of Washington, yet on the 10th of June, 1854, before the execution of the mortgage, the limits of the borough were extended, and the railroad does reach the borough thus enlarged.

It seems to us that it is very clear that the termini of the railroad of the Chartiers Railway Company, under the mortgage and charter based on the sale thereunder, were at the one end the borough of Washington, according to its limits as it existed at the date of the mortgage, and at or near Mansfield at the other end. If this view needed confirmation it will be found in the letter of J. Edgar Thomson, President of the Pennsylvania Railroad Company, dated October 15, 1868, to the president and directors of the Chartiers Railway Company, containing the offer upon the faith of which the issue of 5000 shares of capital stock was authorized, to four shares of which the defendant below subscribed. It states the road to be "from a point at or near Mansfield, in Allegheny County, to or near Washington borough, in Washington."

Nor do the provisions of the Act of April 8, 1861 (Pamph. L. 259), entitled "An Act concerning the sale of railroads, canals, turnpikes, bridges, and plank roads," interfere with the view which we take of this case. The Chartiers Valley Railroad Company possessed the franchise of making a road to Pittsburgh and to the original bounds of Washington borough, and let it be conceded that as to the subscribers to the stock of that company they were bound to exercise that franchise. But it does not follow that they were compelled to include that franchise in this mortgage, and that the purchasers would come under any obligation to complete the whole road. The Act of Assembly is silent on the subject. It provides, indeed, that the purchasers shall be in-

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vested with all the rights and franchises of the corporation as whose the railroad may have been sold; but surely this must be limited to so much of the road as has been mortgaged and sold. If they could mortgage the whole, they could also a part, and the rights and franchises of the purchasers cannot extend higher or reach further than the mortgage upon which their title rests.

We think also that there was error in receiving and submitting to the jury the evidence offered and given in regard to representations made by those employed to solicit subscriptions as to the connection to be formed with the Hempfield Road. Laying aside altogether the question of the sufficiency of the evidence of their authority to bind the company by any such condition to be annexed to the contract, the representations relied on amounted to mere declarations of intention, and for all that appears perfectly honest when made. The cases all concur in the doctrine that to introduce a new term into a written contract, the evidence of the agreement of the parties to do so must be clear and distinct, and that the contract was executed upon the faith of such collateral agreement. But the evidence fell far short of this requirement. Take the defendant's own testimony upon the subject. "Joshua Wright and John McElroy presented the book to me for my subscription. There was considerable talk at the time. I cannot give their language; the substance of what they said was that there would be a connection between the Chartiers and Hempfield Railroad. I cannot say that their conversation was the only inducement. Their conversation made me conclude there would be a connection between the roads. They so represented to me that there would be a connection between the roads, that I had no doubt of it. *There was no positive arrangement.* They assured me that the connection would be made. I thought the assurance had been given them that the connection would be made. I did not investigate whether they had authority to make the the connection." What would any written contract be worth if such loose testimony is permitted to go to a jury in order to reform the instrument by introducing a new term or condition? The subscriber to the stock of a corporation has a plain chart before him. If he insists on conditions not contained in the subscription paper, he can insert them over his name. The company can then know whether to accept or refuse the subscription with such conditions. The defendant understood this, for having first put his name to a special subscription on the express condition that the road should be located and constructed upon a line connecting the same with the Hempfield Railroad, that subscription was erased and the unconditional one substituted. Yet it was submitted to the jury to say whether the new subscription was not made on the same terms as the old, and the learned Judge instructed the jury that it mattered not whether the agents who made the representations relied on were or were not authorized to make conditions with the subscribers. The case of the Railroad Company *v.* Stewart (5 Wright, 159), which he cites, was a case in which there was no question as to the authority to accept the special subscriptions. It was the act of the president of the company.

It is undoubtedly true that fraudulent misrepresentations of an unauthorized agent will infect the contract; for a principal cannot avail himself of a contract so made. But there was in this case no evidence of fraud. There were declarations of intentions to do what they honestly intended to do, and no doubt if they had the ability they would have done, and the defendant could not have regarded them in any other light.

We think also that the evidence of ratification by the company was insufficient to submit to the jury. It was of the same character as all the rest—recognition of the fact that it had been the intention of the company to connect its road with the Hempfield, and still was. There was nothing in all of it like the acknowledgment of of a subsisting condition.

Judgment reversed, and *venire facias de novo* awarded.

Opinion by SHARSWOOD, J.

July, '77, 55½. Jan. 30, 1878.

McCauley's Appeal.

Errors and appeals—No appeal from taxation of costs lies to the Supreme Court—Materiality of witnesses.

No appeal lies from the taxation of costs in the Court of Common Pleas to the Supreme Court.

The materiality of witnesses in a trial before a jury, depends on facts known to the Court below, whose discretion in the allowance of fees to the witnesses can not be examined without the evidence, which is not brought up either by appeal or certiorari.

Certiorari to the Common Pleas No. 1, of Philadelphia County.

Appeal and certiorari by Daniel McCauley from the taxation of costs in the case of McCauley *v.* Dixon.

The plaintiff, who was a livery stable keeper, brought suit against Dixon for deceit, in that he hired a horse and wagon of the plaintiff, and so recklessly drove and abused the horse that he subsequently died. The jury found a verdict for the defendant. The defendant's bill of costs contained charges for witness fees of five persons,

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who were in attendance at the trial, but were either not examined or knew nothing about the case. This bill of costs was allowed by the prothonotary. The Court below overruled and dismissed the plaintiff's appeal from the taxation of costs.

The plaintiff took this certiorari and appeal, assigning for error this action of the Court.

Lucas Hirst, for the appellant. This was a case of oppression, and the Courts should interfere to break up this system of calling large numbers of witnesses who know nothing about the matter in dispute, merely to swell the costs.

DeBenneville *v.* DeBenneville, 3 Yeates, 558.

E. Hunn, Jr., contra.

February 11, 1878. THE COURT. No appeal lies from a taxation of costs by the Court of Common Pleas to this Court. A writ of error reaches only the record, and errors apparent on the record only can be corrected. The materiality of witnesses in a trial before a jury depends on facts known to the Court below, whose discretion in the allowance of fees to the witnesses cannot be examined without the evidence, which is not brought up either by appeal or certiorari.

The appeal and certiorari in the case quashed at the cost of the plaintiff in error.

PER CURIAM.

Common Pleas—Law.

C. P. No. 1. March 18, 1878.

Suydam v. Elliott, late sheriff, etc.

New trial—Trespass—Excessive damages—Execution of writ after return day.

Rule for new trial.

The action was trespass against the sheriff for damages for dispossessing the plaintiff of certain premises. On the trial the following facts appeared in evidence: A judgment in an amicable action of ejectment was entered September 30, 1876, against one Lanck, the landlord of the present plaintiff. A writ of *habere facias possessionum* issued the same day, returnable to the first Monday in November, 1876; this was placed in the sheriff's hands on October 22d, and the following day the deputy entered upon the premises, demanded possession, and left a copy of the writ with Lanck. On October 28th, Lanck obtained a rule to open the judgment, proceedings to stay in the meanwhile, which was discharged November 25.

A certified copy of the discharge of the rule was given to the sheriff December 8th, who, on the 13th of December, turned out the present plaintiff, Suydam, he being the tenant of Lanck, and in possession of the premises, but having received no notice of the ejectment suit.

Suydam then brought the present suit. The sheriff justified under the writ of *hab. fac. poss.* The verdict was for plaintiff for $1000 damages.

Ridgway, now showed cause.

The sole evidence of the execution of the writ prior to the return day was that the sheriff gave a copy to the defendant and demanded possession; nothing was done afterwards until December 13, when the tenant was ejected.

This is not such an execution as will permit the sheriff to proceed six weeks after the return day.

The command of the writ is to eject the party in possession.

Watson on Sheriffs.

8 Bacon's Abg't 693, and cases cited.

The writ cannot be executed after the return day.

8 Bacon's Abgt. 694.
Vail *v.* Lewis, 4 Johns. 450.
Devoe *v.* Elliott, 2 Caines, 243.
Gwynne on Sheriff, 424.

The burden of proof is on the sheriff that he took possession prior to return day, and the evidence does not show this. It is contended that the order of Court staying the writ kept it alive after the return day. But the Supreme Court say, in an analogous case, that the order to stay had the effect of hanging up the execution until after the return day, thus suspending the writ until its vitality was gone.

Commonwealth *v.* Magee, 8 Barr, 240.

Beyond the return day its operation and vigor could only be preserved by an actual levy, and to constitute a levy there must be an actual seizure.

Spangs *v.* Commonwealth, 2 Jones, 358.
Duncan's Appeal, 1 Wr. 500.
Trovillo *v.* Tilford, 6 W. 468.

Gilpin, contra.

The entry of the sheriff's deputy on the premises, the service of the copy, and the demand of possession prior to the return day of the writ were a sufficient execution to continue its vitality after the return day. When the stay was removed the sheriff was bound to go on and deliver possession. A sheriff can sell after the return day when he has levied before. The verdict in the present case is excessive.

March 23, 1878. THE COURT. Whether the proceedings of the sheriff in this case were regular or technically irregular, the verdict was excessive.

Oral opinion by BIDDLE, J.

Rule absolute.

[See Sturges's Appeal, decided April 1, 1878, opinion by TRUNKEY, J., to be reported soon.]

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C. P. No. 3. April 6, 1878.

Robinson v. Leahy.

Affidavit of defence law—Landlord and tenant—Parol testimony to contradict a lease—Fraud.

Rule for judgment for want of a sufficient affidavit of defence.

Suit was brought on a lease for rent. The affidavit of defence set forth that defendant had been negotiating with plaintiff through an agent of the latter for the purchase of the premises in question, and had agreed to buy the same, provided a certain loan could be obtained by defendant on said premises from the Moyamensing Building Association; that plaintiff's agent persuaded defendant to execute the lease under pretence that he might then secure a better loan from the Building Association, it being agreed that he would not be required to pay rent; that on the faith of this agreement, made at the time of signing, he signed the paper, believing he was purchasing the premises, and would not have to pay rent; that he did not in any way use or occupy the premises during the time for which rent is claimed; and that the agreement for the sale fell through by reason of the Building Association refusing to make the loan.

Wm. F. Harrity showed cause.

The parol agreement as set forth in the affidavit is sufficient to vary a written instrument. The attempt to recover upon the written instrument, considering the circumstances under which it was executed, amounts to a fraudulent use of it, and parol evidence is admissible in cases of fraud.

Oliver *v.* Oliver, 4 Rawle, 141.
Renshaw *v.* Gans, 7 Penna. 117.
Hultz *v.* Wright, 16 S. & R. 345.

E. C. Shapley, contra.

Rule discharged

C. P. No. 4. March 14, 1878.

Mozart Building Association v. Frisdjen.

Landlord and tenant—Purchaser at sheriff's sale—Action for use and occupation—Trespass—Act of June 16, 1836, § 105—A permissive occupation is sufficient to sustain an action for use and occupation—A disaffirmance of a lease by notice to quit under § 105 of the Act of June 16, 1836, does not constitute the tenant a trespasser—In such case a tenant is in by sufferance, and is liable in an action for use and occupation.

Motion for judgment on point reserved.

This was an action for use and occupation. By the evidence it appeared that the plaintiffs had purchased the property at sheriff's sale under a judgment upon a mortgage given by a former owner. The defendant was a tenant of the grantee of the mortgagor and came into possession under a lease made by him. The plaintiffs, after their purchase, gave notice to the defendant, on the 2d of January, 1875, requiring him to surrender the possession within three months from the date of the notice, agreeably to the provisions of the Act of 16 June, 1836, § 105 (Purd. Dig. 660). The defendant remained in possession until the 3d of April, and the action was brought to recover for the three months' occupation during the period intervening between the date of the notice and the date at which the possession was relinquished.

The jury found for the plaintiff subject to the point reserved, whether or not, upon the facts, an action for use and occupation could be maintained.

C. Davis, for the motion.

We do not claim under the lease, but for use and occupation. The Act of June 16, 1836, § 119, simply enables the purchaser at sheriff's sale to affirm the lease; but in this case, the purchaser by giving notice to quit under § 105 of the Act of June 16, 1836, expressly disaffirms the lease. The tenant is liable to him in an action for use and occupation.

Bank *v.* Ege, 9 W. 436.
Bush *v.* Oil Co., 5 WEEKLY NOTES, 143.

E. O. Michener, contra.

In order to maintain the action for use and occupation, the relation of landlord and tenant must exist.

Lloyd *v.* Hough, 1 Howard, 159.
Wharton *v.* Fitzgerald, 3 Dal. 503.
1 Chitty's Pleading, 107.

[BRIGGS, J. Would you not be liable if you had made an agreement with the purchaser?]

Yes, undoubtedly.

[BRIGGS, J. Well, then, the Act has made the agreement for you. You are in by contract, and he suffers you to remain in.]

In order to be liable in this action, the defendant must hold by permission.

Espinasse, Nisi Prius, 20.
Henwood *v.* Cheeseman, 3 S. & R. 500.
Lloyd *v.* Hough (*supra*).
Stockett *v.* Watkins, 2 Gill & I. (Md.) 326.
Cripp *v.* Blank, 9 D. & R. 480.

After notice to quit, the tenant is a trespasser, his possession is tortious, and he no longer holds by permission.

Henwood *v.* Cheeseman (*supra*).
Bank *v.* Ege, 9 W. 436.
Peters *v.* Elkins, 14 Ohio, 344.
Featherstonehaugh *v.* Bradshaw, 1 Wend. 134.
Lloyd *v.* Hough (*supra*).

The plaintiff cannot have the two actions; he has given notice to quit, and therefore made his election to treat the tenant as a trespasser. Where a former owner is in possession after the property

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has been sold by the sheriff, the purchaser may maintain trespass, but not assumpsit for use and occupation.

Fox *v.* Harding, 21 Maine, 107.
Curtis *v.* Treat, Ibid. 525.
Edmonson *v.* Kile, 43 Missouri, 176.
Croswell *v.* Crane, 7 Barbour (S. C.), 203
McCloskey *v.* Miller, 22 Sm. 154.

C. A. V.

March 30, 1878. THE COURT. After stating the facts (*ut supra*). It was contended by the defendant's counsel that the action for use and occupation would not lie because the notice to quit disaffirmed the lease, and the possession of the defendant after the notice must be considered as the possession of a mere trespasser. But this position is altogether untenable, for it by no means follows that because the lease was disaffirmed the occupation during the three months was not permissive. Indeed the contrary may fairly be inferred from the fact that the owner brought no ejectment and resorted to no other means to put the defendant out during that period. A permissive occupation is all that is necessary to sustain this action. That the notice to quit does not operate as a bar to the action for use and occupation even where the tenant holds over beyond the time fixed for his departure by the notice, was ruled by the Supreme Court in the late case of Bush *v.* The National Oil Refining Co. (5 WEEKLY NOTES, 143). He is tenant by sufferance, and as such liable in this action for the value of the occupation. A *fortiori* is he liable where, as in the present case, the action is for the value of the premises during the running of the notice. In Hemphill *v.* Tevis (4 W. 535), which was much relied on by the defendant's counsel, the action was upon the contract contained in the lease, and not for use and occupation. This is quite apparent from the opinion delivered by Mr. Justice SERGEANT in that case, although the contrary would seem to have been inaccurately asserted by the reporter in his statement of the case. "We think," says SERGEANT, J., "the lease was at an end by the notice and that the purchaser could not afterwards sustain an action *founded upon the contract* to recover rent. If the defendants are liable at all, *it can only be for use and occupation*, or on some other ground than the contract. (4 W. & S. 541.")

There is therefore no conflict between Hemphill *v.* Tevis and Bush *v.* The National Oil Refining Company. At any rate the point must be regarded as settled by the later case already cited.

Judgment for the plaintiff on the reserved point.

Opinion by THAYER, P. J.

Orphans' Court.

Feb. 19, 1878.

Gheen's Estate.

Sale of real estate for the payment of debts—When not set aside—Judgment creditor of heir, who obtained judgment before the right of the heir vested, has no claim upon fund arising from sale of decedent's estate.

Sur petition to set aside sale, and demurrer.

Jacob Gheen, the decedent, died intestate, leaving a widow, nephew, and brother as his heirs. The widow was appointed administratrix, and obtained an order for the sale of decedent's real estate for the payment of debts, and, having obtained leave of the Court to bid at the sale, purchased the property for $4100.

The petitioner, John A. Blake, is a judgment creditor of Charles H. Gheen, a nephew of the decedent, and asks to have the sale set aside, alleging that the personal property of the decedent was sufficient to pay his debts, and that the inventory and appraisement were false, personal property being concealed. To this petition a demurrer was filed by the administratrix.

G. T. Bispham (with him *Wayne MacVeagh*), for demurrer.

The petitioner has no such interest as entitles him to interfere and ask leave to have the sale set aside.

Greiner's Estate, 2 WEEKLY NOTES, 292.

He does not aver want of notice, and must be presumed to have had notice, and could have bid at the sale.

He does not show that he will be damnified.

H. G. Smith, contra.

The sale takes away the petitioner's lien for his judgment. Blake, the petitioner, occupies a very different position from the petitioner in Greiner's Estate (*supra*).

Shollenberger's Appeal, 9 Harris, 337.
Kittera's Estate, 5 Harris, 416.
Whiteside *v.* Whiteside, 8 Harris, 473.

The sole object of the sale is to deprive petitioner of his lien. The order of sale was improvidently awarded on a false inventory and appraisement.

C. A. V.

April 6, 1878. THE COURT. The demurrer filed to this petition must be sustained. The petitioner is a judgment creditor of Charles H. Gheen, a nephew of decedent, and distributee of the estate, and prays that an order of sale of real estate, which was obtained by the administratrix for the payment of debts, may be vacated,

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and the sale set aside on the ground that the personal estate of decedent was sufficient.

The petition sets forth that the creditor obtained judgment against the heir February 2, 1875. But the heir did not obtain his interest in decedent's land until November 28, 1876, the date of decedent's death. No execution having issued upon the judgment, the creditor had no lien upon the heir's portion of the estate, and, therefore, no interest in the fund raised by this sale. (See Greiner's Estate, 2 WEEKLY NOTES, 292.)

Opinion by ASHMAN, J.

March 18, 1878.

Bessinger's Estate.

Orphans' Court practice—Bill of review—When errors are alleged in an account which has been confirmed by the Court a bill of review is the proper practice—Time will not operate against the complainant in case of minority—Practice.

Sur exceptions to adjudication.

The following facts appeared from the adjudication: John Bessinger died April 8, 1864, leaving a widow and two daughters, Hannah and Catherine. The widow elected to take against the will, and subsequently intermarried with one John Bucholder, and died November 1, 1868, leaving no children by him. By his will, Bessinger appointed C. F. Ehrenpfort his executor and guardian of the minors. The executor's first account was filed June 1, 1865, and confirmed absolutely November 17, 1865. The second and final account was filed May 4, 1867, which, after confirmation, was opened by a bill of review, and finally confirmed March 10, 1877.

The aforesaid Catherine became of age November 7, 1877, and Ehrenpfort filed his account as guardian on December 6, 1877. This account was called for audit January 31, 1878. At the audit the ward alleged that in his first executor's account the accountant had claimed credit twice for the same item ($451.25), and also in his second executor's account had claimed a double credit for the sum of $43.33. The ward also claimed a share in a parcel of three building lots in Riverside, New Jersey, which the accountant had not accounted for, although their purchase had been effected by the decedent.

The auditing Judge held that the double credits were errors patent on the face of the account, and surcharged the accountant with the share of the ward, with interest from the dates of confirmation of his accounts, and also with the value of one-third of the New Jersey lots and interest.

The accountant excepted to all of these rulings. The ward excepted, because the Judge had only surcharged accountant with the value of one-third of the New Jersey lands, instead of one-half, as the lots had been purchased by decedent, and, secondly, because he did not surcharge the accountant with one-third of the amount due the estate of the mother of the ward arising from the double credits in the executor's account.

J. A. Burton, for the ward, cited—
Stanley's Appeal, 8 Barr, 434.
Wills' Appeal, 10 Harris, 325.
Kinter's Appeal, 12 Sm. 324.

J. R. Sypher, for the accountant, cited as to conclusiveness of confirmation of auditor's report—
Downing's Estate, 5 Watts, 90.
Bradley *v.* Flowers, 4 Yeates, 436.
Rhoad's Appeal, 3 Wr. 186.

The decree of the Orphans' Court is conclusive as to the amount in hand for distribution.
Wither's Appeal, 4 Harris, 151.

To avoid a decree on the ground of fraud, it must be distinctly and positively averred, not left to be inferred from circumstances.
Franks *v.* Groff, 14 S. & R. 181.

A judgment or decree of a court of competent jurisdiction is conclusive evidence of every fact on which it must necessarily have been founded.
Hamner *v.* Griffith, 1 Grant, 193.
Farrington *v.* Woodward, 1 Norris, 259.

March 30, 1878. THE COURT. Whether, upon the settlement of the account of a testamentary guardian, a final decree confirming his accounts as executor may be corrected by simply indicating by parol to the auditing Judge errors apparent upon the face of the account, and whether the errors thus indicated are so apparent as to overcome the presumption in favor of the regularity of the decree, are questions that we are saved from now considering by the offer of the accountant to show affirmatively that the credits were properly allowed.

We are of opinion that there is sufficient ground for referring the matter back to the auditing Judge, in order to permit the accountant, who, relying on the supposed conclusiveness of the decree, had not come prepared to support the credits in his executor's account, to give full explanation as to all the questions which arise upon the record as it is now before us.

In the mean time it may be safer for the counsel for the ward to file a bill or petition for a review, under which all technical difficulties in the way will be got rid of. That this will be in favor of the ward, notwithstanding the lapse of time, is shown by Briggs's Appeal (5 Watts, 91). (See also Whelen's Appeal, 20 Smith, 40; Steward's Appeal, 35 Legal Intell. 60.)

Adjudication opened.

Opinion by PENROSE, J.

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WEEKLY NOTES OF CASES.

VOL. V.] *THURSDAY, MAY 16, 1878.* [No. 16.

Supreme Court.

Oct. & Nov. '77, 19. Nov. 5, 1877.

In re Saw-mill Run Bridge. Ballentine's Appeal.

Constitutional law—Local taxation, when justifiable—What are local improvements—Acts of June 6, 1864 and May 26, 1871—Bridges—Municipal law—City of Pittsburgh.

Legislation authorizing an assessment of the cost of a local improvement upon the properties benefited, will not be sustained where from the nature of the improvement a fair and equal assessment is impossible.

A bridge over a stream at the crossing of a public street of a city is a public and not a local improvement, and its cost must be borne by the municipality.

By an Act of Assembly the city of Pittsburgh was authorized to open streets and build sewers, and to assess the cost thereof upon the properties benefited. By a subsequent Act this power was extended to the construction of bridges. In 1872 the borough of T. was consolidated with the city. Shortly afterwards the city removed a bridge belonging to the borough and which spanned a stream at the crossing of the main street, and in its place erected a new iron bridge at the cost of about $12,000.00. This cost was assessed by viewers appointed under the above Acts, on 364 properties, situated on different streets in the city and at various distances from the bridge. Upon exceptions to their report:

Held (reversing the decree of the Court below), that the statutory provisions for assessing the cost of a street or sewer upon the property benefited, could not be extended to the case of a bridge upon a public highway, since it was impossible that anything like even approximate accuracy or equality could be obtained upon an assessment in such a case.

Held further, that the bridge was not a local but a public improvement, and that its cost, therefore, could not be assessed upon particular individuals.

Per WOODWARD, J. At the very utmost in the case of an improvement whose public object and character are palpable, assessment of individual property to meet its cost would be justified only by affirmative and distinct proof appearing on the record, of individual benefits actually conferred, and of their nature, extent, and value.

Whether the Act of 1871 applied to the removal of an existing bridge and the building of a new one in its place, *dubitatur*.

Certiorari sur appeal to the Quarter Sessions of Allegheny County.

This case was heard in the Court below upon exceptions to the report of viewers assessing upon the property of certain citizens of Pittsburgh the cost of building a bridge in said city. The testimony taken in support of the exceptions disclosed the following facts:—

In 1872 the Pittsburgh and Noblestown Plank Road passed through the borough of Temperanceville, crossing Saw-mill Run in that borough by a wooden bridge. On July 6, 1872, the borough purchased for $2000.00 the rights and franchises of the Plank Road Co. to that portion of the road within the borough, and paved and graded the road as a street, allowing the old bridge to remain. Afterwards in 1872, by virtue of an Act of Assembly (P. L. 743) the borough was consolidated with the city of Pittsburgh. On December 23, 1872, the councils of said city passed an ordinance for the construction of a new bridge of iron on the said street over Saw-mill Run, the expense of the same to be assessed and collected in accordance with the provisions of the Act of Jan. 6, 1864 (P. L. 1131), and its supplements.*

The old bridge was accordingly torn down, and a new one erected. On June 15, 1874, the viewers made their report to city councils, assessing the cost of the bridge upon the owners of various properties. On June 26, upon the petition of certain citizens, the report was ordered to be returned to Court. On September 26, the report was referred back by the Court to the viewers, who, on November 9, 1874, filed a second report, by which they found that the cost of the bridge was $11,764.70, and the expenses of the two views $484.73. The whole amount was assessed by them upon 364 owners of lots in the city of Pittsburgh. Most of these lots were designated in the report as being situated upon various streets and alleys, others were described as included in a plan called the Oberhelm plan of lots, others as situated in "Shalersville," and the bal-

* The Act of 1864 gave to the councils of the city of Pittsburgh power to lay out and open streets and alleys, and to appoint viewers who should assess the cost upon the properties benefited thereby. The 12th section was as follows: "The said councils are hereby authorized whenever they may deem the same necessary to cause sewers to be constructed in any street, lane, or alley of said city and to levy and collect the cost and expense thereof by an assessment upon the properties benefited thereby; the said assessment shall be made by three discreet and disinterested freeholders of said city whom the said councils shall appoint as assessors for that purpose."

A supplement to said Act passed May 26, 1871 (P. L. 1236), provides "that hereafter, whenever the councils of the city of Pittsburgh may deem the same necessary, they shall be and are hereby authorized to cause to be constructed bridges or culverts over any ravine or stream, or over or under any railroad within the city of Pittsburgh and approaches thereto, at the crossing of any street, lane, or alley which now is, or shall hereafter be, laid out in said city, the same to be constructed of such materials as said councils shall direct; and the cost and expense thereof shall be assessed upon and collected from the owners of property benefited thereby, in the same manner that the cost and expense of sewers in said city are by law assessed and collected."

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ance as included in what was known as the "Acre Assessment." Most of the lots were assessed at a rate per foot front, varying according to the street in which each was situated from ten cents to seventy-five cents. In almost every instance all properties on the same street were assessed at the same rate per foot irrespective of their relative distances from the bridge. In the "Acre Assessment" eighty acres were assessed at $8 per acre, thirty-one properties varying in size from one-half acre to thirty acres at $6.61 per acre, one body of ninety-one lots at $2.00 a lot, seven acres at $20 per acre, and nine acres at $10 per acre.

Exceptions were filed to this report by citizens whose property had been assessed, upon the ground *inter alia* (3) that no real benefits could be assessed in such a case, because any standard of assessment would be illegal and imaginary, and could not be estimated by any actual standard of benefits as in the case of sewers. (4) That the assessment was void because the benefits to the assessed property were not local benefits, but were shared by all the citizens of Pittsburgh, and properly collectable by a general tax. (5) That there was no authority of law for the attempted assessment because the work was not properly a construction within the meaning of the Act of 1871, but was a rebuilding of an old bridge, and therefore only a necessary repair to a public highway to be paid for as a general benefit.

These exceptions were overruled, and the report confirmed. The exceptants took this appeal, assigning for error the ruling of the Court below upon the points of law raised by their exceptions.

Robert Woods, *T. H. Baird Patterson* (with them *S. Woods*), for appellants.

There is no legal authority by which the costs and expenses of such a bridge as the one in question can be assessed as special or local benefits on properties; there being no legal standard whereon these assessments are possible, according to the rules of law. The assessments, as made, are only guesses of the viewers.

In re Washington Avenue, 19 Sm. 352.
Hammett *v.* Philadelphia, *supra*.
Const. of Penna. Art. IX. sec. 1.

The bridge was on a public highway of the city of Pittsburgh, and therefore for the general benefit of all the citizens. Local assessments cannot be imposed when the improvement is either expressed or appears to be for the general benefit.

In re Washington Avenue, *supra*.

By the Act of consolidation the city assumed the burdens and liabilities of the borough of Temperanceville.

Act of April 2, 1872, P. L. 743.

As a municipality it was bound to provide for the expense of repairing its highways.

Hammett *v.* Philadelphia, 15 Sm. 156.

The Act of 1871, under which this assessment was made, relates to new constructions only, and not to the repair or reconstruction of an existing bridge.

M. W. Acheson (*Thos. S. Bigelow* with him), contra.

The power of the Legislature to direct the assessment of the cost of a bridge, or other local improvement, upon the properties benefited thereby, upon a special inquiry into the fact of such benefit by a board of viewers, has been so long regarded as a proper exercise of the taxing power as to forbid discussion. Since the question was first raised in M'Masters *v.* The Commonwealth (3 Watts, 292), this Court has never swerved from the conclusions of that case upon this subject.

The present case is not within the principle of Hammett *v.* The City of Philadelphia, since there was no improvement of the public highway, as such at the expense of the properties benefited, previous to the construction of the bridge in controversy.

The purchase from the Plank Road Company was merely an extinguishment of an easement.

January 7, 1878. THE COURT. General provisions "concerning streets and sewers in the city of Pittsburgh" were contained in an Act of Assembly passed in the session of 1863, and approved on the 6th of January, 1864 (P. L. of 1864, 1131). The first three sections regulated the mode by which streets, lanes, and alleys should be laid out, opened, widened, straightened, and extended. All discretion and authority to determine upon the propriety of the steps to be taken were vested in the city councils. Three discreet citizens were to be appointed by them, by ordinance, as viewers to fix the location, breadth, and length of any highway to be laid out or changed. These viewers were required to make "a true and conscionable appraisement of the damages" any owner or owner would "be likely to sustain by reason of the proposed improvement" and to assess the same equitably, justly, and without partiality upon the properties that might be, and would be, likely to be benefited. By the sixth section, power was given to the councils to pave, repave, grade, regrade, or macadamize any highway in the city when they should deem it necessary, and to levy and collect the cost by an assessment of an equal sum per foot on the properties abutting on the highway improved. The twelfth section authorized the construction of sewers whenever necessary at the expense of the properties benefited, which were to be assessed by three discreet and disinterested freeholders, whom the councils were to appoint assessors for that purpose.

On the 26th of May, 1871, a supplement to the Act of 1864 was passed (P. L. of 1871, 1236). By its terms the councils were empowered to cause bridges or culverts to be constructed over

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any ravine or stream, or over or under any railroad within the city of Pittsburgh, and the approaches thereto, at the crossing of any highway then existing, or thereafter to be laid out; and cause the cost and expense to be assessed upon and collected from the owners of properties benefited, in the same manner that the costs and expense of sewers were by law assessed and collected.

This legislation required that absolute equality should be worked out between the cost of each improvement and the assessment of the fund for its payment. Whatever the merits of any particular case, the councils were given power to find some owner or owners of property somewhere upon whom by the application of some wrenching process the expenditure could be charged. Large as the power was, and arbitrary and oppressive in its execution, as it must sometimes have been, its general exercise has been supported by the decisions of this Court. McMasters *v.* The Commonwealth (3 Watts, 292), and the cases that have followed in its track, have extended the long-settled principle that local taxation is justifiable for local purposes, so as to sustain legislation that imposes on property benefited by a local improvement, or its owner, a tax in proportion to the superadded value of the property caused by the improvement, of which this property has a peculiar advantage beyond that of others not in like circumstances. (Per AGNEW, J., in Washington Ave., 19 P. F. S. 352.) There can be no objection to a rule that charges special liabilities in return for special benefits. Unimpeded and convenient access to places of business in crowded thoroughfares, and even to dwellings in the compactly built portions, of a city is afforded often at a large expense, and is a peculiar privilege conferred on the individual for whom it is provided.

In a still more especial manner, an expenditure for a sewer is an appropriation for a local purpose. The properties it improves may be numbered, and its effect may be exactly measured. In ascertaining and apportioning its cost, there is, in the ordinary case, no hazard from caprice, prejudice, or mistake. The general result of the authorities on this branch of the law is, that a statute providing for the fair and equal assessment of properties peculiarly benefited by a local improvement, in order to pay its cost, will be sustained as a legitimate and constitutional exercise of legislative powers.

Are the circumstances of this case such as to bring it within the operation of the settled rules? The Act of 1871 undertook to apply to the construction of all bridges in the highways of Pittsburgh the provisions relating to sewers, of the twelfth section of the Act of 1864. The bridge over Saw-mill Run was built at a cost of $11,764.70, and the expenses of the two views increased the amount to $12,249.43. This sum was assessed by the last view on a multitude of properties situated on eleven different streets, alleys, and avenues; in what was called in the report the "Oberhelm Plan of Lots" in Shalersville; and in what was called the "Acre Assessment." The lots were charged at different rates, ranging from ten cents per foot in Shalersville to seventy-five cents per foot on Main Street. Except in a part of Main Street, where the amount of the charge was forty cents, the rates on all the lots in each of the streets were uniform, irrespective of their relative distances from the bridge. In the "Acre Assessment," Mrs. Denny was assessed for eighty acres at eight dollars per acre, and thirty-one other properties containing quantities reaching from half an acre to thirty acres were returned at the uniform rate of six dollars and sixty-one cents. In the schedule, one body of ninety-one lots was returned at two dollars a lot, two parcels of land, containing together seven acres, at twenty dollars, and one parcel of nine acres at ten dollars per acre. It would seem impossible, in the very nature of the case, that anything like even approximate accuracy or equality could have been attained in such an assessment. A variety of cases can be conceived where persons to whom the bridge would be a peculiar advantage for exceptional reasons, might be entirely omitted in the report, and persons to whom and to whose property it could bring no earthly benefit might be assessed. Unlike a sewer, and unlike a highway in front of a merchant's store, or a tradesman's shop, a peculiar local advantage derived from the bridge would have to be conjectured by the viewers, and the extent of that advantage would be the subject of a second guess. The uniform rates fixed for all varieties and classes of properties on the line of the same street must have been necessarily unequal, and, therefore, essentially unjust. The construction of a street or a sewer improves all the lots along its line in the same way and to the same proportional extent. The erection of a bridge increases facilities for travel, which may materially and immediately improve the business of a baker, a butcher, the proprietor of a hotel, or the keeper of a livery stable, without affecting in any possible way the business or the property of many classes of mechanics, laborers, and men of business. The difficulties and embarrassments inherently involved in the application to such a subject of the statutory provision regarding sewers and streets would seem to be insuperable.

Main Street is a public thoroughfare of the city of Pittsburgh. It was formerly the line of the Pittsburgh and Noblestown Plank Road Company, running through what was then the borough of Temperanceville. On the 6th of July, 1872,

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the borough purchased from the company the portion of the road within the corporate boundaries for the consideration of two thousand dollars. Saw-mill Run crosses Main Street, as the thoroughfare was called after the purchase, within the borough limits; and when the street was graded and paved, the plank-road bridge was left to stand. Later in 1872, the borough of Temperanceville was consolidated with the city of Pittsburgh; and on the 23d of December, in that year, the city council began proceedings for the erection of the new bridge, the assessment of the cost of which is the subject of this controversy.

Can this be called a local improvement, especially benefiting particular individuals, and for which they should be compelled to pay? Saw-mill Run crosses a public highway of the city. The bridge over it was built in the line of this highway, in which every inhabitant of Pittsburgh may have some interest, and every citizen of Allegheny County and of the Commonwealth is entitled to assert some right. In such an improvement, surely no citizen can have exclusively private right, and he can scarcely have any definable private interest. The bridge was constructed to serve an apparent and essential public purpose, and to impose the cost of it on individuals selected out of the mass of the community, on any conceivable rule that viewers could adopt, would be the placing of public burdens on private shoulders. Among the cases collected in Hammett *v.* Philadelphia (15 P. F. S. 146) was that of the Tide-water Company *v.* Coster (3 C. E. Greene, 518). In that case Chief Justice BEASLEY said that a "legislative act authorizing the building of a public bridge, and directing the expenses to be assessed on A., B., and C., such persons not being in any way peculiarly benefited by such a structure, would not be an act of taxation, but a condemnation of so much of the money of the person designated to a public use." "It matters not," Mr. Justice SHARSWOOD said in Hammett *v.* Philadelphia (*supra*), "whether an assessment upon an individual or a class of individuals for a general and not for a mere local purpose, be regarded as an act of confiscation, a judicial sentence or rescript, or a taking of private property for public use without compensation; in any aspect it transcends the power of the legislature, and is void." At the very utmost, in the case of an improvement whose public object and character are palpable, assessment of individual property to meet its cost would be justified only by affirmative and distinct proof appearing on the record of individual benefits actually conferred, and of their nature, extent, and value.

It is by no means clear that these proceedings were not fatally defective upon another ground. The Act of 1871 authorized the construction of bridges in the line of the highways of Pittsburgh. Does this provision warrant the removal of any existing bridge, and the building of another at private cost, at the option of the city councils? If so, how often may the change be made, and where shall the limit of the citizen's liability be fixed? The borough of Temperanceville paid the Plank Road Company two thousand dollars for their road and bridge out of the funds of the municipality. To these funds the taxes on the properties of these complainants presumably contributed. The old structure afforded a passage across the run, and the new one did no more. A strict construction is required of legislation that imposes unequal burdens, just as it is required of legislation that creates exceptional privileges and immunities. The exigencies of the case do not require a decision of the point, but it may well be that the reconstruction of a bridge was not within the legislative intention when the Act of 1871 was passed.

A great variety of questions came up in the mass of materials of which the record consists. The view that has been taken of the rights of the parties saves all need of their discussion.

The order of the Court of Quarter Sessions of the 26th of November, 1875, confirming the report of the viewers, is reversed, and the report is set aside.

Opinion by WOODWARD, J. AGNEW, C. J., and PAXSON, J., absent.

[See Kelly *v.* City of Pittsburgh, next case.]

Oct. & Nov. 1876, 172. Oct. 30, 1876, Oct. 4, 1877.

Kelly v. City of Pittsburgh.

Constitutional law—Taxation of farm lands for municipal purposes—Inequality and injustice of taxation—Constitution of Penna. art. 1, sect. 10—Power of court to declare tax unconstitutional.

Where farm lands situated within the boundaries of a city are taxed for the support of the city government, the fact that such tax is unfairly burdensome, or that the lands, owing to their distance from the built-up portion of the city, are not within the reach or protection of particular departments of the city government, for the support of which they are taxed, does not render the tax unconstitutional.

Under authority of an Act of Assembly, the city of Pittsburgh extended its boundaries by the annexation of adjacent territory. In this territory was situated a tract of land used exclusively for farm purposes, and which, on account of its distance from the built-up portion of the city, was not within the reach of the water, fire, police, and other departments of the city government. The city, however, for the support of these departments, levied a tax on said farm, the amount of which was largely in excess of the farm's annual productive value:

Held (AGNEW, C. J., and STERRETT, J., dissenting), that the tax was not unconstitutional.

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Appeal from the Common Pleas No. 1, of Allegheny County.

Bill in equity, filed August 15, 1874, by James Kelly against the City of Pittsburgh to restrain said city from assessing or taxing plaintiff's farm for purposes from which said farm derived no benefit, on the ground that such attempted exercise of the taxing power is in conflict with section 10 of Article I. of the Declaration of Rights of the Constitution of Pennsylvania.

The bill set forth that the plaintiff was the owner of a farm of eighty acres, originally situated in Collins Township, Allegheny County; that the city of Pittsburgh, with the single purpose of increasing her revenue, against the will of the plaintiff, and without any pretext of extending any municipal benefit to him, was instrumental in procuring an Act of the Legislature, of April 6, 1867 (P. L. 846), extending the territorial limits of said city over and beyond plaintiff's farm, with the full knowledge that it was an improved farm, occupied by the owner as fields, pasture, and woodlands, adapted to agricultural purposes only, and always used as such; that this territorial extension was not required by any increase of population, or other municipal necessity; that plaintiff's lands have not been laid out in lots and streets, nor used or needed in any way for city purposes; that large quantities of vacant land lie between plaintiff's land and the closely inhabited portion of the city, and that said city will not for a generation to come need any portion of said land to accommodate her increasing population; that not one single city improvement, convenience, or protection has been extended to or bestowed on said lands, nor does the plaintiff expect or require it; that he desires to retain the use of said land as a farm, until by the natural growth of the city it shall be required for city purposes, and he denies the right of the city to interfere with his premises or require him to abandon the rural use thereof. That nevertheless the said city, defendant, has levied a tax upon plaintiff's farm for the support of the water, fire, police, and other departments of city government, amounting to $2672.48 for the year 1874, upon an assessed valuation of $244,000; that the greatest annual productive property of said farm is $800; of which in 1874 $428.47 was paid for county and State taxes, and the balance was mainly required for necessary repairs, leaving the said city taxes unpaid by any productive value of said farm, and said taxes can only be paid by taking the farm or a portion thereof; that if the said defendant is permitted thus to confiscate or deprive plaintiff of his individual property through pretended taxing power, it is forcing him to surrender his property for the benefit of others without compensation, and is therefore in violation of Article V. of the Amendments to the Constitution of the United States, and of section 10, Article I. of the Declaration of Rights of the Constitution of Pennsylvania. Complainant further averred that if defendant's right to tax his lands were undisputed, said tax was unreasonable and oppressive, but that plaintiff expressly denies that defendant has any municipal jurisdiction over his said land or farm, or any right to impose taxes thereon for any city or municipal purposes whatever.

The bill prayed that the city defendant be restrained by injunction from assessing or taxing plaintiff's lands, or from exercising any municipal jurisdiction over the same for raising city revenue so long as said lands are agricultural lands and appropriated to such purposes.

The answer averred that many municipal improvements had been made in the immediate vicinity of plaintiff's land; that the consolidation under which complainant's land was brought into the city was an immediate benefit to the citizens of the annexed district, and has appreciated the value of their property, including complainant's, and will continue to appreciate its value.

The cause was referred to an Examiner and Master (Thomas McConnell) to take testimony, who found the facts as to the assessment of taxes, and as to the productive value of the land, to be substantially as set forth in the bill. He also found that the land remained substantially in the same condition as before consolidation; that it was not connected with the built-up portion of the city by paved streets, and neither water nor gas had been extended to it; that Mr. Kelly did not need, for the purposes for which it is used, water from the city works; that it is sufficiently watered by springs, wells, etc.; that the old roads accommodate the land sufficiently for the purposes for which it was used; that the fire department did not act at that distance from the city proper, and, in fact, could not be made available there for want of water, and that the police did not extend their visits to the locality. The Master further reported: "Mr. Kelly's land was, prior to consolidation, in close proximity to the city. Its value therefore depended on the growth and prosperity of the city. As the city grew and prospered, the value of this land increased, until it became very great. It was then brought into the city and made a part of it, but its value still continued to depend on the growth and prosperity of the city. To arrest the prosperity of the city would be to seriously affect the value of the land; to destroy that prosperity would be to destroy to great extent that value. The prosperity of the city depends on its streets being kept in repair, and its water, gas, and educational facilities being ample. Without these it would fall into decay, and the value of all real estate in it, including Mr. Kelly's, would be incalculably reduced. The

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city cannot keep the streets in repair, and furnish an adequate supply of water and gas and educational facilities, without money; and the only way it can raise money for those purposes is by taxation. It seems to me, therefore, that the idea that Mr. Kelly is not interested in the objects to which the taxes are to be applied, and that he receives no benefits in return for the taxes, is a mistaken one, even if he received no special benefits from the application of the taxes; and the idea that taxing unproductive property according to its market value is confiscating it, or taking it for public use without compensation, I think is equally a mistaken one. Mr. Kelly's case is doubtless a hard one, as is that of his neighbors in like condition, but I think the courts have not power to relieve him; the Legislature alone, I think, has the power to do it. In Robinson *v.* County of Allegheny (7 Barr, 164), Judge ROGERS says, "All considerations of hardship or inequality must be left to the Legislature; with that we have nothing to do."

The Master, therefore, reported that tne bill be dismissed with costs.

Counsel for Mr. Kelly filed, *inter alia*, the following exceptions to the Master's report: (3) The Master, finding from the evidence the fact that the city does not extend to this property the considerations which the Supreme Court of Pennsylvania have held to be the essential requisites to justify the exercise of the taxing power for either general or local purposes, the Master should have found, as a legal consequence, that complainant's farm was not liable to taxation for municipal purposes, and therefore entitled to relief from the following taxes, as stated in the city's statement of assessments, as set out in the Master's report, to wit:—

City Taxes, 4 mills, . . .	$876 40
City Building, ¼ mill, . . .	54 90
Fire, 1 mill, ...	219 60
Water-works, Interest and Sinking Fund, 1½ mills, . . .	329 40
City School, ...	634 76

(4) The Master, finding complainant's farm lands unchanged by and receiving no benefits from consolidation, should have reported that said farm lands were subject to taxation *for only such purposes as the same were subject to previous to consolidation*, or that similar property is subject to without the city boundaries, and that by the Act of Consolidation the municipal authorities became and were *ex officio* authorized to collect and disburse the same.

After argument before the Court below in banc (STERRETT, P. J., presiding), the exceptions to the Master's report were dismissed, and it was decreed that the bill be dismissed with costs. Plaintiff took this appeal, assigning for error the action of the Court in overruling the above exceptions and dismissing the bill.

The case came on to be argued before the Supreme Court October 30, 1876. Subsequently the Court, of its own motion, ordered a reargument, which was had October 4, 1877.

W. H. and *A. N. Sutton*, for appellant.

It has been held in numerous cases, that the power of the Legislature, or of any subordinate municipal authority, to impose taxes is limited to such property as receives the benefit of its protection, and for such purposes as the people from whom they are exacted have an interest.

Sharpless *v.* Mayor of Philadelphia, 9 Harris, 147.
Hammett *v.* City of Philadelphia, 15 Sm. 153.
Washington Avenue, 19 Sm. 352.
McKeen *v.* County of Northampton, 13 Wr. 524.
Pittsburgh, Fort Wayne and Chicago Railway Co. *v.* Commonwealth, 16 Sm. 73.
Lewis *v.* County of Chester, 10 Sm. 329.
Borough of Carlisle *v.* Marshall, 12 Casey, 402.
Hilbish *v.* Catherman, 14 Sm. 159.
Durach's Appeal, 12 Sm. 491.
Grim *v.* Weissenberg School District, 7 Sm. 437.
Mayor of Newark *v.* State of New Jersey, 13 Am. Law Reg. N. S., 441.
Weismer *v.* Village of Douglas, 64 N. Y. 90.
Bradshaw *v.* Omaha, 1 Neb. 16.
Georgia *v.* Stanton, 6 Wallace, 50.

What compensation does the city give Mr. Kelly for the taxes it is seeking to impose, or for the portion of his land which will have to be taken if the accrued taxes are to be paid? There is an item of $219 for fire tax, yet the Master finds the department does not act that far out; also $329 water tax, while the Master finds the farm is abundantly watered by springs and wells. Another item of $634 for the benefit of schools seven miles distant from the lands taxed. For city buildings and other purposes in which Mr. Kelly has no interest are other assessments amounting in all to three times the yearly revenue the land affords the owner.

The constitutional provision, the protection of which complainant now invokes, is found not only in the constitution of our own State; it is as old as Magna Charta and the Bill of Rights, and is in the Constitution of the United States and in the constitution of every State in the Union. As found in the constitutions of Kentucky and Iowa, it is almost identical in letter and spirit with our own; and in both these States, on states of facts closely resembling the present case, their Supreme Courts decided that where persons or property are subject to a local burden for the benefit of others, they are not bound to contribute.

Cheaney *v.* Hooser, 9 B. Monroe, 342.
City of Covington *v.* Southgate, 15 B. Monroe, 494.
Cyprus Pond Co. *v.* Hooper, 2 Metcalfe, 350.
Sharp *v.* Dunavan, 17 B. Monroe, 223.
Maltus *v.* Shields, 2 Metc. 553.
Arbegust *v.* Louisville, 2 Bush, 271.
Swift *v.* Newport, 7 Bush, 37.
Henderson *v.* Lambert, 8 Bush, 609.
Morford *v.* Unger, 8 Iowa, 85.

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Langworthy *v.* City of Dubuque, 13 Iowa, 86.
Fulton *v.* City of Davenport, 17 Iowa, 404.
Deeds *v.* Sanborn, Marshall, 26 Iowa, 419.
Buell *v.* Ball, Marshall, 20 Iowa, 282.
O'Hare *v.* City of Dubuque, 22 Iowa, 144.
Davis *v.* City of Dubuque, 20 Iowa, 458.
Deiman *v.* City of Fort Madison, 30 Iowa, 542.
Durant *v.* Kauffman, 34 Iowa, 192.
Mitchell *v.* Kauffman, 34 Iowa, 194.

We claim that the Master should have found that Mr. Kelly's farm was subject to taxation only for such purposes as the same was subject to without the city boundaries, and that after consolidation the city authorities were *ex officio* authorized to collect and disburse the same. The mere extension of territorial boundaries, being a legislative act *per se*, carries with it no power to tax.

Seely *v.* City of Pittsburgh, 1 Norris, 360; S. C., 3 WEEKLY NOTES, 413.
Cooley on Taxation, 104 *et seq.*

The Legislature can extend the city limits to Greensburg, or beyond; does she thereby confer the right to tax the included territory for city purposes? Where there is no city in fact, no density of population, no closely built-up district, calling for a more stringent government and the many incidental expenses of a fire department, police, water mains and reservoirs, sewers, sanitary department, and other city conveniences of lighting, paving, and cleaning streets, there can be no tax imposed in order to defray the expense of these conveniences in another district.

To the State, county, township, road, and local school taxes there is no objection; but for municipal purposes the right of the city to tax these lands at all is denied. It is taking private property for public use without compensation, and is a usurpation that calls for the interposition of the Court, by giving a proper construction to the constitutional provisions invoked.

George Shiras, Jr. (with him *Thos. S. Bigelow*), contra.

The Act of April 6, 1867 (P. L. 846), extending the limits of the city of Pittsburgh so as to embrace plaintiff's property, has been declared constitutional, and that it was a question of expediency of which the Legislature was the competent and exclusive judge.

Smith *v.* McCarthy, 6 Sm. 359.
City of Philadelphia *v.* Fox, 14 Sm. 169.

The territory annexed has been now subject to the city government for ten years. Leading avenues and many cross streets have been extended over the territory. New water-works have been constructed and mains laid within a short distance of plaintiff's land. Police stations and a force of police, engine houses and other fire apparatus have been allotted to the new district; all of which have contributed and still contribute to increase the value of plaintiff's and other lands in said district, mainly at the expense of the tax-payers of the old district.

It has been declared and reiterated again and again by this Court, that the existence of injustice or inequality in the enforcement of a municipal tax law is insufficient as a ground upon which to pronounce such tax unconstitutional.

Weber *v.* Reinhard, 23 Sm. 370.

The Courts of Kentucky and Iowa, in their rulings cited, seem to have departed from the settled construction given to this subject by the Courts of the other States in the Union, and in Mitchel *v.* Davenport (34 Iowa, 192) the Supreme Court of that State was forced to return almost to the original theory for the purpose of getting a foundation for a municipal tax.

Cooley on Taxation, p. 120.

In the case of City of Pittsburgh *v.* Kitty Roup (1 WEEKLY NOTES, 254), the power to classify the various kinds of property within the city limits for the purpose of taxation was declared to be legislative and sovereign in its character, and not subject to supervision by the judiciary.

Where the Legislature, in the exercise of its constitutional power, extends the taxable limits of a city, a Court of Equity will not interfere by injunction to restrain the collection of taxes within the limits thus extended, to defray the expenses of the corporation, because such property is used for farming and pasturing purposes.

Groff *v.* Frederick City, 44 Maryland Reports, 67.

January 7, 1878. THE COURT. The lands of James Kelly, the appellant, upon which the taxes complained of were assessed, were formerly within the township of Collins, and were afterwards, under the provisions of the Act of April 6, 1867 (P. L. p. 846), made part of the city of Pittsburgh. That there may be no doubt concerning the subject-matter of the plaintiff's complaint, and that we may exhibit precisely the nature and character of his contention, we give the 6th paragraph of his bill *in extenso*.

"It is competent for the Legislature, with or without the consent of the citizens, to enlarge the limits of any town or city, and it is competent for the defendant (city), when the requirements of population, commercial and mechanical interests, sanitary or protective municipal purposes, require it, to apply to city uses the full extent of her territorial limits, but your orator expressly denies that such necessity or even propriety exists; on the contrary, large amounts of city territory, on either side and in front of your orator's farm, are occupied, held, and owned, without prospects of demand for city purposes for many years to come. Your orator insists that, by extension of city territorial limits, the character, situation, and use of his said lands were not changed, but remain an improved and occupied farm, as before, and agricultural lands only; having received no benefit whatever, in the way

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of municipal improvements, aid, protection, convenience, or care; and that, therefore, they are not, in any sense, liable to municipal or city taxation for any purpose whatever, for no single benefit has been received." Again, paragraph 17, latter part: "But your orator expressly denies that the defendant had any municipal jurisdiction over his said land, or farm, or any right to impose taxes thereon for city or municipal purposes whatever."

We are thus presented with the broad question of the right of the city to tax rural lands, within its bounds, for any municipal purpose whatever. It is not admitted that the city succeeded to the rights of the township in this respect,* for this would be a surrender of the whole controversy, since it is not doubtful that the township had the power to tax these lands for every lawful municipal purpose whatever.

The power of the Legislature to transfer the plaintiff's farm from one municipality to the other is admitted; indeed, that power could not, in the face of Smith *v.* McCarthy (6 P. F. S. 359), be gainsaid. But it is urged, nevertheless, that the city's power of taxation must be suspended until this land becomes necessary for city uses. Exactly what this means we are not informed, nor do we suppose it can be certainly known, except from some judicial decree not yet rendered. No doubt the meaning of the plaintiff is, that this power of the city is to be suspended, or to rest in abeyance, until the city is so nearly built up to his lands that they may be advantageously laid out and sold as city lots, and until this occurs they are to be exempt from all taxes of a municipal character. This proposition is novel in Pennsylvania, since we have uniformly, and heretofore without serious complaint, in boroughs as well as cities, taxed rural and even unseated lands for borough and city purposes. This doctrine is, however, supported by certain cases, cited by the learned counsel for the appellant, decided in the Superior Courts of Iowa and Kentucky. The bill seems closely to have followed these cases, and it is principally upon their authority that the plaintiff's case is rested. These decisions, whilst entitled to a great respect, are not allowed to unsettle our own rules on the subject of taxation, or change the current of our policy on this subject. They are indeed of doubtful authority; for Judge COOLEY, in his work on taxation, when speaking of these very cases, remarks, that "it is difficult to harmonize them with the conceded principles governing the laws of taxation; for they, not questioning the legislation as being in excess of authority, leave it to stand, and only interfere to qualify its effect on the ground that it has been adopted on improper grounds, and will operate unequally. This is done on an inquiry into the facts and a substitution of the judicial for the legislative conclusion on a subject not at all judicial; a subject too—the proper limits of city extension—upon which persons are certain to differ widely and where inquiry after the judicial method by examination of witnesses is usually much less satisfactory than that personal knowledge and investigation which legislators are supposed to possess or make." It has, indeed, the effect to suspend the legislation until certain conditions influencing the judicial mind are fulfilled. We need not stop to consider the inconvenience or uncertainty of such a condition of things, or how little consonant it would be with our settled modes of thought and action on subjects of this kind. There is, however, an element in the case in hand which either did not exist in the case alluded to, or was not sufficiently considered; that is, the subjection of the lands to previous municipal taxes. The argument, in favor of their exemption, would have more strength had they, previously to their attachment to the city, been subject only to state and county rates and levies; had they not been within the dominion of any municipality equivalent to that now complained of. But the plaintiff's property was subject to municipal taxes when it was yet in the township of Collins, hence it is not subjected to any new or even greater powers than formerly; it has been but transferred from township to city. This element breaks the force of the plaintiff's argument, as it leaves him nothing of which to complain; for his complaint is not that his municipal burdens are greater in the city than they were in the township, but that as his lands are now situated the city has no power to tax them in any manner whatever. This is the bald proposition submitted for our discussion, a proposition requiring little consideration for its disposition, since there is here no room for the intervention of judicial interference, or for the exercise of judicial discretion. The Legislature certainly did not exceed its powers in the Act consolidating the two municipalities, and as both had the power of taxation over their several territories, that power must remain with the present corporation, and the plaintiff's lands must continue liable for those rates and levies to which it was subject under the township government, otherwise they are exempt from these impositions for the maintenance of the public schools, the support of the poor, and construction and repairs of the highways, from which no one's property ought to be exempt.

On the broad grounds, therefore, on which the

* This is a correct statement of plaintiff's claim as set forth in his bill, but from the terms of the fourth exception to the Master's report (*supra*, page 326) it would m that plaintiff admitted that his land was liable to the taxes to which it was subject under the township government, and contended that by virtue of the "Consolidation Act" the city was *ex officio* authorized to collect taxes.

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plaintiff has put his plaint, it cannot be maintained, and must be dismissed. Considering it, however, from the less general and most favorable point of view, and it but comes to this: that the taxation is unequal and burdensome, and that the complainant is taxed for some things, as police and water, from which, however necessary for the welfare of the municipality, he derives no benefit. Granted that the tax is both unjust and unequal, it does not follow that the remedy is within the power of the Courts; on the other hand, the contrary has been expressly ruled. In the case of Weber *v.* Reinhard (23 P. F. S. 370), Justice SHARSWOOD says, in commenting on the case of the Philadelphia Association *v.* Wood (3 Wr. 73), "The idea that the Court could pronounce a tax unconstitutional, on the mere grounds of injustice or inequality, was expressly repudiated." He further remarks: "There is no provision in the Constitution that taxation shall be equal. Sound policy requires that it should be so as far as possible, but perfect equality is not possible."

So in Kirby *v.* Shaw (7 Har. 258), GIBSON, C. J., says: "As regards taxation there is no limitation of it. Equality of contribution is nowhere enjoined in the bill of rights, and probably because it was known to be impracticable."

That the person taxed derives no immediate personal benefit from the purpose to which the taxes are appropiated, is, in like manner, no argument against the constitutionality of the laws imposing them. For, if direct personal benefits were to form a criterion for taxation, we should have half the community clammering at our doors for relief. What interest, direct or personal, has the unseated land owner in the school or poor of the borough or township in which his land lies? Or, for that matter, what interest has any one not having children to educate in the school of either township, borough, or city? Why shall one pay road tax when roads are of no benefit to himself or his property? Why shall he help pay the expenses of a fire department when his property is so situated that it may burn down before an engine can reach it? Or why, either in the country or city, having a supply of water on his premises, shall he pay a water tax? To these questions there is but one answer; these things are intended for the public good, and hence, every one is indirectly if not directly benefited, thereby; the taxes for their maintenance are a public burden, and therefore every one must contribute to their support. If, however, this burden rests unfairly heavy upon some classes or upon some individual, the remedy is not with the Court but with the Legislature. As is said in Kirby *v.* Shaw, the judiciary could interfere only "by overstepping the limits of its sphere; by arrogating to itself a power beyond its province; by producing intestine discord, and by setting an example which other organs of the government might not be slow to follow." But the Legislature has granted all the relief that the plaintiff and his class ought in reason to expect or ask, for at the time of filing of this bill rural lands were authorized to be taxed at but two-thirds of the ordinary municipal rates, and now, by Act of May 5, 1876 (P. L. 124), at but one-half those rates. Thus the injustice and inequality of the taxation complained of has been, if not wholly obviated, at least very much mitigated.

Again, taxation is peculiarly a legislative function, and before we undertake to revise it we should have a clear warrant therefor in the letter of the constitution. "A tax law must be considered valid unless it be for a purpose in which the community taxed has no palpable interest; where it is apparent that the burden is imposed for the benefit of others, and where it would be so pronounced at first blush." Sharpless *v.* The Mayor of Philadelphia (9 Har. 147, per BLACK, C. J.); Speer *v.* Blairsville (14 Wr. 150, per AGNEW, J.). But in the present case there is no doubt that the community, called the city of Pittsburgh, of which the plaintiff is a member, has a direct and vital interest in the taxation complained of, and such being the case, there is an end of our power to grant relief. It will not do for us to stop to consider the peculiar interests of the individual as segregated from the community, for, if we should do so, few tax laws could be enforced, since it often, if not generally, happens that such laws bear hardly upon some individuals, and not unfrequently individual interest is opposed to that of the public. We must have regard to the public welfare; if it be not shown to us that the legislation is for the promotion of the good of some other party or community than the one taxed, we have no right to pronounce it unconstitutional. The individual must be regarded as interested in the public welfare, hence his interest must be looked for in that of the community of which he forms part. Now it may be true that the plaintiff is not personally benefited by either the educational or poor department of the city, but neither is any one not having children to educate and not being himself a pauper. Yet, for such reasons, we are hardly prepared to stay the hand of the collector of school and poor rates. He may not be personally benefited by the fire or police department, but the general municipality is largely benefited thereby, and his welfare is found in the prosperity of that municipality. As was well said by the learned master to whom this case was referred, the value of the plaintiff's property has heretofore depended upon the growth and prosperity of the city, but these, in turn, depend upon the character of the city streets, and police department,

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and upon its water, gas, and educational facilities. Without these it would fall into decay, and the value of real estate within the bounds of the municipality, including that of the complainant, would be incalculably reduced. It is thus apparent that the plaintiff has not only a general but a direct interest in the objects which the taxation complained of is intended to promote.

Decree affirmed.

Opinion by GORDON, J. AGNEW, C. J., and STERRETT, J., dissent.

Dissenting opinion by AGNEW, C. J.

The leading facts of this case, raising an important question upon the power of taxation for city purposes, alleged in the bill, and either not denied in the answer or found by the Master, are these: The limits of the city of Pittsburgh were extended to embrace a large tract of country composed of farm lands, including the rural townships Pitt, Oakland, Collins, Liberty, and Peebles. The plaintiff owns a farm of eighty acres, bounded by farms, excepting an adjacent parcel of about twenty acres laid off into lots. On the north of his tract lie about one thousand acres in farms, and surrounding and between it and the city lie other farms. His tract is used for farming and dairy purposes only. It was not brought into the city with his consent, and has not been laid off into lots. It lies distant from gas-pipes and lamps, water-pipes, sewers, police beats, and fire apparatus. It has no streets or lanes maintained for city uses, excepting those prior-existing roads which were and are sufficient for the use of his farm. It has springs of water sufficient for its use. In consequence of being brought within the city limits it is taxed a sum of $2115.06, on a valuation of $244,000 for city purposes alone, exclusive of county, poor, and ward school taxes; while its productive yearly value as a farm is $10 per acre, or $800 for the whole.

The Master has discussed a number of immaterial questions; for example, the system of valuation and its conclusiveness, the power of the city to extend works into the tract, and the ability of Kelly to lay off his land into city lots. These, however, concern the future chiefly, and are aside from the true question, that of power, to wit: the authority of the city to burden such property, in its existing condition, with taxes for merely city purposes. The rightful power of the city to do this is rested primarily on the power of the Legislature to extend the city limits over farm lands. The power to extend is conceded. It is often necessary as a wise preparation to bring such lands into a state necessary to adapt them to future progress. But this concession to the power of extension and general municipal jurisdiction, gives no power to tax farms having no need of city improvements for exclusively city purposes. The powers are essentially different. It might as well be argued that the extension, by Act of Assembly, of the limits of Pittsburgh to the boundaries of Allegheny County, or to that part lying between the rivers Monongahela and Allegheny, would confer a power upon the city to tax all the farms in the county or that section of it between the rivers for gas, water, police, fire, and other city uses. The difference is not in principle, but only in extent of surface. It is just as illegal to tax these farms in the several townships heretofore named, as to tax all the townships in that section between the rivers. The latter only exhibits the abuse more palpably. The owners of these farm lands in the townships brought within the limits, have no common interest in or benefit of the improvements in the built-up or true city.

If the Legislature can, by a mere extension of boundary, authorize the city to tax farm lands for purely city purposes, it might, without extension, direct all farms within given lines, outside of the city, to pay these city taxes. Thus, when we get rid of that confusion of thought which confounds extension of boundary and power of taxation, we perceive that taxes laid on mere farm lands to pay city levies applicable only to the built-up or true city, is nothing more than an order to farmers to pay for the benefit of the city residents; it is taking the money of A. to pay for improvements made for the use of B. This is palpably and flagrantly unjust, and therefore against common right. If the Legislature itself cannot compel farmers to pay city taxes for purely local purposes, in which they have no share, it is clear it cannot authorize the city to do indirectly what it cannot do directly. An order with or without the extension of boundary, upon a certain class to pay taxes for local benefits conferred on others, is wholly different from a power to lay a general tax for the support of government. The latter is a power to which every citizen of a State submits himself in consideration of the general benefits derived from government. But as to the former, it is well said in Bradshaw *v.* The City of Omaha (1 Nebraska, 16), that the object is to make the owners of farms divide the expense of supporting the municipal government with those who need it; that the true city is the built-up part, while the levy of taxes on farms is to confiscate property outside for the benefit of those within the true city. (See also Taylor *v.* Porter, 4 Hill, 140; Holden *v.* James, 11 Mass. 396.)

The power of the Legislature is clear to divide the State, for convenient local government, into counties, townships, cities, boroughs, etc., conferring on each an appropriate autonomy. But in doing this, the powers conferred must be adapted to the ends to be accomplished by each.

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A sound and large discretion is necessarily exercised in this adaptation of powers. But it is equally clear that the powers conferred must have a reasonable appropriateness to the end proposed. Such an exercise of power only can fairly comport with the true and acknowledged principles of our American governments, which are all founded on the rights of the people, and for their "peace, safety, and happiness" (sect. 2, Declaration of Rights, new Constitution). These principles are well stated by Justice CHASE in Calder *v.* Bull (3 Dallas, 386). "The people of the U. S. (he says) erected their constitutions or forms of government to establish justice, to promote the general welfare, to secure the blessings of liberty, and to protect their persons and *property* from violence. The purposes for which men enter into society will determine the nature and terms of the social compact, and as they are the foundation of the *legislative* power, they will decide what are the proper objects of it. The *nature* and *ends* of legislative power will limit the exercise of it." Again. "There are acts which the Federal or State Legislatures cannot do without exceeding their authority. There are certain *vital* principles in our free republican governments which will determine and overrule an *apparent* and *flagrant* abuse of the legislative power, as to authorize manifest injustice by positive law; or to take away that security for *personal liberty* or *private property* for the protection whereof the government was established."

The same thoughts were thrown out by Chief Justice MARSHALL in Fletcher *v.* Peck (6 Cranch, 87). "It may well be doubted (he says) whether the nature of society and of government does not prescribe some limits to the legislative power, and if any be prescribed, where are they to be found if the property of an individual, fairly and honestly acquired, may be seized without compensation? To the Legislature power is granted; but the question whether the act of transferring the property of an individual to the public be in the nature of the legislative power, is well worthy of serious reflection."

This is precisely the question before us, whether, under the mere name or color of taxation, the Legislature can confer on a city a power to transfer the money or property of farmers outside of the true city to those who live within it, for purposes by which they alone are benefited.

The inviolability of the right of private property and the natural boundary of the legislative power has been enforced already in this State in the case of Washington Avenue (19 P. F. Smith, p. 363), in these words: "When, therefore, the Constitution declares in the ninth article, that among the *inherent* and indefeasible rights of men is that of acquiring, possessing, and protecting property; that the people shall be secure in their possessions from unreasonable searches and seizures; that no one can be *deprived* of *property* unless by the judgment of his peers or the law of the land; that no man's property shall be taken or applied to public use without *just compensation* being made; that every man for an injury to his *lands* or *goods* shall have remedy by due course of law, and right and justice administered without sale, *denial*, or delay; and that no law *impairing* contracts shall be made; and when the people, to guard against *transgressions* of the high powers delegated by them, have declared that all these rights are excepted out of the general powers of government, and shall forever remain inviolate, they for their own safety stamped upon the right of private property an inviolability which cannot be frittered away by verbal criticism on each separate clause, nor the united fagot broken, stick by stick, until all its strength is gone. There is a clear implication from the primary declaration of the inherent and indefeasible right of property, followed by the clauses guarding it against specific transgressions, that covers it with an ægis of protection against all unjust, unreasonable, and palpably unequal exactions, under any name or pretext. Nor is this sanctity incompatible with the taxing power, or that of eminent domain, where, for the good of the whole people, burdens may be imposed or property taken. I admit that the power to tax is unbounded by any express limit in the Constitution; that it may be exercised to the full extent of the public exigency. I concede that it differs from the power of eminent domain, and has no thought of compensation by way of return for that which it takes and applies to the public good, further than all derive benefit from the purpose to which it is applied. But, nevertheless, taxation *is* bounded in its exercise by its own nature, essential characteristics, and purpose. It must, therefore, visit all alike in a reasonably practicable way, of which the Legislature may judge, but within the just limits of what is taxation. Like the rain, it may fall upon the people by districts and by turns, but still it must be public in its purpose, and reasonably just and equal in its distribution, and cannot sacrifice individual righ by a palpably unjust exaction. To do so is confiscation, not taxation; extortion, not assessment; and falls within the clearly implied restrictions of the Bill of Rights."

Therefore while we concede the wide range to be given to legislative discretion in adapting the means to the end, that is, to the purposes of *local* government, there is a limit beyond which the legislative power cannot sacrifice the sacred right of private property. This limit is reached when it palpably and plainly sacrifices this right, which the people themselves have jealously guarded

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against transgression in their fundamental law. There must be, therefore, a reasonable appropriateness in the means employed to execute the legislative purpose. This has been well expressed by Chief Justice MARSHALL, that bright luminary of constitutional law, in discussing the power of Congress under the 19th clause of the 8th section of the 1st article of the Federal Constitution, to make all laws necessary and proper for carrying into execution the federal powers. "But we think (he said) the sound construction of the Constitution must allow to the national legislature that discretion with regard to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner *most beneficial* to the people. Let the end be legitimate, let it be within the *scope of the Constitution*, and all the *means* which are *appropriate* which *plainly are adapted to that end*, which are *not prohibited*, but *consist* with the *letter* and *spirit* of the Constitution, are constitutional." (McCullough *v.* Maryland, 4 Wheaton, 316.) The italics are mine.

This was said by that great jurist of an express power to pass all laws necessary and proper to execute expressly conferred powers; the means must be appropriate, must be plainly adapted to a legitimate end; one not prohibited, but consistent with the letter and *spirit* of the Constitution. How much stronger, then, does the language apply to a case like this, where no express power over the means is given, but the power is left to be inferred only from its appropriateness.

The taxing power conferred on the city, therefore, cannot extend to such a case as this, where a ruinous burthen is laid on land wholly rural and outside of the city proper, for purely local and city objects, in which Mr. Kelly, the owner, has no interest. This distinction between *local* taxation for purely *local* purposes, and general taxation by the State, in which all are interested, cannot be overlooked or thrust aside. It is the very pivot of the question. (People *v.* Mayor of Brooklyn, 4 Comstock, 419; Morse *v.* Stoker, 1 Allen, 159.) It is not the extension of boundary which is unconstitutional, but it is the imposition of a burthen where it is palpably and flagrantly unjust and contrary to common right. (Bradshaw *v.* Omaha, 1 Neb. 16.)

We are not without very respectable and numerous precedents for the doctrine contended for. The very point in question is decided in the following cases: Cheany *v.* Hooser (9 B. Monroe, 330); Covington *v.* Southgate (15 B. Monroe, 491); Morford *v.* Unger (8 Iowa, 82); Langworthy *v.* Dubuque (13 Iowa, 86); Fulton *v.* Davenport (17 Iowa, 404); Bradshaw *v.* Omaha (1 Neb. 16). The opinions in some of these cases are elaborate, well considered, and very convincing to my mind.

Much of the answer given to this view of the natural right of property secured by constitutional limitations, is a mere criticism on words. Thus it is said the protection claimed refers only to the power of *eminent domain*, which relates to a taking, not a taxation of property. Even this clause is entitled to a liberal interpretation (Pearce Heirs *v.* Patton, 7 B. Monroe, 162). But the Declaration of Rights does not confine its protection to this clause, when it declares the *inherent* right of private property, and places it on the same high plane of protection as the rights of *life and liberty*, or when it declares that the *possessions* of the people, as well as their persons, houses, and papers, shall be secure from *unreasonable seizures*, and when it asserts that free governments are instituted for their peace, safety, and happiness.

Indeed the whole circle of fundamental rights rise up in earnest protest against the doctrine of the absolute despotism of the legislative power over property; while the clause relating to the power of eminent domain only strengthens the protest. It is not the province of the Courts, which stand between the citizen and the abuse of power by public servants, to fritter away these clauses to mean next to nothing. Eminent domain is simply high and eminent domain, and is but another name for sovereignty. Specially it is one of the powers of sovereignty, which includes the taxing power as well as that which takes. Taxation exacts of the owner of property a share of the public burdens as his just proportion for the benefits received from the government. Eminent domain goes a step further, and takes more than a just share, and therefore awards compensation for the excess. (People *v.* Brooklyn, 4 Comstock, 420.) But it is evident that both are founded on the consideration of benefits conferred in some form. Sovereignty in a constitutional government under a bill of rights, imports no arbitrary power for any purpose. What is taxation but a delegated power, and therefore subject to the fundamental rights of men, which government is intended to protect, when the exercise of this power conflicts with them without just cause? If the power to tax be absolute and unbounded by just cause, there is no protection whatever. You cannot take property without just compensation, but you may tax it to destruction. You may not lop off a limb or cut off the head without a just cause, but you may bleed the whole trunk to death. Or if you cannot find a good cause, you may presume it; or you may find it in some infinitesimal quantity to furnish a pretext. Clearly the power of taxation is not so destructive. It is bounded by the exigency which calls forth its exercise. Kirby *v.* Shaw (7 Harris, 259), a case admittedly on the verge of the taxing power,

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contains probably the strongest expressions of the absolute character of the taxing power; yet these must be taken in reference to the case itself which called them forth, and it was one where a specific benefit was conferred on the borough of Towanda, and the Chief Justice made this the corner-stone of his argument.

In discussing this question the advocates of unlimited power ignore the distinction so palpable between the general power of taxation for the benefit of the whole State, though laid in districts, and the imposition of local burthens in return for *specific benefits*. As to the former, all men participate more or less in the general advantages of government; but there can be no such postulate for the latter, where it is palpably clear the local burthen is imposed without just cause, and is plainly for the benefit of others. And a Court must regard a substantial return, not a merely speculative or shadowy benefit, which amounts to no more than a pretext.

When, therefore, the exercise of the power of local taxation is manifestly arbitrary and palpably unjust and without just cause; when, according to Chief Justice MARSHALL, it is not "appropriate" to the true purpose of local or city government, it is not constitutional; it infringes the fundamental rights of the citizen, and is void. This is the rule laid down in Sharpless *v.* City of Philadelphia (9 Harris, 164), and many other cases to determine the constitutionality of laws. (Fletcher *v.* Peck, 6 Cranch, 87; Cooper *v.* Telfair, 4 Dallas, 14; Eakin *v.* Rewb, 12 S. & R. 339; Com'th *v.* Smith, 4 Binney, 123; Cheany *v.* Hooser, 9 B. Monroe, 330; Norford *v.* Unger, 8 Iowa, 82; Bradshaw *v.* Omaha, 1 Neb. 16.)

In this case it is palpably, clearly plain that as to gas, water, fire, and police the Kelly farm is taxed for purely city purposes in which it has no share. It is perfectly manifest that his money is transferred to a local use for the benefit of others. Why then shall a Court hesitate to pronounce the burthen contrary to right and void?

No stronger authority will be found, for the principle I have insisted upon, than the decision of the whole Court in the case of the bridge over Saw-mill Run, argued last November at Pittsburgh [reported *ante* page 321.] The very foundation of the opinion of Justice WOODWARD is the absence of peculiar benefits to the party assessed. On the doctrine of general benefits, or a supposed or infinitesimal benefit, the assessment was valid. Its rejection proves that this Court does look at the nature and practical operation of the charge, and the want of any substantial return for the tax, in local taxation.

Reference is made to the Kitty Roup case as covering this. That is a mistake. It decides one point only—the power under the new constitution to *classify* the subjects of taxation. But the power to classify is essentially different from the power to impose *any* tax. Classification implies that the subject is taxable for a proposed purpose.

But our question is upon the power to impose *any* tax for gas, water, fire, and police. The *classification* into *urban* and *rural*, the only point in the Kitty Roup case that had a majority of the Court, does not determine whether the *rural* is subject to a tax for merely city purposes. Some rural properties may be subject, for they may have the benefit of gas, water, police, and other city advantages. But when the property is, as here, a farm not subject to the tax for these city purposes, it is manifest that classification has nothing to do with the case. Classification merely reduces the amount of the tax on the subject of the classification (when it is a taxable subject) to two-thirds if rural. But the point made in this case is that the subject is not taxable at all for these purely city uses, and the tax is therefore *illegal* in whole and in part. It is not taxable for two-thirds or any other proportion. It is not a tax for those general purposes which concern the State, such as county, poor, road, and school tax. That would bring the case within the general taxing power. In such a case it is immaterial whether the tax is imposed over the State at large, or in districts, for the purposes are those of general advantage.

We have arrived just at that point in the history of local taxation, where in my judgment this Court should stand firmly as the bulwark of human rights to prevent their sacrifice in detail and by gradual encroachment. If the rights of property can be taken or taxed away, without a justifiable cause to bring the legislative act within the just powers of government, it is confiscation, not legal contribution. Planted on the broad foundation of the rights of men, I shall stand alone, if no one go with me, in the defence of constitutional liberty, opposed to every scheme of plunder, however gilded or bright, which the tenants of municipal places may devise.

[This case has been taken to the Supreme Court of the United States, upon the question of the constitutionality of the tax, under the clause of the fifth amendment of the Constitution of the United States, which reads: "Nor shall private property be taken for public use without just compensation."]

Jan. '76, 144. Feb. 14, 1878.

Catherine Hunt's Appeal. Jackson's Estate.

Husband and wife—Marriage—Cohabitation and reputation not conclusive as to, but may be rebutted—Divorce—Decedent's estate.

Cohabitation and reputation are not marriage, but merely circumstances from which a marriage may be presumed:

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this presumption may be rebutted by proof that no marriage in fact ever took place between the parties.

A relation between a man and woman shown to have been illicit at the commencement is presumed to continue so until proof of change, and such relation raises no presumption of marriage.

J. was formally married to L. in 1871, having at the time another wife living. He cohabited with L. and treated her upon all occasions as his wife, until his death in 1874. Two months prior to his death, his first wife obtained a decree of divorce against him. During this period of two months no second marriage ceremony took place between J. and L.

Held (reversing the decree of the Court below), that as the cohabitation of the parties was illicit down to the date of the divorce, and no marriage in fact took place after that date, L. was not entitled to a share of J.'s estate as his widow.

Appeal from the Orphans' Court of Philadelphia County.

This was an appeal by Catherine Hunt, guardian of Leonora Jackson, a minor, from a decree of the Orphans' Court in the matter of the account of the administrator of James Jackson, deceased, the father of the said minor.

Before the auditing Judge (HANNA, J.) appeared one Mary Jane Longcake, or Jackson, who claimed, *inter alia*, $300, as the widow of said decedent under the Act of 1851.

Upon the testimony taken before him the judge made the following adjudication:—

"It was clearly shown that decedent was married to Mary Jane Longcake, July 23, 1871. At that time he had already a wife living, from whom he had been separated at least five years. After his second marriage, he and said Mary Jane went to keeping house together, and lived and cohabited together as husband and wife until his death, February 16, 1874. They were known and reputed as man and wife among their mutual relatives, friends, and neighbors. Two years or more before decedent's death his first wife commenced proceedings to obtain a divorce from him. During their pendency, he married the second time.

"The decree in divorce was granted December 13, 1873, and decedent died February 16, 1874. During this period of two months he and said Mary Jane, who was believed and reputed to be his lawful wife, continued to reside together, as they had done for more than two years, cohabiting as husband and wife, known and respected as such by their relatives and friends, and visiting and being visited by them. Decedent always spoke of, and addressed, claimant as his wife, and introduced her as such to his friends who were strangers to her

"Under these facts, notwithstanding the second marriage of decedent was illegal, yet after the decree of divorce, he was at liberty to marry again; and although no actual marriage again took place with her who now alleges herself to be his widow, yet the cohabitation and reputation of herself and decedent, from the date of the divorce to the day of his death, are sufficient in law from which to presume a marriage between them, and entitle her to a share in his estate.

"The claims made by her must therefore be allowed; her claim to the $300 exemption being in time."

To this adjudication, Catherine Hunt, as guardian for the daughter of the decedent by his first marriage, filed exceptions, which were dismissed by the Court (DWIGHT, J., dissenting), and the adjudication confirmed.

Mrs. Hunt took this appeal, assigning for error the action of the Court in presuming that a valid marriage had taken place between the decedent and Mary Jane Longcake, and in awarding to her $300 as his widow.

George H. Van Zant (*Elijah J. Fox* with him), for the appellant.

Evidence that parties had the habit and repute of marriage is not marriage, but simply evidence from which marriage may be presumed. But this presumption may always be rebutted, and a man having a wife in full being cannot establish a marriage with another by mere cohabitation and reputation

Yardley's Estate, 25 Sm. 212.
Senser *v.* Bower, 1 Penna. 452.
Heffner *v.* Heffner, 11 H. 104.
Kenley *v.* Kenley, 2 Yeates, 207.

Albert S. L. Shields, contra.

A marriage, though unlawful at first, may subsequently become valid.

Fenton *v.* Reed, 4 Johns. 52.
Rose *v.* Clark, 8 Paige, 574.
In re Taylor, 9 Paige, 611.

March 11, 1878. THE COURT. Mary Jane Jackson, the appellee, claimed $300 out of the balance in the hands of the accountant, under the act of 1851, and also one-third of the estate as widow, the decedent having died intestate. Her claim was allowed by the Orphans' Court: hence this appeal.

The facts have been clearly found by the learned Judge of the Orphans' Court. They are as follows: the decedent was married to Mary Jane Longcake (alleged widow) July 23, 1871. At that time decedent had a wife living, from whom he had been separated for several years. After his second marriage he and the said Mary Jane went to housekeeping together, and lived and cohabited together as husband and wife until his death, February 16, 1874. They were known and reputed as man and wife among their mutual relatives, friends, and neighbors. Two years or more before decedent's death his first wife commenced proceedings to obtain a divorce from him. It was during the pendency of

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these proceedings that he married the said Mary Jane Longcake. The decree in divorce was granted December 13, 1873, and the deceased died February 16, 1874. During the period intervening between said decree and his death, he continued to reside with the said Mary Jane as his wife, but no actual marriage took place.

From this state of facts the learned Judge of the Court below held that "the cohabitation and reputation of herself and decedent from the date of the divorce to the day of his death are sufficient in law from which to presume a marriage between them and entitle her to a share in his estate." The presumption to which the learned Judge refers is entirely demolished by his finding of facts. Cohabitation and reputation are not marriage. They are but circumstances from which a marriage may be presumed. (Yardley's Estate, 25 P. F. S. 207.)

The presumption of marriage arising from such facts may always be rebutted, and wholly disappears in the face of proof that no marriage in fact had taken place. Again, the cohabitation was illicit at its commencement. It may not have been meretricious so far as the appellee is concerned; there is evidence to show that she was deceived; but it was clearly illegal.

The general rule is that a relation shown to have been illicit at its commencement is presumed to continue so until proof of change; such a relation raises no presumption of marriage. In the case at bar the fact is found that the cohabitation was illicit at its commencement, and necessarily continued so down to the decree of divorce; and that there was not a marriage in fact between the date of the divorce and the death of the decedent. This is conclusive against the appellee. She has failed to establish her claim as widow, and has of course no right to participate in the distribution of the decedent's estate.

The decree is reversed, and it is now ordered and decreed that the balance in the hands of the accountant, $812.88, be paid to the guardian of Leonora Jackson, the costs of this appeal to be paid by the appellee.

Opinion by PAXSON, J. WOODWARD, J., absent.

July '77, 106. Jan. 29, 1878.

City of Philadelphia to use, etc., v. Sanger.

Municipal claims for paving—Contractor's notice to property owners by advertisement of award—What particularity requisite in—Ordinance of Dec. 31, 1862—Pleadings—Evidence.

To a *sci. fa.* sur municipal claim for paving, the defendant pleaded, *inter alia* (10), that the claimant's notice of his application for the contract had not been published for two weeks as required by the ordinance; (11) that such notice had not been published in the two daily papers having the largest circulation in Philadelphia; (12) that the notice did not set forth the names and residences of the property owners who requested that the claimant should do the work. To pleas 11 and 12 the defendant demurred. Plea 10 he traversed, and he offered in evidence files of the *Evening Bulletin* containing his advertisement. The offer was refused, as it was not accompanied with an offer to prove that an advertisement had been published, as provided by the ordinance of December 31, 1862. A nonsuit was entered against the plaintiff:

Held (affirming the judgment of the Court below), that the evidence and offers of evidence were insufficient proof of notice.

Error to Common Pleas No. 1, of Philadelphia County.

Scire facias on a municipal claim filed by the city to the use of Peters against Sanger, for paving done on Bridge Street in front of the defendant's property. Pleas, the general issue, and a number of special pleas setting forth, *inter alia*, that the claimant was not selected according to law by a majority of the property owners; (10) that the claimant had not published notice of his application for his contract at least two weeks prior to his application, as required by the ordinance; (11) that the notice had not been published in the two papers having the largest circulation, as required by the ordinance; (12) that the claimant's notice had not set forth the residences of the persons signing the request for his appointment as contractor; and that these signatures had been procured through corrupt promises. The plaintiff traversed, *inter alia*, the tenth plea, and demurred to pleas 11 and 12.

At the trial the plaintiff read in evidence a resolution of councils of November 2, 1873, providing for the paving; the request of property owners for his appointment as contractor, signed by a number of persons certified by the surveyor of the district to constitute a majority of the owners on the part of the street paved; the contract between the city and the plaintiff, and the claim sued on. He then offered in evidence a file of the *Evening Bulletin* newspaper to show the advertisement of his application for the contract. This was objected to upon the ground that the advertisement had not been published as prescribed by the ordinance of December 31, 1862. Objection sustained; exception.

The ordinance of December 31, 1862, as amended by that of March 24, 1871, provides as follows:—

. . . . "The person or persons applying for such contract shall give notice of such application in two daily papers having the largest circulation, by three consecutive insertions, at least two weeks prior to the making of such application; such notice to set forth: *First.* The name of the contractor or contractors. *Second.* The locality of the space or spaces intended to be paved. *Third.* The

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name and residence of each person signing for contractor. *Fourth.* To such notice shall be added an invitation to the owners of property on such street to meet at the Department of Highways, at a certain hour on a given day, to show cause, if any, why such contract should not be awarded to the applicant."

The plaintiff then offered in evidence a scrap book belonging to the Highway Department in which a copy of the newspaper advertisements were kept. This book was excluded, and the plaintiff again excepted. He then offered to prove by the Chief Commissioner and Assistant Commissioner of Highways what was the custom of the department as to award of contracts. Objection. Objection sustained; exception.

On cross-examination of the plaintiff and his foreman it appeared that they had told the owners, before signing, that prompt payment of the paving bills would secure them a discount of about twenty-five per cent. on the price authorized as the charge by the city, and that these discounts were actually allowed to several of the owners. It appeared doubtful whether the certificate of the surveyor to the fact that a majority of the owners had asked for the award of the contract to the plaintiff, was accurate.

PIERCE, J. ordered a nonsuit, which the Court in banc refused to take off. The plaintiff took this writ, assigning for error the refusal of his offers of evidence and the refusal to take off the nonsuit.

Sellers (*Wm. Hopple* with him), for the plaintiff in error.

The plaintiff, having put in evidence the resolution of November 2, 1873, proved his selection by a majority of the owners, and read in evidence his claim, *prima facie* proved his claim.

Schenley *v.* The City, 12 C. 29.
Wister *v.* Id., 3 Gr. 311.
City *v.* Burgin, 14 Wr. 539.
Lea *v.* City, 1 WEEKLY NOTES, 189. See 3 WEEKLY NOTES, 126, note.
City *v.* Brooke, 31 Sm. 23.

The order of proof was not changed by the pleading. Certain pleas aver that the notice of application for the contract was not in accordance with the ordinances of the city. The corresponding replications traversed these pleas and left the burden of proof upon the defendant. It is said that the Court took judicial notice of the ordinance of December 31, 1862. Judicial notice can be taken of public statutes, but not of municipal regulations. It is true that the excluded advertisement did not contain the residences of the property owners, but such an omission does not destroy a contract or amount to payment for the work which has been done. Such directions in the ordinances are simply for the convenience of the owners.

Junkin, for the defendant in error.

This is an attempt to charge the defendant's property for work and materials which he did not order or contract to pay. He can be put under a legal obligation only when the power conferred on the municipal authorities has been legally exercised.

The City *v.* Lea, 5 Phila. 77.
Fell *v.* The City, 31 Sm. 75.

The claim is evidence only of the matters therein set forth. Here it does not set forth the selection of the claimant by a majority of the property owners. This selection is not elsewhere established, and the case is governed by Reilly *v.* The City (10 Sm. 467), which requires the affirmative proof of this fact.

As to the notice, there was no offer of proof of advertisement in more than one paper; it was not pretended that that paper had the largest circulation, or that the residences of the owners were announced. Such advertisements are not merely formal, but are essential prerequisites. Judicial notice of such ordinances was taken in—

The City *v.* Edwards, 28 Sm. 62.

February 11, 1878. THE COURT. This case was decided by the Court below, under the pleadings, upon the ground of the insufficiency of the notice by advertisement required by the ordinance to be given by a contemplated contractor before the awarding of the contract to him.

This notice is held to be essential to his right to obtain the contract from the city, and the name of the city being used in the action solely for his benefit, the want of such notice to the owners of lots is fatal to his claims against them.

We think the evidence and offers of evidence, when all taken together, were insufficient proof of notice.

It is unnecessary to decide the other question as to the evidence and regularity of the proceedings to obtain the consent of the lot owners to the making of the contract with the plaintiff. The case differs from that of Reilly *v.* The City (10 P. F. Smith, 77), where there was an entire absence of any evidence of the selection of the contractor, and he relied on the Act of 1843 to supply the presumption of selection.

We refrain from the expression of any opinion on this point.

Judgment affirmed.

Per CURIAM.

Oct. & Nov. '76, 168. Oct. 16, 1877.

Siggins et al. v. Commonwealth ex rel. Commissioners, etc.

County treasurer—Road tax on unseated lands—Act of April 15, 1834—Decision of county auditors as to sums due by county treasurers, etc.—When final.

The Act of April 15, 1834, providing for the settlement of the account of county officers by the county auditors,

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makes the decision of the auditors final after the expiration of the time therein allowed for an appeal.

Error to the Common Pleas of Forest County.

Debt on the official bond of James P. Siggins, late county treasurer, and his sureties, by the Commonwealth, at the relation of the Big Level Road Commissioners, to recover a sum alleged to be due the county by the defendant, collected as a tax on certain unseated lands.

Pleas *non est factum*, covenants performed, payment with leave, etc.

The facts were as follows:—

The Act of Assembly of May 1st, 1861 (P. L. 611) created the "Big Level Road Commissioners" for the purpose of laying out a State Road in McKean, Elk, and Forest Counties. The seventh section provided—

"That the said commissioners shall have power to levy and assess a tax upon the unseated assessed property in the townships through which said road shall pass, for the year 1862, and annually thereafter during the continuance of this Act, not exceeding ten mills on the dollar in any one year, if they shall deem the same necessary for the purposes herein mentioned, which shall be collected by said commissioners, in the same manner as other road taxes in the said townships are now by law collected."

This tax, after being thus assessed, was collected by the county treasurer. Siggins was county treasurer for the years 1869 and 1870. Upon the audit of his account for the first year, a balance was found due upon account of this road tax of $3717.56. Upon the audit at the end of the second year, the auditors found that this account was fully paid, and that no balance was due. No appeal was taken. On March 6, 1873, this suit was instituted.

On April 10, 1873, an Act of Assembly was approved which enacted:—

"That it shall be lawful for the auditors of Forest Co., after ten days' notice to the commissioners of said county, and to said J. P. Siggins, to meet at the commissioners' office, in said county, and re-audit the accounts of James P. Siggins, late treasurer of said county, and having so made the same, like proceedings shall be had as in other cases; and such re-audit, so made as aforesaid, shall have the same effect as in other cases against the county as against the said James P. Siggins and his sureties." (P. L. 747.)

At the audit held in conformity with the provisions of this Act, the auditors decided that they were not empowered to re-audit the fund in question, and no appeal was taken.

At the trial (before WETMORE, P. J.) these reports were given in evidence. The Court, however, charged the jury:—

"The plaintiffs are not estopped by the auditors' reports as given in evidence. The proceedings before the auditors on the re-audit do not disclose any fact to submit to the jury, on the question of an audit of the amounts, or claim of plaintiff."

Verdict and judgment for the plaintiff, $8000. Defendants took this writ, assigning as error the charge of the Court.

B. J. Reid (*M. W. Tate* with him), for plaintiffs in error.

The Act of Assembly of April 15, 1834 (P. L. 545), has provided the specific remedy for charging county officers with public moneys, through the county auditors, and gives sixty days for an appeal from their decision. A long line of decisions has established that this decision unappealed from is final, and is an estoppel to a recovery in any other suit.

Brown *v.* White Deer Township, 3 C. 111.
Potter County *v.* Oswayo Township, 11 Wr. 163.
Blackamore *v.* Allegheny County, 1 Sm. 160.
Glatfelter *v.* Commonwealth, 24 Id. 74.

There was no paper book for defendant in error, and no counsel appeared.

Jan. 7, 1878. THE COURT. It was no part of the purpose of the Act of the 1st of May, 1861, to enlarge the liabilities of the treasurers of the counties of McKean, Elk, Forest, and Clarion, or to vary the mode prescribed by the Act of the 15th of April, 1834, for the settlement of their accounts. The object in view when the Act of 1861 was passed was the construction of a State road from a point to be fixed in Hamlin township, in the county of McKean, to Tylersburg, in the county of Clarion. The third section authorized the commissioners named in the first section to receive a portion of the road taxes equal to three and one-half mills per dollar on the property valuation of the townships through which the State road should pass. A proviso empowered the supervisors of the proper townships in the county of Forest to levy and collect for the benefit of this improvement a tax of three and one-half mills in addition to the whole road tax authorized by then existing law. Apparently, this was the completed original plan to secure the construction of the projected highway. The seventh section, out of which this controversy has grown, looks as if some afterthought had prompted its interpolation. These are its terms: "The commissioners shall have power to levy and assess a tax upon the unseated property in the townships through which said road shall pass, for the year one thousand eight hundred and sixty-two, and annually thereafter during the continuance of this Act, not exceeding ten mills on the dollar in any one year, if they shall deem the same necessary for the purposes herein mentioned, which shall be collected by said commissioners in the same manner as other road taxes in said townships are now by law collected." This extraordinary enactment appears to have been acted on, and transcripts of the assessments it authorized were returned to the county commissioners, who certified them to the treasurer for collection.

James P. Siggins, one of the defendants below, was treasurer of the county of Forest during the years 1869 and 1870, and collected the taxes

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levied by the State Road commissioners just as he collected the other road taxes assessed on unseated lands. His accounts for this fund were settled like his other accounts, by the county auditors. In the first settlement, made on the 13th of January, 1870, he was charged with $3717.56 collected for the State Road commissioners from the taxes of 1868 and 1869; and in the final settlement for the second year of his official term, on the 30th of January, 1871, the auditors ascertained and reported that the moneys he had received for this fund had been fully paid. No appeal was taken from the report, but after an acquiescence in the adjustment for more than two years, the State Road commissioners brought this suit on the 6th of March, 1873, to recover a balance alleged to have been collected by the treasurer, and left unaccounted for and unpaid. Pending the suit, the Act of the 10th of April, 1873, was passed, authorizing the auditors for the time being to re-audit the accounts of Siggins, as late treasurer, upon ten days' notice to him and to the county commissioners. At the re-audit, which was had on the 23d of October, 1873, the claim of the State Road commissioners was presented, but its investigation was refused on the ground that the Act had been passed at the instance of the county officers to correct some errors in a former settlement of county funds. It appears, indeed, from the testimony of D. W. Clark, that the re-audit was had on an appeal from a report on the county account.

The rights of the State Road commissioners must rest where the settlement of the 30th of January, 1871, left them. The Act of 1873 placed them by its terms in no new position, and the refusal at the re-audit to open the account was a re-affirmance of the former adjustment. Well-considered authorities have settled that their sole remedy was an appeal from the report of the auditors. In Brown *v.* White Deer Township (3 Casey, 111), a supervisor had presented a claim against the township, part of which had accrued before a former settlement of his accounts, and the whole of which the auditors declined to allow. In entering the judgment of this Court in the suit he afterwards brought to collect his claim, KNOX, J., said: "From the refusal of the auditors to allow this claim when presented in March, 1850, the supervisor should have appealed within the time allowed by law, if he desired to make good his demand for the money in controversy." The provision of the 10th section of the Act of 1861, that the taxes should be collected "by the said commissioners in the same manner as other road taxes in the said townships are now by law collected," meant simply that they should perform the duties of supervisors in furnishing transcripts of their assessments, and in receiving the money which the county treasurer should in the usual and legal way collect. It was held in Potter County *v.* Oswayo Township (11 Wright, 162), that where township taxes assessed upon unseated lands, and collected by the county treasurer, were not paid over by him, the county was responsible to the township for the default. The unreported case of The County of Lycoming *v.* Haling was referred to in the opinion of Judge WHITE in Potter County *v.* Oswayo Township, which this Court adopted. J. H. Huling had been treasurer of the county, and in the settlement of his accounts a balance in favor of the county had been found due. He paid a portion of it to his successor, and a suit was brought on his official bond to recover what remained unpaid. His defence was that this was made up of road taxes assessed and paid on unseated lands. The Court of Common Pleas held this to be a good defence. In the opinion of this Court reversing the judgment, it was held that while the money received by the treasurer for road taxes remained in the treasury, it was to all intents and purposes a county fund, differing from the other county funds only in this, that it must be applied to a special object. The same rule was applied in Glatfelter *v.* Commonwealth (24 P. F. S. 74), where moneys belonging to the military fund created by the Act of the 17th of April, 1849, and various supplementary statutes, had passed into the hands of the treasurer of the county of York. After reciting the provisions of the Act of the 21st of April, 1858, the present Chief Justice added: "Thus, throughout the Act, the county treasurer is made the custodian of the military fund, as he is of the other funds of the State and county, while the law is silent as to the settlement of his account. There being no repealing clause, and no substitute, his account is necessarily to be audited and settled under former laws. A settlement by the county auditors was declared, therefore, to be conclusive on the commonwealth. Blackmore *v.* The County of Allegheny (1 P. F. S. 160), and the array of precedents there collected, abundantly prove that the decision of the auditors on the accounts of the treasurer is controlling, and cannot be inquired into either by the same tribunal at another time, or by a Court of law, except upon appeal. When the accounts of Siggins, as treasurer of the county of Forest, were adjusted in January, 1871, by a report from which there was no appeal, the settlement was final, and binding on all parties and for all time.

Judgment reversed.

Opinion by WOODWARD, J. SHARSWOOD, J., absent.

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May, '77, 119. June 5, 1877.

Battles & Webster v. Laudenslager.

Bills and notes—Note obtained by fraud—Bona fide holder—Degree of proof necessary to affect holder with notice of fraud.

Nothing but clear evidence of knowledge or notice, fraud or *mala fides*, can impeach the *prima facie* title of a holder of negotiable paper purchased for value before maturity.

An instruction to the jury that the plaintiffs, who were *prima facie bona fide* holders, could not recover "if there was any evidence tending to show that they were connected with or had knowledge of the original fraud," is erroneous.

Per STERRETT, J. No doubt considerable latitude should be allowed in the admission of circumstantial evidence for the purpose of proving participation in manifest fraud, but where the testimony is before the Court it is their duty to see that it has at least a natural and reasonable tendency to sustain the allegations in support of which it is introduced. . . . If there is no sufficient evidence to justify an inference of the disputed fact the Court has the right and it is its duty to withhold it from the jury.

The evidence in this case held insufficient to be submitted to the jury, for the purpose of affecting the plaintiffs with notice of fraud by the payee in obtaining the note in suit.

Error to the Common Pleas of Lycoming County.

Assumpsit on a promissory note by the holders against the maker. Pleas, non-assumpsit, payment with leave, etc. The case was originally brought before the city recorder of Williamsport, from whose judgment, in favor of the plaintiffs, the defendant appealed to the Common Pleas.

Upon the trial, before GAMBLE, P. J., the plaintiffs put in evidence a promissory note for $238.40 dated Oct. 19, 1871, made by the defendant to the order of D. C. Sullivan, and endorsed by him, payable in six months, at defendant's house.

The defendant admitted the signature, but claimed that the note had been obtained by fraud, and that the plaintiffs were affected with notice thereof. In support of this defence the following testimony was admitted, under objection and exception, viz: That Sullivan came to defendant's farm representing himself to be the agent of the Girard Electrical Insurance Co. of Erie Co., and induced the defendant to agree to insure his buildings on the plan adopted by said company, namely, that he, Sullivan, should erect lightning rods on said buildings at a certain valuation, upon which amount the defendant should agree to pay interest only, at six per cent annually, as the cost of insurance, for a term of sixteen years. The defendant testified that Sullivan, having put up the lightning rods, said to him, "'I want you to sign this agreement to show that you are willing to pay the six per cent. interest annually; it will be collected every year; the repairing team will come around and keep these rods in repair free of charges, and collect the interest.' I told him I had not my glasses along, and wished him to read it; he read the article of agreement. . . . That is the paper he read to me, and which I thought I signed." The Electrical Insurance Company subsequently sent to the defendant a policy of insurance against fire by lightning.

The fraud on the part of Sullivan in obtaining the note was practically undisputed. For the purpose of affecting the plaintiffs with notice thereof, the defendant offered to prove, substantially, that at the time the fraud was perpetrated one of the plaintiffs was treasurer and both were directors in the said Electrical Insurance Company, of which Sullivan was agent; that the plaintiffs' office as brokers commuicated by a door with that of the insurance company; that both knew that Sullivan was insolvent, and that his character was bad; that he had formerly been in the employ of Webster, one of the plaintiffs, in the lightning rod business; that the plaintiffs, having such knowledge purchased the said note, with a large number of others, amounting in the aggregate to $20,000, at a discount of about twenty per cent. and without any knowledge of the responsibility of the makers. Objected to; objection overruled and evidence admitted. Exception. (First assignment of error.)

In rebuttal, the plaintiff Battles testified that he had no knowledge or suspicion that the note had been obtained by fraud; that he had on a former occasion purchased notes from Sullivan which had been duly paid; that Sullivan, in selling the lot of notes of which the note in suit was one, had told him that the notes were given by farmers for lightning rods, and that he, Sullivan, was acting as agent for one Crowell who owned the notes. On cross-examination Battles admitted that Sullivan was known to him to be insolvent, and was considered "sharp, active, and a little tricky;" that the plaintiffs did not ask for Crowell's indorsement, but took Sullivan's word for it that the makers were good; that the note in suit was not presented to defendant for payment at maturity, though made payable at defendant's house, and was not protested.

The plaintiffs presented, *inter alia*, the following points: (2) The entire evidence in the cause does not show the plaintiffs to have had notice of the fraud practised by Sullivan, nor that they are holders *mala fide*, and the plaintiffs are therefore entitled to recover. (4) That under all the evidence in the cause, there is no question of fact raised to be submitted to the jury. They must, therefore, under the law, find for the plaintiffs. The Court refused both points and left the question of *mala fides* on the part of the plaintiffs as a question of fact to the jury. (Ninth and tenth assignments of error.)

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The Court charged, *inter alia:* "If there is any evidence at all in the case tending to show that the plaintiffs were connected with the original fraud, or that they had any knowledge of the original fraud, then they ought not to be permitted to avail themselves of this principle of law and to come in and say 'because this is negotiable paper and we hold it, we have a right to recover.'"

Verdict and judgment for defendant.

Plaintiffs took this writ, assigning for error, *inter alia*, the admission of defendant's offer of testimony, the refusal of the above points, and the portion of the charge quoted.

C. S. McCormick (with whom was *J. C. Hill*), for plaintiffs in error.

The evidence was insufficient to affect the plaintiffs with notice of the fraud, and it was therefore improper to submit the case to the jury.

Phelan *v.* Moss, 17 Sm. 59

Moorehead *v.* Gilmore, 27 Id. 120.

The evidence relating to the bad reputation of Sullivan was irrelevant and improperly admitted.

Porter *v.* Seiler, 11 H. 424.

H. C. Parsons (with him *H. W. Watson*), for defendant in error.

Great latitude is permissible to connect plaintiffs with the fraud. The chain of circumstances proved was amply sufficient.

Brown *v.* Schock, 2 WEEKLY NOTES, 151.

The evidence showed that there was either knowledge or *a careful and intentional avoidance of knowledge*, which would have the same effect in law as knowledge.

1 Pars. Notes and Bills, 258.

While the bad character of Sullivan was not an issue in the cause, the evidence of the knowledge by plaintiffs of such bad character, in connection with the other facts proved, was admissible as affecting the *bona fides* of their transaction with him.

Oct. 1, 1877. THE COURT. It may be assumed that the signature of the defendant, as maker of the note in suit, was fraudulently obtained by the payee. This fact was clearly shown, and has been impliedly found by the jury. The testimony was also clear and uncontradicted that the plaintiffs became the holders of the note for value before maturity. The only question of fact upon which the defence hinged, was whether they were *bona fide* holders without notice of the fraud practised by Sullivan the payee. This question was submitted to the jury and passed upon by them adversely to the plaintiffs. The substance of their complaint is that there was no competent evidence to justify the Court in submitting the question.

It is not claimed that either of the plaintiffs was present at the time the note was given, nor was there a particle of direct evidence that they had any knowledge of the fraudulent conduct of Sullivan. On the contrary, Mr. Battles, who transacted the business for them, testified that they neither knew nor had reason to suspect it. For the purpose of affecting them with such knowledge the defendant relied entirely upon the facts and circumstances which he was permitted to prove under his first offer; and it was claimed that such a train of circumstances was established as justified the Court in submitting the question to the jury, whether the plaintiffs purchased the note with knowledge of the fraud practised by Sullivan. Assuming the facts and circumstances to be true, are they, singly or collectively, sufficient to justify the inference sought to be drawn from them? We think not. They are entirely consistent with honesty and good faith on the part of the plaintiffs and their ignorance of Sullivan's fraudulent conduct. It may be said they are not inconsistent with their knowledge of fraud, but that amounts to nothing unless they point in some degree to the conclusion sought to be established. We are unable to see that any natural inference or presumption of knowledge arises from them. If there is, it is so weak and inconclusive that it would be unsafe and improper to submit the question to the jury. At best it could be merely the subject of conjecture or speculation, and "mere speculative inferences are not allowable and cannot be regarded as evidence" (Goodman *v.* Simons, 20 Howard, 360.) No doubt great latitude should be allowed in the admission of circumstantial evidence for the purpose of proving participation in manifest fraud; but where the testimony is before the Court, it is their duty to see that it has at least a natural and reasonable tendency to sustain the allegations in support of which it is introduced—that it is of such a character as to warrant an inference of the fact to be proved, and amounts to something more than a mere basis for conjecture or vague speculation. If there is no sufficient evidence to justify an inference of the disputed fact, the Court has the right, and it is its duty, to withhold it from the jury. "Evidence may be legally admissible as tending to prove a particular fact which yet, by itself, is utterly insufficient for the purpose. It may be a link in a chain, but it cannot make a chain unless other links are added" (Howard Express Co. *v.* Wile, 14 P. F. Smith, 201.) So in England it is now settled that the preliminary question of law for the Court is not whether there is literally no evidence, but whether there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established. If there is evidence on which the jury can properly find the question for the party on whom the onus of proof lies, it should be submitted; if not, it should be withdrawn from the jury" (Ryder *v.* Wombwell, Law

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Rep. 4 Exch. 39; Jewell *v.* Parr, 13 Com. Bench, 916.)

Again, in determining whether a question of fact should be submitted to the jury on the evidence presented, the character or degree of the proof required should also be taken into consideration. The plaintiffs, in the present case, were the holders for value before maturity of negotiable paper. The presumption in their favor was that they were *bona fide* holders without notice, and to affect them with knowledge of such fraud as would defeat a recovery, the evidence should be clear. (Moorehead *v.* Gilmore, 27 P. F. Smith, 122.) In that case it is said that the latest decisions both in England and in this country have set strongly in favor of the principle that nothing but clear evidence of knowledge or notice, fraud or *mala fides* can impeach the *prima facie* title of a holder of negotiable paper taken before maturity. It is of the utmost importance to the country that the principle should be strongly adhered to, however hard may be its operation in particular cases. To the same effect are, Goodman *v.* Harvey (4 Adolph. & Ellis, 870), Goodman *v.* Simmons (20 Howard, 348), and Phelan *v.* Moss (17 P. F. Smith, 59).

Considering the facts and circumstances, relied on by the defendant, either singly or collectively, we are of opinion that they were insufficient to justify the inference sought to be drawn from them, and that they utterly failed to furnish that degree of proof which was required to impeach the *prima facie* right of the plaintiffs, and should not have been submitted to the jury. The ninth and tenth assignments of error are, therefore, sustained.

In addition to the insufficiency of the testimony to justify an inference of the facts to be proved, part of it was objectionable on another ground. The character of Sullivan for honesty and integrity in 1871–2 was irrelevant, and could have no other tendency than to mislead or prejudice the jury. All that was done by him in procuring defendant's signature to the note, so far as it tended to prove fraud, was relevant, but his general reputation for honesty was in no way involved in the issue.

The learned Judge, in that part of his charge covered by the second assignment, fell into an error, in saying to the jury that the plaintiffs ought not to recover "if there was any evidence tending to show that they were connected with or had any knowledge of the original fraud." This gave the jury an unwarrantable latitude. It by no means follows that any fact is to be accepted as true because evidence has been introduced tending to prove it. It frequently occurs that there is evidence tending to prove certain facts, but it often falls far short of establishing their truth.

There is nothing in any of the remaining assignments that calls for special notice. If the testimony had been such as to justify the submission of the question of notice, or knowledge of the fraud to the jury there would be no just ground of complaint.

Judgment reversed, and a *venire facias de novo* awarded.

Opinion by STERRETT, J. SHARSWOOD, J., absent.

Common Pleas—Law.

C. P. No. 1. April 13, 1878.

Jordan et al., Assignees, etc., v. Keller.

Affidavit of defence—Suit on a lost note—It is not sufficient that the copy filed should be "as near as can be ascertained"—Defendant is entitled to indemnity before judgment will be given against him on a lost note—This, notwithstanding the copy filed shows that the note is not negotiable.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit on a promissory note.

The note having been lost, the plaintiff filed this copy:—

Copy, *as near as can be ascertained*, of the promissory note upon which this action is brought:—

$12,562$\frac{20}{100}$. Harrisburg, Pa., Jan'y 1, 1876.

Two years after date I promise to pay to John A. Bigler twelve thousand five hundred and sixty-two and $\frac{20}{100}$ dollars, at the City Bank of Harrisburg, without defalcation, for value received.

(Signed) P. A. KELLER.

The plaintiff also filed the following copy of "acknowledgment subsequently made by the maker of the note:"—

Philadelphia, October 12, 1876.

The amount of the note given by me to John A. Bigler about the 1st Jan'y, 1876, including interest to the day of maturity, viz.: Jan. 1, 1878, was $12,562$\frac{20}{100}$.

P. A. KELLER.

The affidavit of defence suggested: That the copy filed does not entitle plaintiff to judgment for want of an affidavit of defence; and further, that since the note is either *lost, destroyed, or negotiated*, and cannot be produced and delivered to defendant upon payment, he is entitled at all events to indemnity against all and every liability arising thereupon, before judgment can be entered against him.

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James S. Williams, for the rule.

The copy filed, with the subsequent acknowledgment of the existence and amount of the note, is sufficient under the terms of the Act of March 28, 1835, § 2 (Purdon's Dig. 495).

The plaintiff is entitled to judgment without giving indemnity. To entitle the defendant to indemnity he must show affirmatively that the lost note was negotiable, and also that it was negotiated.

Pintard *v.* Tackington, 10 Johns. Rep. 104.
Rowley *v.* Ball, 3 Cow. 303.
McNair *v.* Gilbert, 3 Wend. 344.
Lazell *v.* Lazell, 12 Vt. 443.
Story on Prom. Notes, § 106.
2 Parsons on Notes and Bills, 290, and note *n*.

Negotiability will not be presumed although the note is alleged to have been "negotiated."

Hough *v.* Barton, 20 Vt. 455.

The copy filed is that of an unnegotiable note, and the defendant has not denied the correctness of the copy, nor alleged that the note was negotiable, therefore it is no defence in a suit against the maker, that the payee cannot deliver the note upon payment.

Wain *v.* Bailey, 10 A. & E. 616.
Price *v.* Price, 16 M. & W. 231.
Hough *v.* Barton, 20 Vt. 455.
Chitty on Bills, 293.
Chitty on Contracts (11th Am. ed.), 1138.

Where the lost note sued upon is not negotiable, or where, though negotiable, it is payable to order and unindorsed or specially indorsed, or where it is shown to have been destroyed, defendant can run no risk by payment without its delivery, and plaintiff is entitled to recover without giving a bond of indemnity.

2 Daniel on Negotiable Instruments, § 1481.
2 Parsons on Notes and Bills, 289.

Hood Gilpin (with him *C. Gilpin*), contra.

The copy filed does not purport to be a true copy of the instrument upon which suit is brought. Unless such a copy is filed, no judgment can be recovered.

Reigel *v.* Breidenhart, 1 T. & H. Prac. 385, *n*.
Shaw *v.* Baildon, Id. 383, *n*.
Wilson *v.* Kahn, 1 WEEKLY NOTES, 444.

Where an action is brought upon a lost note, indemnity must be offered before suit can be maintained. The remedy is an equitable one, and he who would have equity must do equity. The sufficiency of indemnity is for the Court.

Bisbing *v.* Graham, 2 H. 14.
Keyes's Appeal, 15 Sm. 196.
Yerkes *v.* Mooney, 1 WEEKLY NOTES, 433.
Foster *v.* Sandeman, 5 Phila. 133.
Snyder *v.* Wolfley, 8 S. & R. 328 (Lottery ticket).

C. A. V.

April 20, 1878. THE COURT. To take judgment for want of an affidavit of defence a copy of the instrument which creates the obligation to pay money must first be filed. Here the plaintiff files "a copy as near as can be ascertained." This is not enough.

The defendant very properly says that if he was satisfied that the note was not negotiable he would pay it although lost, but that question being left in doubt by the inability of the plaintiff to file an *exact* copy, he requires first to be indemnified.

Rule discharged.

Oral opinion by BIDDLE, J.

C. P. No. 1. June, 1875.

Meylert v. White & Braley and the Lancaster Fire Insurance Company et al., garnishee.

Foreign attachment—When it will lie—Garnishment—Foreign corporations cannot be made garnishees.

Rule to show cause of action and why a foreign attachment should not be dissolved.

A writ of foreign attachment was issued by plaintiff against the defendants and twenty-six fire insurance companies (twenty of which were incorporated by other States and foreign countries), garnishees. The above rule was entered on the plaintiff, who filed the following affidavit as a cause of action.

"A. P. Meylert, being duly sworn, says that he contracted with the defendants to trade certain real estate, situate in Sullivan Co., Pa., for their Lithography, Printing, Engraving, and Book Manufacturing Establishment and business in Buffalo, New York. A copy of their offer, which was accepted, etc., is hereto attached, and marked Exhibits 'A' and 'B.' That the defendants have broken their contracts and refused to comply with the same, whereby a right of action has accrued to the plaintiff. Deponent says that the real estate which he was to convey he contracted for at the price of fifty thousand dollars, and he is advised by his counsel that the measure of damages is the difference between the cost of said real estate to him, and the value of their property.

A. P. MEYLERT."

Exhibits "A" and "B" were letters, one from the defendants to plaintiff stating their terms of trade, the other from the plaintiff to the defendants accepting their offer. It also appeared that before an actual transfer of the properties took place, defendants' property was destroyed by fire, whereupon plaintiff brought this suit and issued the above writ, attaching the insurance money in the various companies.

D. C. Harrington showed cause.

This claim is capable of being reduced to a certainty; a foreign attachment will therefore lie.

Carland & Bierne *v.* Cunningham, 1 Wr. 228.
Strock *v.* Little, 9 Wr. 416.
Fisher *v.* Consequa, 2 Wash. C. C. 382.

A non-resident person may be made a garnishee if he can be served. A foreign corporation is a "person" liable to a suit of foreign attachment.

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The Acts of Assembly require foreign insurance companies doing business in this State to have a resident agent on whom service can be made.

Act of March 21, 1849, Purd. Dig. 287, § 30.
Act of April 4, 1873, P. L. 27, § 13.
Bushel *v.* Ins. Co., 15 S. & R. 173.

S. C. Perkins, contra.

Foreign attachment will not lie for speculative or unliquidated damages resulting from a breach of contract, but only such as may be reduced to certainty by a definite standard.

Strock *v.* Little, *supra.*
Clark's Exec. *v.* Wilson, 3 Wash. C. C. 560.
Hazard *v.* Jordan, 12 Ala. 180.

The damages that can be recovered here are necessarily unliquidated and wholly speculative, and as there is no allegation of fraud, can be but nominal. Foreign attachment, therefore, will not lie.

Meason *v.* Kaine, 17 Sm. 126.
Bitner *v.* Brough, 11 P. S. R. 127.
Dumars *v.* Miller, 10 Ca. 319.
Hertzog *v.* Hertzog, Ibid. 418.
McNair *v.* Compton, 11 Ca. 23.

Foreign corporations cannot be made garnishees.

Barron *v.* Morrison, 3 T. & H., Pr. 286.
Christmas *v.* Biddle, 1 H. 223.

The Acts of Assembly above quoted do not make the corporations liable to garnishment in respect to debts due by them to non-resident debtors.

Rule absolute.

A rule was afterwards entered to amend the affidavit to show cause of action, which was subsequently discharged.

(A writ of error was taken to the Supreme Court, but the case was afterwards settled.)

[See Eldridge *v.* Robinson, 4 S. & R. 548, and Jacoby *v.* Gogell, 5 S. & R. 450.]

Orphans' Court.

April 15, 1878.

Colehower's Estate.

Guardians and trustees—Where one is appointed a guardian by will, the evident intention of testator being to appoint a trustee, the appointment will be considered as that of a trustee.

Sur petition for citation to guardian to show cause why he should not file his account and answer.

After attaining the age of consent, Maggie J. Colehower, a minor, was permitted to make choice of a guardian, at whose instance a citation was issued, directed to the former guardian, directing him to appear and show cause why he should not file an account. The answer set up that on February 3d, 1865, David Evans, the respondent, was duly appointed guardian of the person and estate of the said minor. That the minor's estate was derived through the following clause in the will of Sarah E. Colehower, deceased, the mother of the minor:—

"I give, devise, and bequeath all the rest and residue of my personal estate, and the proceeds of my real estate which may have been sold, or if not sold, the said real estate, and also the brick house and lot of ground in which I now reside (after deducting the expenses of their education, clothing, &c.), unto my four children, Elizabeth, Charles T., Sallie B., and Maggie J., and their heirs, the same to be divided between them or the survivor of them, and the heirs of any deceased child, in equal shares or parts, when the youngest of my children, then living, shall have arrived at the age of eighteen years."

That the testatrix appointed respondent the executor of her will and guardian of the persons and estates of her minor children, and that on settlement of the estate of the said Sarah E. Colehower the sum of $6149.14 had been awarded to the respondent as guardian of the said minors. That the period for the division of the estate will not arrive until the youngest child shall have attained the age of eighteen years, and that until then the interest of the minor named in the petition cannot be ascertained.

H. M. Dechert, for the petitioner.

J. W. Barnard, contra.

April 27, 1878. THE COURT (after reciting the facts). The Act of April 8, 1833 (Pur. 411), which provides that every person competent to make a will, being the father of any minor child unmarried, may devise the custody of such child during his or her minority, or for any shorter period, raises a presumption that no person but the father may exercise that authority. The appointment of David Evans, as guardian by the will in question, would seem, therefore, at first sight, to be a nullity. But although she named him as guardian, the intention of the testatrix, as disclosed by the various provisions of the will, evidently was to constitute him a trustee for the benefit of her children. It was said in Vanartsdalen *v.* Same (2 H. 384), in the case of a testamentary appointment of a guardian by a grandfather: "It is plain the testator does not mean to interfere with the natural right of the father to the custody and care of his children. All that is intended is to commit the management of the estate to his executors, who are appointed guardians of the children. It is of no sort of consequence that he designates them as guardians, rather than as trustees or curators of the estate

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for the benefit of the infants. The will must receive such a construction as is beneficial to the minors, at the same time carrying out the intention of the testator."

It will not be denied that the testatrix had a right to couple with the disposition of her property such conditions as she chose to impose. Accordingly she left to her children an estate, and committed its charge and their maintenance to the respondent, whom she styled their guardian. By the terms of the will the present minor took a vested interest at the death of the mother, subject to be divested in the event of the minor's death under eighteen years of age without issue. (Deane *v.* Test, 9 Ves. 147, 152; Davidson *v.* Dallas, 14 Ves. 576.) The trust thus created in the guardian was intended to continue as an active trust until the happening of the contingency. In such a case the court will not take the trust out of the hands of one in whom the testatrix had placed it, and confide it to another, who can exercise no other or greater right over it than could be exerted by the original custodian. This was the doctrine of Barnett's Appeal (10 Wr. 392), supported by numerous authorities there quoted.

It may be objected to this that the moneys of the minors were actually awarded by the Orphans' Court to the respondent as guardian. But while it is true that the court adopted the term by which he was designated in the will, they surely did not intend to abridge any of the rights or to lessen any of the duties which had been created by that instrument. The rights and duties thus created were clearly those of a trustee, and with the will of the testatrix before them, it is not fair to presume otherwise than that the court awarded the fund to the respondent as a trustee for the minors. To take the share of the petitioner out of the hands of the respondent would lead to the embarrassment, in the case of her death before eighteen years of age, of a separate administration account, and a re-transfer of the fund, without any possible benefit as a compensation. For these reasons the prayer of the petition is refused.

Opinion by ASHMAN, J.

U. S. Circuit Court—Equity.

April, 1878.

National State Bank of Camden v. Pierce et al.

Injunction—Taxation of national banks located in another State—Term "located" defined—Acts of Assembly of 12 April, 1867; 2 April, 1868; 22 December, 1869; and 31 March, 1870.

For purposes of State taxation a national bank of the United States is not *located* within a State in which it carries on no business except that of receiving deposits.

Hearing sur bill and answer.

This bill was filed to restrain the tax collector of Philadelphia from collecting taxes for the past ten years, assessed by the bank assessors under the Acts of Assembly of 12 April, 1867 (P. L. 74), 2 April, 1868 (P. L. 55), 22 Dec. 1869 (P. L. for 1870, 1373), and 31 Mar. 1870 (P. L. 42), upon the capital stock of the National State Bank of Camden. The bank, while doing business in Camden, New Jersey, opened an office in the city of Philadelphia for the purpose of receiving deposits which at the close of each day were carried to the bank in Camden. The plaintiffs averred that no notes had been discounted or money loaned or any banking business done by them in the State of Pennsylvania, and that they had already paid a similar tax in accordance with the laws of New Jersey.

The Act of April 12, 1867, § 1, provides for a tax on "all the shares or stocks held by any person in any bank incorporated by or in pursuance of any law of the government of the United States," and in § 2, provides that assessors shall visit all the United States banks "located within the county or district, for which the assessor is appointed [and thereupon] assess all of the stockholders resident within the county or district for which he is appointed." Sect. 4 provides for the assessment of "shares of stock of said banks held by persons resident without the proper districts." The Act of 1869 provides for the taxation of United States Banks "located in this commonwealth." The Act of 1870 provides for the taxation of the shares of national banks "located within this State."

John Goforth, for the plaintiffs.

Samuel Gustine Thompson, contra. The Acts of Assembly provide for a tax upon the capital stock of all banks *located* in this State, and include such cases as this. If the plaintiffs do business here, they ought to pay taxes.

April 23, 1878. THE COURT. Decree for the plaintiffs, and perpetual injunction granted as prayed for.

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WEEKLY NOTES OF CASES.

VOL. V.] *THURSDAY, MAY 23, 1878.* [No. 17.

Supreme Court.

Jan. '76, 102. February 7, 1878.

Montgomery's Appeal. Wharton's Estate.

Decedents' estates—Executors and administrators—Commissions—When five per cent. excessive—When a gross sum will be awarded as compensation for services—Executor's accounts.

Although a certain percentage on the amount of an estate is often a convenient and fair method of computing the compensation of executors or trustees, the real inquiry in every case should be what have the services rendered been actually worth.

A trust company, exempted by law from responsibility for loss arising from depreciations in value of stocks and securities received by them in a fiduciary capacity, was appointed executor of an estate, the appraised value of which was $34,000. Subsequent dividends and interest received increased the amounts with which they charged themselves in their account to $42,000. The bulk of the estate remained unconverted in the hands of the executors, and at the request of the residuary legatee was to be transferred to her in specie. The Orphans' Court having allowed the executors commissions at the rate of 5 per cent. on the amount with which they charged themselves in their account, this allowance was reduced by the Supreme Court to a gross sum of $500 with an additional $100 for counsel fee.

It was further decreed that the executors, also being trustees under the will as to $20,000 of the estate for certain purposes, will be entitled to an additional allowance of $200 when they shall have converted $20,000 of the assets of the estate into cash and passed it to the credit of the trust estate, but this allowance is not to be credited upon their account until conversion has actually been accomplished.

Appeal from the Orphans' Court of Philadelphia County.

This was an appeal by John T. Montgomery and Alida G. his wife, from a decree in the estate of Edward Wharton, deceased.

The following facts appeared: Edward Wharton died in 1873, having made his last will, by which, after making a provision in trust of $20,000 for a friend and an infant son, he devised and bequeathed all the residue of his estate to his sister, Alida G. Montgomery, and appointed the Pennsylvania Company for Insurance on Lives, etc., executors. The executors filed their account, showing that the estate left by the decedent consisted almost entirely of stocks appraised at $34,460, which amount was increased by dividends, interest, etc., received up to the time of filing the account, to $42,385.

The executors claimed commissions upon this latter sum at the rate of five per cent. The auditor to whom the account was referred, after stating that it was a mistaken view to suppose that executors' commissions were to be paid *as commissions*, and not as compensation for labor, care, and responsibility, and that a gross sum in accordance with the value of the services rendered, might be awarded to them (*In re* Harland's Accounts, 5 Rawle, 330), reported as follows:—

"It is in view of this decision, the facts above referred to, and the peculiar fitness of the case in hand for departing from the custom of paying the executors in the form of commissions, that your auditor has determined upon the award of a sum in gross to them for their compensation. In order that your honorable Court may the more readily and better understand the whole ground of your auditor's determination, it will be necessary to refer to some facts appearing in the account and others coming to his notice through the counsel of the parties in interest. An examination of the account will show that the estate, as it came to the executors' hands, consisted wholly of stocks and a small amount of furniture. The subsequent receipts were only of stocks and cash dividends and interest. The debts paid were seven in all, besides the one contested before your auditor; and these debts, he is satisfied from what occurred before him, were paid with the approval, and after the examination of the residuary legatee, who also took the furniture, at the appraised value. When the original account was filed, none of the stocks had been converted into cash, but the supplemental account shows the sale of some, and under the decision above made with reference to the $20,000.00 legacy, it will be necessary to convert enough of them to provide that fund. It appears then that all but about $16,000 worth of the stocks have been or will have to be converted into cash by the executors."

Then, after stating that, under the ruling of Stearly's Appeal (2 Wr. 525), and McCausland's Appeal (Id. 470), the executors could not claim compensation for an extra risk said to have been incurred by them in not changing stock into a legal investment, he continued: "Under all the circumstances of the case, the almost total absence of authorized responsibility and the very slender services performed, your auditor is of the opinion that the accountants would be liberally compensated by the sum of $500, and this he accordingly awards them. The credits claimed, therefore, of $2095.26 and $11.48 are refused, and it is also ordered that the accountants allow interest on these sums at the rate of 4 per cent. from the time

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they were credited with them respectively. With these exceptions, the credits claimed in the account and supplemental account are allowed."

To this report the executors filed exceptions, which were sustained in the Orphans' Court, HANNA, J., saying: "The auditor has examined with great care the questions presented to him, and conscientiously performed the duties assigned to him, but we are obliged to disagree with his views upon the subject now brought to our notice.

"In Harland's accounts (5 Rawle, 330), GIBSON, C. J., says that the compensation of accountants, though usually awarded in the form of commissions, is not determinable by any established practice or rule, being graduated to the responsibility incurred, the amount of the estate, and the sum of the labor expended. Recognizing the principle thus announced, executors and other trustees, for the faithful performance of the *ordinary* duties of the trust, have generally been compensated by a commission of five per cent. upon the amount of the personal estate, and two and one-half per cent. upon the proceeds of real estate. This has become the established practice and rule. And where additional trouble has been occasioned in the settlement of the estate, an increased commission has been frequently allowed.

"In Robinson's Estate (5 Phila. Rep. 99), it was decided by this Court, LUDLOW, J., in view of want of proper care and use of certain moneys of the estate by the executor, though under a claim of right, that his commissions should be reduced to three per cent. And by reason of his responsibilities for certain securities, investments of the testator, he was allowed two and one-half per cent. as custodian of the certificates. In the late case of Eshleman's Appeal (24 Sm. 42), the estate, consisting of realty and personalty, amounted to about $75,000, and a commission of five per cent. was allowed upon the personalty, and two and one-half per cent. upon the proceeds of the real estate. We think the general rule mentioned applicable to the present estate. There were no extraordinary services performed, but, as in Eshleman's Appeal, it was "attended with the quantity of trouble, care, and responsibility, which the settlement of intestates' estates ordinarily imposes." The executors here are entitled to the same compensation as would be allowed individuals. That they are a corporation does not create any distinction. The same duties are required, and similar responsibilities incurred. Nor can they then be expected to execute trusts without just compensation. They incur expense for reliable officers, clerks, and other employés; are subject to taxation of their real and personal estate, and the individuals composing the corporation are entitled to a return for the risk of the capital invested, and liable for the honesty and careful management of their employés."

A decree was entered awarding the executors the sum claimed by them. From this decree Mrs. Montgomery, the residuary legatee, and her husband appealed.

John Cadwalader, Jr., for the appellants.

The allowance of five per cent. commissions on personal estate in the executor's hands, the greater portion of which was invested in securities merely to be transferred to the legatee, was excessive.

Pusey *v.* Clemson, 9 S. & R. 204.
Walker's Estate, 9 S. & R. 223.
Stevenson's Appeal, 4 Wh. 98.
Whelen's Appeal, 20 Sm. 431.

Especially so, in view of the fact that by the Act of April 6, 1870 (P. L. 986), the Pennsylvania Company were specially exempted from liability for the depreciation of securities withheld by them from conversion.

Until the trust account for the $20,000 is settled, they certainly have no claim for commissions upon that sum.

The course of the auditor in awarding a gross sum for compensation instead of a percentage is fully sustained, not only by the case of Harland's Accounts (5 Rawle, 330), but by the late case of Carrier's Appeal (29 Sm. 230).

John G. Johnson, contra.

No evidence was produced before the auditor as to the nature of the executor's services, etc., and he had no right to undertake to weigh or consider them.

Executors in Pennsylvania are allowed two and a half per cent for the mere responsibility of the office, apart from the trouble. The *ordinary* trouble of administering an estate entitles them to a similar percentage additional in estates less than $100,000 as compensation.

Stevenson's Estate, 4 Wh. 98.
Gable's Appeal, 12 Casey, 395.
Eshelman's Appeal, 24 Sm. 42.

There is nothing in this case to take it out of the ordinary rule. The estate was invested in hazardous stocks, which the executors held until the last moment, and then converted the major part of them at prices greatly above the appraised value.

In all the cases in which an allowance of less than five per cent. was made, there were circumstances of an exceptional character, which rendered a smaller allowance proper.

March 11, 1878 THE COURT. The compensation of a trustee of any character may be arrived at, as a matter of convenience, by the way of a percentage on the amount of receipts and disbursements. But after all, on all authority, it is a question not of percentage but of compensation. When the Court has fairly responded to the interrogatory, how much has the trustee earned, it has discharged its whole duty in the premises.

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It, therefore, comes to nothing to say the percentage is large or the percentage is small as compared with the estate, if the executor has received neither less nor more than what his services are worth.

This is, in effect, but a restatement of the doctrine of Harland's Appeal (5 Rawle, 323). GIBSON, C. J., in speaking of this matter, says that though compensation is "usually awarded in the form of a commission, the rate is not determinable by any established practice or rule, being graduated to the responsibility incurred, the amount of the estate, and the sum of the labor expended. It may be awarded even in a gross sum, according to a common practice in the country, which I take to be the preferable one, as it necessarily leads to an examination of the nature, items, and actual extent of the services, which the adoption of a rate per cent. has a tendency to leave out of view." So it is said by STRONG, J., in McCausland's Appeal (2 Wright, 466), "commissions are given as a compensation for labor and responsibility, and where neither the one has been performed nor the other incurred, there is nothing to be compensated." This same general idea runs through all the cases, and it is useless to enumerate them. Whilst a percentage is constantly spoken of and used, because of its convenience, yet it is compensation, nothing more nor less, that is steadily kept in view.

Our present inquiry is, was the allowance by the Orphans' Court to the Pennsylvania Company for the Insurance on Lives, etc., a fair and just compensation for the services rendered by it as executor in the settlement of the estate of Edward Wharton, deceased? A review of the facts, as presented to us by the auditor and the accounts filed by the appellee, warrant us in saying it was not, that it was much more than was earned. Five per cent. was charged and allowed on forty-one thousand nine hundred and five dollars, the whole estimated value of the estate. This estate, excepting one hundred and six or seven dollars' worth of furniture, passed to the residuary legatee at the appraised value, consisted wholly of stocks and loans, and of these an amount, not exceeding in value four thousand dollars, had been converted into cash at the time the accounts were filed. Debts and expenses of various kinds, amounting to about five thousand dollars, had been at that period paid, and the stock dividends and interest on the loans had been collected.

If to these we add the ordinary services of proving the will, appraising the assets, filing the inventory, etc., we have the sum total of all that was done by this corporation for this estate. When, in connection with this meagre array of services, we consider the fact that, by an Act of Assembly, this corporation is relieved of all responsibility, which otherwise might attach to it from a depreciation of the stocks whilst in their possession, we cannot but think that it was far overpaid in the charge and allowance of two thousand and ninety-five dollars in addition to one hundred dollars as a counsel fee. We incline rather to approve the auditor's award of five hundred dollars, with the counsel fee, as a more fair and just compensation.

As we are not certainly informed whether, since the filing of the accounts now in hand, the executor has converted stocks sufficient to meet the legacy of Mrs. Lawrence, we may add that if this has been done, or if not so done, when such conversion is made, and the proceeds thereof passed to the credit of the trust estate, an additional allowance may be made to this executor in a sum not exceeding two hundred dollars, to be paid out of the residuary estate. It is to be understood, however, that this is to be credited on the executor's account as of the date when the conversion of the stock into cash has been accomplished, and the proceeds passed to the trust, that it is not to be dated back so as to anticipate interest due to the estate, for this is a method of anticipating the compensation which may result from future services that is not commendable.

The decree of the Orphans' Court, so far as it embraces the compensation of the executor, is now reversed at the costs of the appellee, and the report of the auditor is restored and confirmed.

Opinion by GORDON, J. WOODWARD, J., absent. PAXSON, J., dissents.

Oct. & Nov. '77, 64. Nov. 12, 1877.

Hindman's Appeal.

Domicile — What constitutes — What acts prove a change of domicile — Auditor's report — When the findings of auditor as to matters of fact are subject to review in Supreme Court.

A man's domicile is that place in which he has fixed his habitation without any present intention of removing therefrom.

Per MERCUR, J. Vattel's definition of domicile as "a fixed place of residence, with an intention of always staying there," is too limited to apply to the migratory habits of the people of this country. So narrow a construction would deprive a large proportion of our people of any domicile.

The ascertainment of a man's domicile depends not upon proving certain facts, but whether all the facts and circumstances, taken together, tending to show that a man has his home or domicile in one place, overbalance all the like proofs tending to establish it in another.

Abington *v.* North Bridgewater, 23 Pick. 170, followed.

A mere intention to remove permanently, without an actual removal, works no change of domicile; nor does a mere removal from the State without an intention to reside

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elsewhere. But when a person sells all his land, gives up all his business in the State in which he had lived, takes his movable property with him, and establishes his home in another State, such acts *prima facie* prove a change of domicile. Vague and uncertain evidence of declarations tending to show a contrary intention, not acted upon, cannot remove the legal presumption thus created.

When an auditor reports facts directly proved by the witnesses, his report is entitled to great weight; but when the fact is simply a deduction from other facts reported by him, such deduction will be subject to review by the Supreme Court, and corrected if error be discovered therein.

Appeal from a decree of the Orphans' Court of Washington County, dismissing exceptions to the report of an auditor appointed to make distribution of the estate of George Hindman, deceased, and confirming the report.

The auditor found that decedent was born in Brooke County, West Virginia, where he resided till 1869, when he moved to a farm which he had purchased in Hancock County, in the same State, and resided there till the spring of 1871. He then sold his farm and went to live with his brothers-in-law in Pennsylvania, and remained with them until his death, in June, 1872. He was a bachelor, and died intestate. His estate was all personal property, which, so far as it was of any value, he had brought with him to Pennsylvania. When he first came to this State, he told his brother-in-law that he thought of buying a farm in Brooke County, West Virginia, and he wanted to stay with him till he could suit himself. He afterwards refused to be assessed, saying he did not want to become a citizen of Pennsylvania, and he did not intend to pay any tax here. He said he was going to return and buy land in West Virginia, and several times went to look at different farms there. He said he did not like the laws of Pennsylvania, especially the collateral inheritance tax law, and did not expect to make this State his permanent residence. (Some additional facts are stated in the opinion of the Supreme Court, *infra.*)

The auditor, upon the whole evidence, reported, as a fact, that the decedent was in Pennsylvania for a temporary purpose only, and not to make it his permanent residence; that there was no actual change of domicile from West Virginia, and, consequently, that the distribution of his estate should be made in accordance with the intestate laws of that State. The administrator filed exceptions to the report, which the Court (ACHESON, P. J.) overruled, and decreed distribution to be made as recommended by the auditor. The report having been re-committed to the auditor, he filed a second report, making distribution in accordance with this decree, which report the Court confirmed. The administrator took this appeal, assigning for error, *inter alia*, the action of the Court in confirming the auditor's report.

D. F. Patterson (with him *John A. Campbell*), for appellant.

The facts found by the auditor and set out in his report show that there was no question before him involving the credibility of witnesses, and hence no peculiar weight is to be attached to his finding.

Phillips's Appeal, 18 Sm. 130.

If the acts of a party are in manifest conflict with his declarations, his intention must be determined by his acts.

Butler *v.* Farnsworth, 4 Wash. C. C. 101.
Butler *v.* Hopper, 1 Wash. C. C. 499.
Holmes *v.* Greene, 7 Gray, 299.
Bruce *v.* Bruce, cited 1 Amer. Lead. Cas. 897.

As to what is domicile, see—

Story's Conflict of Laws, § 43.
Carey's Appeal, 25 Sm. 205.
Grier *v.* O'Daniel, 1 Binney, 349; 1 Amer. Lead. Cas. (5 ed.) 877.
Ennis *v.* Smith, 14 Howard, 423; S. C., 20 Curtis, 263.

As to what constitutes a change of domicile, see—

Story's Conflict of Laws, §§ 46, 49.
Greene *v.* Windham, 13 Maine, 225; cited 1 Amer. Lead. Cas. 889.
Sears *v.* City of Boston, 1 Metcalf, 250.
Wilbraham *v.* Ludlow, 99 Mass. 587.
Harris *v.* Firth, 4 Cranch. C. C. 710.
Hampden *v.* Levant, 59 Maine, 557.

J. D. Braden (with him *Miller*), contra.

Jan. 7, 1877. THE COURT. All the assignments of error relate to the question of George Hindman's domicile at the time of his death. They will therefore be considered together.

Vattel defined domicile as a fixed place of residence, with an intention of always staying there. This definition is too limited to apply to the migratory habits of the people of this country. So narrow a construction would deprive a large proportion of our people of any domicile. The better definition is, that place in which a person has fixed his habitation without any present intention of removing therefrom. (1 Bouv. Law Dic. 489; Story's Conf. of Laws, § 43; Putnam *v.* Johnson *et al.*, 10 Mass. 488; Greene *v.* Windham, 13 Maine, 225; Carey's Appeal, 25 P. F. Smith, 201.)

The evidence in this case shows that George Hindman was born in Brooke County, West Virginia, where he resided until 1869. Then he removed to a farm which he had purchased in Hancock County of the same State. There he resided until March, 1871. He then sold his farm, which was all the real estate he owned, and went to live with his brother-in-law, McClurg, in Washington County, Pennsylvania. He never married, and had no family. His property was all in personal estate. He took with him a horse, and

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a box containing his notes, bonds, and valuable papers. Soon afterwards he brought his other horse to McClurg's, leaving in Virginia only some farming implements of little value. He continued to live with McClurg, paying his board, and there made his home until April, 1872. He then went to live with Gibson, another brother-in-law, in Washington County, taking with him his box, a bureau, clock, and table. There he continued to live until the time of his death, 22d June, 1872. All these facts appear by the evidence and by the auditor's report, and are uncontradicted. Although he thus resided and made his home in this State for about fifteen months, and died here, yet the auditor and the Court below found that he was domiciled in West Virginia at the time of his death. They appear to have reached this conclusion from his declarations, made while he was residing in Pennsylvania.

The evidence shows that after he thus removed from West Virginia, he at different times made visits to friends in that State, yet he always returned to the room which he retained at the house of his brother-in-law in Pennsylvania. Here was his property and his home. He had no house, no residence, no property, no family, in the State from which he had removed. When he sold the farm on which he had lived, he gave up possession and removed therefrom. He thereby gave up that domicile. He then made no new abode, and established no new residence, in that State. He gathered up his property and with it departed, and located in another State. This unequivocal act of moving from the State, and taking up his residence in another State, is very strong evidence of the establishment of a domicile in the latter. Its effect is not destroyed by his expressed and indefinite intention to go back into West Virginia at some future time and there buy land. Nothing less than a present intention to retain his domicile there would prevent its transfer to the State into which he moved. He did not come into Pennsylvania for his health, or as a traveller, nor for any other particular business of a temporary nature.

No person can have more than one domicile at the same time in regard to succession to personal property. (Abington *v.* North Bridgwater, 23 Pick. 170.) It is true that a domicile once gained remains until a new one is actually acquired, *facto et animo*. (Story on Confl. of Laws, § 47.) The fact and intention must occur; yet the former may prove the latter.

A mere intention to remove permanently without an actual removal works no change of domicile; nor does a mere removal from the State without an intention to reside elsewhere. But when a person sells all his land, gives up all his business in the State in which he had lived, takes his movable property with him and establishes his home in another State, such acts *prima facie* prove a change of domicile. Vague and uncertain evidence cannot remove the legal presumption thus created. (Story on Con. of Laws, § 46: Wilbraham *v.* Ludlow, 99 Mass. 587; Harris *v.* Firth, 4 Cranch, C. C. 710.)

The evidence of Hindman's declarations show he had a fickle and uncertain mind. Sometimes he expressed an intention to buy a farm in Brooke County, at others in Hancock County, then in Washington County; sometimes complaining of the collateral inheritance tax of Pennsylvania, and declaring that he did not want to become a citizen of this State, but would go back and make Virginia his home, and that he never intended to pay any tax in this State. He refused to be assessed or registered, and did not vote in Pennsylvania. It, however, does not appear after he moved here that he was either assessed or registered in West Virginia or voted there. Soon after paying his taxes, the 1st of November, 1871, assessed against him in Virginia prior to his sale, he said to Gardner it was the last tax he ever expected to pay in Virginia, and soon thereafter declared he did not want land, as he could do better with his money than by farming. Again in January, 1872, he said to Samuel Hindman that he wanted no more land, and would make his home in Pennsylvania. After this he again talked of buying land in Virginia. Without giving more of the evidence in detail, the whole of it tends to show that he gave up his domicile in West Virginia and acquired one in Pennsylvania; that at first he intended to purchase a farm, and wherever that should be to go and reside on it. While he talked of purchasing in each State, yet his preference appeared to be in favor of one in Virginia.

He seems to have avoided all assessment and all taxes everywhere for the time he lived in Pennsylvania. He made no purchase anywhere. As time ran on he became less desirous of purchasing land. During the last two or three months of his life he made no mention of land. As he had only indicated an intention of returning to Virginia in connection with his purchasing land there, when he ceased to talk about the purchase of land, he said no more about returning to Virginia. It was said in Abington *v.* North Bridgewater (*supra*), "it depends not upon proving particular facts, but whether all the facts and circumstances, taken together, tending to show that a man has his home or domicile in one place, overbalance all the like proofs tending to establish it in another." Applying this rule, which we believe a correct one, we think all the facts and circumstances proved clearly preponderate in favor of his domicile in Pennsylvania.

The conclusion to which we have arrived must not be understood as changing the rule in regard

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to the force to be given to an auditor's finding of facts. When he reports facts directly proved by the witnesses, his report is entitled to great weight. But when the fact is simply a deduction from other facts reported by him, his conclusion is the result of reasoning, of the correctness of which we are as competent to judge as he. We will, therefore, review such result, and correct it if we discover error therein. (Phillips's Appeal, 18 P. F. Smith, 130; Moyer's Appeal, 27 Id. 482.)

The learned Judge erred in the effect he gave to the declarations, followed by no corresponding action changing the domicile. The distribution must be made according to the intestate laws of Pennsylvania.

Decree reversed and the record remanded, with instructions to decree distribution conformably with this opinion.

Opinion by MERCUR, J.

Feb. '77, 47. March 11, 1878.

In re election of A. P. Barber, Prothonotary, etc.

Constitutional law — Contested election — Holding over of incumbent pending contest — Necessity of issuing commission to the prothonotary by the Governor — What constitutes a repeal of a statute by implication — Art. VIII. § 17, of the Constitution — Acts of July 2, 1839 and May 19, 1874.

The provisions of the Act of July 2, 1839, relating to contested elections, are not repealed, but are modified, by the Constitution and the Act of May 19, 1874.

T. was duly elected to, commissioned, and qualified to hold, and held, the office of prothonotary. At the general election preceding the close of his term, B. was returned as elected to, was commissioned and qualified and claimed to hold the same office. T. contested his election, and remained in office pending the contest. The Court of Common Pleas awarded judgment of ouster against T.

Held (reversing the Court below) that the Act of July 2, 1839, regulating contested elections necessitates the perfecting of title to the office of prothonotary by the issuing of a commission, and that the commission granted to B. pending the contest was unlawfully issued.

For granting commissions to the prothonotary and other county officers, there is sufficient warrant in the Act of July 2, 1839, which, for this purpose, the new Constitution and the legislation under it have left entirely unimpaired.

To repeal a statute by implication there must be a repugnancy between the provisions of the new law and the old so positive as to be irreconcilable.

Where a later statute is absolutely repugnant to a former one only in part, it repeals the former one only so far as the repugnancy extends, and leaves all the remainder in force.

Error to the Common Pleas of Luzerne County.

Case stated, in the nature of a *quo warranto*, as follows: "On March 24, 1875, S. W. Trimmer was duly elected and commissioned to hold the office of prothonotary of the Court of Common Pleas of Luzerne County until the first Monday in January, 1877, and until his successor should be duly qualified. In pursuance thereof the said Trimmer held said office and still claims to hold it against the protest and demand of A. P. Barber. At the general election held November 7, 1876, A. P. Barber was returned as duly elected to the said office, and was on December 7, 1876, commissioned by the Governor to hold the said office from the first Monday in January, 1877 for the term of three years, and until his successor shall be duly qualified, and the said Barber has given the bond and taken the oath prescribed by law and claims to be duly qualified to hold and exercise the said office. On December 6, 1876, a petition was filed in the Court of Quarter Sessions to contest the election of the said Barber, which is still pending, and notice of which was given to the Governor on December 7.

The question to be determined is, whether Barber or Trimmer is entitled to hold the office of prothonotary during the contest aforesaid.

The Acts relied on by the contestants were as follows:—

Act of July 2, 1836, § 3. It shall be the duty of the return judges of the election for representatives for each county, when they meet to make out returns for representatives . . . . . also to make out true duplicate returns of the election of prothonotaries . . . . to be filed in his office. And it shall be the duty of such return judges to give to each person elected to any or all of said offices a certificate of his election; and the persons who appear by such certificates and returns to be duly elected, shall be commissioned by the governor for the respective office or offices for which they may have been elected for three years if they shall so long behave themselves well, and until their successors shall be duly qualified: Provided, That no commission shall issue, within the lapse of thirty days after the election, and shall commence and take effect from the first day of December next after such election, *unless when the same is suspended by reason of a contest under the fifth section of this Act, in which case the commission shall take effect from the time of the legal qualification of the officer under the same, and expire on the first day of December, as in other cases.*

§ 5. The returns of the elections, under this Act, shall be subject to the inquiry, determination, and judgment of the Court of Common Pleas of the proper county, upon complaint in writing, of thirty or more of the qualified electors of the proper county, of undue election or return of any such officer, two of whom shall take and subscribe an oath or affirmation that the facts set forth in such complaint are true to the best of their knowledge and belief. And the said Court shall, in judging concerning such election, proceed upon the merits thereof, and shall determine finally concerning the same, according to the laws of this Commonwealth; and the prothonotary of the said Court shall immediately certify to the Governor the decree of the said Court on such election, and in whose favor such contested election has determined. And the said Court shall hear and determine such contested election, at the next term after the election shall have been held; and such

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complaint shall not be valid or regarded by the Court, unless the same shall have been filed in the prothonotary's office within ten days after the election; and in case such complaint is filed within the time above mentioned, it shall be the duty of the prothonotary to transmit by mail immediately, to the Governor, a certified copy thereof; and in such case, *no commission shall be issued until the Court shall have determined and adjudged on such complaint as aforesaid.*

The Act of May 19, 1874, § 1, providing for contested elections divides the cases into four classes; the office of prothonotary being included in the fourth class. It then enacts:—

§ 16. Cases of the fourth class shall be tried and determined by the Court of Quarter Sessions of the peace of the county in which the election contested shall be held.

§ 18. The commencement of proceedings in every case shall be by petition, which shall be made and filed as herein required, within thirty days after the day of election. The petition shall concisely set forth the cause of complaint. . . . . In cases of the second class the petition shall be signed by . . . . and in cases of the fourth class by at least twenty-five, and shall be verified by at least five of the petitioners by affidavit. . . . . The petition shall be presented to the Court or law judge having jurisdiction. . . . . Notice of the filing of the petition, with a copy thereof, shall be served upon the person whose right of office shall be contested, together with a rule to answer at the time fixed for hearing, which notice, copy, and rule shall be served such length of time before the day fixed for hearing as the said Court or judge shall require, not exceeding forty days in cases of the second and third classes, and in all other cases not exceeding thirty days.

(The Act of May 19, 1874, makes no mention of notice to the governor of a contest or of the issuing of a commission to the prothonotary.)

On January 19, 1877, the Court gave judgment of ouster against Trimmer, who thereupon took this appeal.

Stanley Woodward (*John Lynch* and *C. L. Lamberton* with him), for plaintiff in error.

No commission could legally issue to Barber while the contest was pending. The laws which define the manner, time, and place of conducting the election of prothonotary, the method of contesting an undue election, and the limitations upon the power of the executive in issuing commissions pending contests, are embodied in the Acts of July 2, 1839 (P. L. 559), and May 19, 1874 (P. L. 208). The former Act is not repealed, but only modified by the latter: it has not been expressly repealed, and there is no such inconsistency as to repeal it by implication. In the absence of such inconsistency, the tendency would be to sustain the former Act.

Jefferson Co. *v.* Reetz, 6 Sm. 44.
Howard Association's Appeal, 20 Id. 346.

The Act of 1874 was intended to carry out article VIII. § 17 of the constitution of 1873. It aimed at a classification of the several classes of contested elections, and a distribution of jurisdiction among the Courts. It supplemented and amended the Act of 1839. If the Act of 1874 were held to entirely repeal the Act of 1839, it should, on the same ground, repeal the Act of April 14, 1834 (P. L. 355), which is the only law in existence prescribing the bond, oath, and mode of qualification for the office. The general structure of the Act of 1874 shows that in all cases of contests the commission must await the final result, and it leaves untouched the special provision for that contingency contained in the Act of 1839.

Henry W. Palmer (*E. S. Osborne* and *A. T. McClintock* with him), for defendant in error.

Under a contest, as provided for by the Act of 1874, no mere legislative enactment could suspend the right of the person returned as elected. The return is *prima facie* evidence of the title to the office, and under it he is entitled to hold the office until ousted by judicial decree. The title is complete under the constitution. No commission is required, and the attempt of the legislature to suspend or abridge his vested rights would be unconstitutional.

The Act of 1874 repeals the Act of 1839, because: (1) it is an affirmative statute plainly inconsistent with the former statute; (2) it introduces a new and uniform system of contesting elections, complete in itself and capable of general application.

Johnson's Estate, 9 C. 511.
Gwinner *v.* L. & D. G. R. R. Co., 5 Sm. 126.

The Act of 1874 shows that in no cases, excepting those of an elector and a judge, is the person returned as elected to an office to be restrained from the exercise of that office pending a contest. The special reasons of public policy which justify the exceptions show conclusively that in the non-excepted cases the officer is to assume and continue in the exercise of his duties without a commission.

The reason of the legislature in omitting in the Act of 1874 the prohibition upon issuing a commission pending a contest, is found in the fact of the repeated contests carried on in bad faith and for the purpose of enabling the incumbent to hold over and secure the emoluments.

March 25, 1878. THE COURT. Proceedings to contest the election of Barber as prothonotary of the Court of Common Pleas of the county of Luzerne, were begun on the 6th of December, 1876, twenty-nine days after the date of the election. On the 7th of December notice of those proceedings was given to the governor, who issued a commission to Barber the same day. The question as to the effect of the commission is presented by this record. S. W. Trimmer, in pursuance of a previous election, had been commissioned as prothonotary until the first Monday of January, 1877, and until his successor should be duly qualified. In a case stated in the nature of a *quo warranto* between Barber as plaintiff

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and Trimmer as defendant, the Common Pleas decided that Barber was entitled to hold and exercise the office pending the contest, and entered judgment of ouster against Trimmer. In the determination of this question the construction of the provisions relating to contested elections of the Act of 2d of July, 1839, of the constitution of 1873, and of the Act of 19th of May, 1874, is necessarily and directly involved. The 3d section of the Act of 1839 prescribed the manner in which returns of the election of county officers should be made out, filed in the prothonotary's office, transmitted to the secretary of the Commonwealth, and delivered to the successful candidates. Thereupon commissions by the governor were required to be issued.

The proviso to the section contained this explicit direction: "No commission shall issue, within the lapse of thirty days after the election, and shall commence and take effect from the first day of December next after such election, unless when the same is suspended by reason of a contest under the fifth section of this Act, in which case the commission shall take effect from the time of the legal qualification of the officer under the same, and expire on the first day of December as in other cases." This direction was repeated in the concluding clause of the fifth section of the Act, which regulated the mode in which election contests should be heard and determined. The language was: "In such case no commission shall be issued until the Court shall have determined and adjudged on such complaint as aforesaid."

By the third section of the sixth article of the constitution of 1838, it was made the duty of the governor to commission the prothonotaries and clerks of the Courts elected in the several counties and districts of the Commonwealth. No such provision is contained in the constitution of 1873. Whether the omission was casual or designed, direct authority is given to issue commissions to no officers except justices of the peace and aldermen by the 11th section of the fifth article; judges of the Supreme Court, when two or more shall be elected at the same time, by the 17th section of the same article; the president judge of the Court of criminal jurisdiction for the counties of Schuylkill, Lebanon, and Dauphin, as a judge of the Court of Common Pleas of Schuylkill County, by the 15th section of the schedule; and associate judges not learned in the law, by the 16th section of the schedule. The duty to commission judges of the Supreme Court would seem to be implied, however, from the provision of the second section of the fifth article, that "each judge whose commission shall first expire shall in turn be chief justice." The directions contained in the 16th, 18th, and 19th sections of the schedule, that of the law judges of the several Courts of Common Pleas of Philadelphia and Allegheny and throughout the State the oldest in commission shall be president judge, also indicate an intention on the part of the convention to make no change in the mode by which the title of these officers had immemorially been authenticated. The constitution makes no provision whatever for commissions to the judges of the separate Orphans' Courts, the police magistrates of Philadelphia, or county officers of any grade. The omission in the case of the judges, however, has been supplied by the Act of the 19th of May, 1874, relating to the organization and jurisdiction of Orphans' Courts, and commissions to the Philadelphia magistrates have been authorized by the sixth section of the Magistrates' Courts Act of the 5th of February, 1875. The second section of the schedule maintains in force all laws not inconsistent with the constitution. For granting commissions to prothonotaries and other county officers there is sufficient warrant to the governor in the Act of 1839, which, for this purpose, the constitution and the legislation under it have left entirely unimpaired. Upon this subject the Act of the 19th of May, 1874, is equally silent with the constitution. It transfers the jurisdiction to hear and determine contested elections from the Common Pleas to the Quarter Sessions; it authorizes a petition by twenty-five qualified electors instead of the thirty required by the Act of 1839; it requires a verification of the petition by the oaths of five instead of two qualified electors; it extends the time allowed for filing the petition to thirty days instead of ten; it omits the direction to transmit a certified copy to the governor; and it makes no provision that, pending the contest, the commissions shall be withheld. It was insisted at the argument on behalf of Barber that this statute supplied and replaced the fifth section and the proviso to the third section of the Act of 1839, that the commission to him was regularly and providently issued, and that it gave him the right to be installed in the office of prothonotary.

The Act of the 19th of May, 1874, was limited to a single subject-matter. It was enacted to carry into effect the requirements of the 17th section of the eighth article of the constitution, that "the trial and determination of contested elections of electors of President and Vice-president, members of the General Assembly, and of all public officers, whether state, judicial, municipal, or local, shall be by the courts of law, or by one or more of the law judges thereof. "The object in view was to replace a mass of incongruous and uncertain legislation by a speedy, symmetrical and uniform plan for the settlement of peculiarly difficult, exciting and angry controversies. The title of the Act described it as "de-

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signating the several classes of contested elections in this commonwealth, and providing for the trial thereof." It did not profess to regulate elections, or to define the duties of public officers, or to create any duty or confer any power on the governor to interpose between the candidate shown by the face of the returns to be elected and the candidate shown by the face of the returns to be defeated. A right so to interpose could only be derived from a legislative intention somewhere or in some way expressed.

It has been settled that a proceeding instituted to contest an election cannot be frustrated by a commission issued afterwards. (Ewing *v.* Filley, 7 Wright, 384.) The legal provisions made necessary by the general requirements of the eighth article of the constitution were embodied in an Act entitled "A further supplement to the Act regulating elections in this commonwealth," passed on the 30th of January, 1874. By the 13th section of that supplement the duty was imposed on the judges of the Courts of Common Pleas of opening and computing the returns made by the election officers. But nothing in that section or in the residue of the Act demanded any action of the Court that could affect the rights of the parties in such a contest as this. Indeed, those rights were expressly preserved. The 13th section directed that "if palpable mistake or fraud shall be discovered, it shall, upon such hearing as may be deemed necessary to enlighten the Court, be corrected by the Court, and so certified, but all allegations of palpable fraud or mistake shall be decided by the said Court within three days after the day the returns are brought into Court for computation; and the said inquiry shall be directed only to palpable fraud or mistake, and shall not be deemed a judicial adjudication to conclude any contest now or hereafter to be provided by law." No provision was made for transmitting to the governor or the secretary of the commonwealth the result of the computation of votes under the Act of the 30th of January, and none for certifying the judgment of the Court in a contest in a case of the fourth class under the Act of the 19th of May, 1874. All steps ulterior to the specification prescribed by the two statutes were left to be governed by the provisions of existing laws, with which the Legislature of 1874 decided wisely not to interfere.

It was by force of the Act of 1839 that Barber was entitled to his commission. The terms which authorized its issue were not more direct and clear than the terms of the proviso to the third section which forbade it to go out while a contest was undetermined. If under the constitution of 1873 and the Act of 19th of May, 1874, the proviso should be held to be repealed, it is not readily seen how that part of the enactment which authorized the commission could be held to survive. Both clauses stand on the same ground. Both fall if the Act of 1874 was designed to establish a complete system in place of the system established by the Act of 1839. Both are unimpaired if the Act of 1874 was passed simply to regulate the mode of trying and deciding election contests. Without repealing or negative words in the new law, without reference to the subject-matter of the proviso to the third section, and without any provision to stand in its place, there is nothing on which an implication of an intention to repeal it can be based.

The proviso and the several sections of the Act of 1874 relating to contested elections of the fourth class may well stand together. To adopt the theory of a repeal by implication would be to disregard the broad equities of the question under review, as well as authoritatively settled rules of law. "Every affirmative statute is a repeal of a precedent affirmative statute, where its matter necessarily implies a negative, but only so far as it is clearly and indisputably contradictory and contrary to the former Act in the very matter (Foster's Case, 11 Rep. 63); and the repugnancy such that the two cannot be reconciled." (Reg. *v.* Inhabitants of St. Edmunds, 2 Qu. B. Rep. 84.) To repeal a statute by implication, there must be a repugnancy between the provisions of the new law and the old so positive as to be irreconcilable. (Potter's Dwarris on Statutes, 154, pl. 4, and the cases there collected.) Where a late statute is absolutely repugnant to a former one only in part, it repeals the former one only so far as the repugnancy extends, and leaves all the remainder in force. (Van Rensselaer *v.* Snyder, 9 Barb. 308.) In many material respects, the Act of 1839 has undoubtedly been modified by the new constitution and the Acts of 1874. Even the proviso to the third section has been affected by the provisions that have fixed the first Monday of January in lieu of the first day of December succeeding an election as the date from which commissions shall respectively have force. So far as it has remained unchanged, however, the Act of 1839 has all the controlling efficacy it would have if the constitution of 1873 had not been adopted, and the Acts of 1874 had not been passed.

This cause was decided at the opening of the May term, in 1877, mainly on grounds that have been stated in this opinion. Under the order made shortly after the judgment was entered, it has been reargued at the present term. The appeal from the decree of the Quarter Sessions in favor of Barber, the candidate returned as elected, involving the merits of the contest, has been heard also, and the decree has been this day affirmed.

Without looking forward to any eventual effect which that decision may or may not have on the

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rights of these parties that are involved in this litigation, the present duty of the Court simply consists in affirming the judgment they regarded it their duty to enter a year ago.

The judgment of ouster is reversed, and it is ordered and adjudged that judgment be entered in favor of S. W. Trimmer, the defendant in the case stated, with costs.

Opinion by WOODWARD, J.

Jan. '76, 117. Feb. 8, 1878.

Huntingdon and Broad Top Mountain Railroad and Coal Company v. Alfred English.

Contracts—Supplemental agreements—Loan of stock—Agreement to pay in money or stock at fixed date—Failure to deliver—Measure of damages

The rule stated in Bank *v.* Reese (2 Casey, 143), for the measure of damages for failure to deliver stock, only applies to cases where there is a trust relation between the parties, or where by their contract there is an obligation to deliver certain specific certificates of stock. It does not apply to cases where the relation is purely contractual and there is no obligation to deliver specific certificates.

In such a case the measure of damages is the same as in the case of any marketable commodity, *i. e.*, the market value of the stock on the day when it should have been delivered, together with simple interest on that amount up to the time of trial.

Error to the Common Pleas No. 2, of Philadelphia County.

Assumpsit by Alfred English against the Huntingdon and Broad Top Mountain Railroad and Coal Company.

Suit was brought April 3, 1873. The first two counts of the declaration set out and alleged a breach of the following agreement:—

"PHILADELPHIA, April 13th, 1867.

Received of Mr. Alfred English, two hundred shares of Pennsylvania Railroad stock, to be returned to him on the fifteenth day of June, 1867, and we have deposited with him as collateral security for the same twenty of the consolidated mortgage bonds of this company for $1000 each, Nos. 1094 to 1098, 1256, 1243 to 1247, 1226, 1428 to 1435, inclusive, and do hereby authorize him, upon the non-performance of this promise at maturity, say on the fifteenth day of June, 1867, to sell, either at private or public sale, or at the Brokers' Board, the above-named bonds at the then market price, without further notice, and apply the proceeds, or as much thereof as may be necessary, to the payment or replacing of the said two hundred shares of stock and all necessary expenses and charges, holding the company responsible for any deficiency or paying the company the overplus, if any.

"L. T. WATSON, President."

The three following counts set out the above agreement, and alleged the existence and breach of another as follows:—

"PHILADELPHIA, October 31st, 1867.

ALFRED ENGLISH, ESQ.,

DEAR SIR:—If you will withdraw the suit for your Pennsylvania Railroad stock loaned us, we will pay the attorney's fee, and we will faithfully agree to pay you, on account of the same, $500 on the 23d November next, 1867; $1000 21st December, 1867; $500 on 23d January, 1868; $2000 on 21st March, 1868; $3000 21st June, 1868, and $3000 21st September, 1868. If the amounts of money specified are not sufficient to replace the said two hundred shares Pennsylvania Railroad stock, we do agree to pay to you as much in addition as will be required on the 21st September, 1868, to make the said stock good. We furthermore agree to pay you interest on the $10,000, at the rate of eight per cent. per annum, as heretofore. The securities (the company's bonds) are all to be retained by you until the said stock is returned. When said stock is returned to you, you are to repay to us the amount of moneys paid to you in accordance with the above with interest at the rate of eight per cent. per annum. On the non-fulfilment of this agreement or any portion of it, you are authorized to proceed at once with the suit. Should the company return you the said stock at any time previous to the 21st September, 1868, then any moneys which have been paid to you on account are to be repaid to the company.

"If any stock dividends are declared by the Pennsylvania Railroad Company at any time, said stock dividends are to stand in your name, and the certificates of stock are to be delivered to you as soon as received from the company.

"The cash dividends that may be declared at any time are to be paid to you in cash at the time the said company pay them.

"Yours, truly,

L. T. WATSON, President.

"Attest: J. P. AERTSEN, Secretary."

At the trial on November 9, 1875, before HARE, P. J., it appeared that the defendants at the time of the first transaction agreed to pay the plaintiff a commission at the rate of eight per cent. per annum on $10,000 until the stock should be returned. The par value of the stock was $50. The plaintiff received interest in full on this amount to March 21st, 1868.

The terms of the second agreement were complied with, and the first and second instalments of $500 and $1000 paid, until January 23, 1868, the date upon which the third instalment was due, when defendants gave to plaintiff their negotiable promissory note for $500 at 60 days, which note remained unpaid.

On August 20, 1868, the plaintiff gave notice in writing to the defendants that the bonds above referred to, held by him as collateral, would be sold at public auction on September 14, 1868, unless the stock was returned at or before that time. The bonds were actually sold September 15th, and the net amount realized was $2944, of which an account was sent to defendants, who denied the plaintiff's right to sell.

Under objection the plaintiff offered evidence to show:—

(1) The highest market price of Pennsylvania Railroad stock between the date of default made in the payment of the fourth instalment under

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the contract of October 31, 1867, and the date of the bringing of the suit, April 3, 1873.

(2) The dividends, cash, and stock of the Pennsylvania Railroad Company, from March 21, 1868, the date of default made in the payment of the fourth instalment due under the contract of October 31, 1867, and the date when the market price of the stock was highest, April 22, 1871.

(3) The *options* offered between March 21, 1868, and April 22, 1871, to holders of stock of the Pennsylvania Railroad Company to subscribe for new stock at par.

(4) The cash and stock dividends and options to purchase stock at par, paid and offered by the Pennsylvania Railroad Company between the date when the price of the stock was highest and the date of the offer, Nov. 9, 1875.

The objections were overruled in each case, and bills of exception sealed.

The defendants submitted, *inter alia*, the following points:—

(1) That the plaintiff's right of action was upon the contract of Oct. 31, 1867, and not upon the contract of April 13, 1867.

(2) That there was no evidence to warrant the jury in finding that the option of rescinding the contract of Oct. 31, 1867, was duly exercised by the plaintiff.

(3) That the omission of the plaintiff to tender back the money paid and the note given by the defendants under the contract of Oct. 31, 1867, and to demand the return of the stock precluded him from recovering, except under the contract of Oct. 31, 1867.

(4) That the measure of the plaintiff's damages was the amount of money that should have been paid him under the contract of Oct. 31, 1867, with interest at the rate of six per cent. from the dates at which the respective payments should have been made.

(5) That the plaintiff was not entitled to recover as damages the highest value of the stock between the time when his right of action accrued and the bringing of his suit, or between the former date and any date subsequent thereto,

(6 and 7) That the plaintiff was not entitled to recover under the contracts of April, 1867, nor Oct. 1867, for stock or cash dividends declared on Pennsylvania Railroad Co.'s stock.

(8) That if the plaintiff could maintain his action under the contract of April, 1867, then the instalment of money subsequently paid by the defendants on account of the plaintiff's claim must be considered as equivalent to a return to the plaintiff of such number of shares as could have been purchased therewith.

(9) That the sale of the collateral bonds was unauthorized, and that, so far as appears from the evidence in this case, the defendants would be entitled to a return of the bonds after the payment of the debt due the plaintiff, and the defendants were not therefore to be credited in this suit with the sum received from the sale of said bonds.

Each of these points was declined.

HARE, P. J., charged [that under the evidence the measure of damages was either the highest market price of the stock between the date of default made by the defendants in the performance of the agreement of Oct. 31, 1867, and the date of trial, with interest and all dividends and increments on the stock up to the date of such highest price; or the market value of the stock at the date of trial, with all dividends and increments thereon from the time that default was made in the performance of the agreement of Oct. 31, 1867; that their verdict should be for the smaller of these amounts, the plaintiff's counsel having consented to this;] [that the defendants were not to be credited with the amount of stock which the instalments paid by them under the agreement of Oct. 31, 1867, would have purchased if invested at the dates of payment in the purchase of stock, the counsel of both sides agreeing, however, that if a different view on this point should be taken hereafter, the proper reduction should be made].

The following statement was submitted to the jury by the plaintiff.

Defendants to Plaintiff, Dr.

1868.	May 30.	200 shares Penna. R. R. stock.		
		10 " " " " dividend.		
		210		
"	Sept. 15.	Sold collateral for $2944, which would purchase 55 shares at $53 and leave a balance of $29.		
		55		
		155 shares at 50¾; value, Nov. 10, 1875 . . .		$7866 25
"	May 30.	Cash dividend 5 per cent.		387 50
		Int. to Nov. 10, 1875 .		173 08
*	* *	* * * *		* *
				$15,131 52
				Cr.
1868.	Sept. 15.	Cash	$29 00	
		Int. to Nov. 10,'75	12 44	
1867.	Nov. 21.	Cash payment . .	500 00	
		Int. to Nov. 10,'75	239 16	
"	Dec. 21.	Cash payment . .	1000 00	
		Int. to Nov. 10,'75	473 33	
				2,253 93
				$12,877 59
		Value of allotments as per statement . .		1,680 61
				$14,558 20

Verdict for plaintiff for $14,558.20 and judgment thereon. The defendants took this writ, assigning for error respectively the admission of the evidence objected to, the portion of the charge contained within brackets, and the refusal

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to charge as requested in the defendants' points as above.

James E. Gowen, for plaintiff in error.

The substitution of the second agreement for the first was in effect an accord and satisfaction of the first, and the new contract thereafter furnished the rule by which the rights and obligations were to be determined.

Christie *v.* Craig, 8 H. 431.
2 Parsons on Contracts, *681.

The second contract cannot now be treated as a nullity, and the right of action based upon the first alone. A contract cannot be rescinded by one party for the default of the other, unless both can be put *in statu quo;* neither can it be, when there has been laches in thus rescinding.

Hunt *v.* Silk, 5 East, 449.
Parsons on Contracts, *677.
Morrow *v.* Rees, 19 Sm. 373.
Beetem *v.* Burkholder, Id. 249.

Here the plaintiff neither tendered nor offered to return the money or the note paid him under the second contract.

The plaintiff has no right to sell the bonds; the second agreement expressly provided that the securities should be retained until the stock was returned; and, as has been already argued, this agreement was never legally rescinded.

The measure of damages was erroneously stated. The familiar rule is that damages for a breach of contract are ascertainable as of the date of the breach.

Smethurst *v.* Woolston, 5 W. & S. 106.

S. S. Hollingsworth and *G. W. Biddle*, contra.

Plaintiff was entitled to avail himself of the remedies belonging to the contract of April 13th, 1867. An *accord* can only be a defence to an original claim when it appears that the plaintiff accepted the agreement itself, and not the performance of it, as a satisfaction for his debt.

Evans *v.* Powis, 1 Ex. Rep. 601.

It was expressly stipulated in the second agreement "on the non-fulfilment of this agreement, or any portion of it, you are authorized to proceed at once with the suit." Granting that suit had not actually been commenced, he only consented to wait, and all the remedies belonging to the first contract were engrafted on the second.

The direction of the Court to allow the market value of the stock at the date of trial with the dividends and increments is fully sustained by the cases.

Bank of Montgomery *v.* Reese, 2 Casey, 143 (1856).
Musgrave *v.* Beckendorff, 3 Sm. 310 (1866)
Persch *v.* Quiggle, 7 Sm. 247 (1868).
Work *v.* Bennett, 20 Sm. 484 (1872).

The idea that this rule was applied to the stock contemplated in these cases, because it was fluctuating in value and not readily obtained, is erroneous; there is nothing whatever in those cases to show it. The clear rule laid down is that the measure of damages is the highest market price of the stock between the breach and the date of the trial; and the verdict in this case was admittedly for a less amount.

Gowen, in reply. The case of Bank *v.* Reese, *supra*, was ruled upon the ground that the claim was presented by a *cestui que trust* against a trustee for profits from the trust property.

Wilson *v.* Whitaker, 13 Wr. 117.

This relation does not exist between a borrower and lender of stock, and further, the stock of this bank was rarely found in the market.

McHose *v.* Fulmer, 23 Sm. 365.
Neiler *v.* Kelley, 19 Sm. 403.

Musgrave *v.* Beckendorff, *supra*, was an action to recover damages for failure to deliver certain *identical* bonds.

arch 4, 1878. THE COURT. We do not regard the acceptance by English of the proposition made by the president of the company, in his letter of October 31, 1867, as the conclusion of a new contract, but rather an extension of the former arrangement. This previous undertaking contemplated the delivery to the plaintiff on the 15th of June, 1867, of two hundred shares of Pennsylvania Railroad stock, which the defendants had received as a loan from plaintiff on the 13th of April preceding. There was no return made of these shares at the date indicated, and English was about to bring suit, when the proposition of the 31st of October was made and accepted.

Taking these two papers as one contract we observe that it provides generally for the return of the stock or its equivalent in money on the 21st of September, 1868, specially for payments in cash to be made from time to time, in all amounting to $10,000, the par value of the two hundred shares; or, if this sum was insufficient to "make good," as the parties termed it, the said shares at the date specified, the company undertook to pay as much more as would accomplish that object. If, on the other hand, the defendant chose to return the stock, at the time fixed by the contract, the plaintiff was required to refund the money which he had in the mean time received; finally, in case any one of the propositions of this contract was not complied with on the part of the company, English was at liberty to proceed with his suit at law.

Now as these were independent contracting parties, bound to each other by no ties save those found in their contract; and as they, by that contract, had from the beginning settled the compensation due English in case of a failure to return the shares of stock at the time fixed, why should we seek for any other rule of compensation than that fixed by themselves? It is certain, had the company tendered to English the value of the shares in cash on the 21st of September,

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1868, he would have been obliged to have received it. On the other hand, in the absence of such tender, the plaintiff might have gone upon that day into the market and supplied himself with two hundred shares of the Pennsylvania Railroad Company's stock, and have compelled the defendants to account for the price thereof. Thus we take it, the rights of the parties were definitely fixed at the time when the breach occurred, just as would have been the case had the agreement been for the delivery of two hundred bushels of wheat, or of any other article of a marketable character.

It is obvious, therefore, that the Court below erred in applying the rule stated in the case of The Bank *v.* Reese (2 Casey, 143) to the controversy in hand, since the contract itself carried it beyond the reach of that rule. Moreover, that rule applies only where the parties bear to each other a trust relation. In Wilson *v.* Whitaker (13 Wr. 114), this Court refused to adopt the above stated rule as applicable to stock contracts generally; and the learned Judge who delivered the opinion in that case, whilst recognizing the case of The Bank *v.* Reese as binding in all cases involving a trust, said that the *dicta* tending to carry the rule beyond the point stated were not essential to the case, and were *extra*-judicial. A similar remark might well be made of the *dicta* in the case of Musgrave *v.* Beckendorff (3 P. F. S. 310), for there the plaintiff's claim was based on an agreement for a return of the identical bonds loaned; and as his property in them was not divested by the contract, it was a breach of trust in the defendant to sell or otherwise dispose of them; hence, as the above stated rule might well apply on principle, the adoption of the *extra*-judicial *dicta* of the Bank *v.* Reese was not necessary. Persch *v.* Quiggle (7 P. F. S. 247) was the case of an agent who had committed a breach of trust in the disposition to his own use of stock shares intrusted to his keeping, and in Neiler *v.* Kelley (19 P. F. S. 403) and Work *v.* Bennett (20 P. F. S. 485) the rule was held not to apply in cases of trover. As yet there does not seem to be any case on our books which militates against the limitation of rule of The Bank *v.* Reese to cases involving a trust, or to those the peculiar character of which renders the application of that rule necessary in order that justice may be meted out to the parties litigant. Such, however, is not the condition of the case in hand. The agreement of the 31st of October required that the plaintiff should be paid by instalments of cash as therein mentioned, and the return of the stock in kind was an option belonging to the company. As this contract was in part executed by the payment of the first two instalments by the defendant, and by the retention and sale of the collaterals by the plaintiff, the default cannot be treated as a rescission of the contract, but only as a breach, the damages for which must of necessity be measured by the money due the plaintiff at the time of such breach, with interest to the date of the verdict.

It follows that English was entitled to recover from the defendant the value of the two hundred shares of stock as of the 21st of September, 1868, with the dividends and simple interest, deducting therefrom the payments as of the date when severally made.

As we think the collaterals were properly disposed of, we refuse to sustain the 15th assignment of error.

Judgment reversed and a new *venire* is awarded.

Opinion by GORDON, J.

On March 5th, 1878, a rule was granted to show cause why judgment should not be entered in this case in favor of defendant in error for the amount due to him according to the principle stated in the opinion of this Court, delivered March 4, 1878, the same to be liquidated by the Prothonotary. After argument on March 18, 1878, the rule was discharged.

Jan. '77, 199. March 20, 1878.

Sherwood v. Sumne.

Ejectment—Presumption of title out of the Commonwealth — Possessory title — Improvement rights—Abandonment.

In ejectment, where there has been less than thirty years' continuous possession, title out of the Commonwealth must be shown.

The Statute of Limitations creates no title for recovery where thirty years' possession is not shown, and the Commonwealth has not parted with her title.

Where an improvement right, which depends on possession, has not existed for twelve years, a conclusive presumption of abandonment arises.

Error to the Common Pleas of Susquehanna County.

Ejectment by Thomas J. Sherwood against Henry Sumne, brought September 26, 1872, to recover one hundred acres of land. Plea, not guilty. The case was tried November 16, 1876, before MORROW, P. J.

The plaintiff, in two separate offers, proposed to prove: That one Bildad Bennett was in possession of the land in dispute, claiming it as his own, about forty-two years ago (1834), which possession he continued until his death, which occurred in 1846. That his administrator soon after, by petition and regular proceedings in the Orphans' Court of the county, obtained an order to sell the same for the payment of debts; that the same was sold in due form of law to one

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James Kelley on January 26, 1847, which sale was duly confirmed by the Court, and a deed was made to Kelley; that Kelley, by deed dated September 14, 1849, conveyed the same to the plaintiff, who continued in possession until fifteen years ago; that the said Bennett, Kelley, and Sherwood successively occupied said property (connected as above stated) for a period of at least twenty-seven years adversely to all the world.

The defendant objected (1) that the offers showed an abandonment of the possession for twelve years before suit brought. (2) That they did not show that the defendant was an intruder on the possession of the plaintiff. (3) That no title was shown out of the Commonwealth. (4) That thirty years' continuous possession, as required by the Act of 1855, was not shown, and nothing upon which the plaintiff was entitled to recover as against the peaceable possession of the defendant.

The Court rejected the offers, and, the plaintiff producing no other evidence, instructed the jury to find for the defendant.

Verdict and judgment for defendant accordingly. The plaintiff took a writ of error, assigning for error the rejection of his evidence.

Littles and *Blakeslee*, for the plaintiff in error.

The plaintiff offered to prove a prior adverse possession of twenty-seven years. The first occupant died in possession. There was a descent cast, and a regular chain of title to the plaintiff. This constituted a *prima facie* case. Any prior possession is sufficient against an intruder.

Kline *v.* Johnston, 12 Harris, 74.
Turner *v.* Reynolds, 11 Id. 199.

But the offer was not merely to prove prior possession. The facts in it showed *title*. Here was a descent cast and long adverse possession. All the plaintiff was obliged to do was to prove twenty years' possession or the seisin of his ancestor and a descent cast. This is sufficient to put the defendant to proof of his title.

Hylton *v.* Brown, 1 W. C. C. R. 204.

The objection that title out of the Commonwealth was not shown is not valid. Actual occupation for twenty-one years gives a right against all but the State. It is not necessary to show such title when the defendant is an intruder or shows no title, as the defendant in this case did not.

Lair *v.* Hunsicker, 4 Casey, 123.
Riddle *v.* Murphy, 7 S. & R. 230.

There was no legal presumption of abandonment raised by the offer, and the defendant, who showed no title, could not take advantage of it if there were.

Watson *v.* Gilday, 11 S. & R. 340.
McCall *v.* Anchors, 2 Harris, 257.
Troutman *v.* May, 9 Casey, 460.

The defendant showed no title, and is to be regarded as an intruder.

B. O. Camp (with him *J. B. & A. H. McCollum*), contra.

There is no evidence and no presumption that the defendant was an intruder, and the part of the plaintiff's argument which is based on that assumption must fall. Where title is not shown out of the Commonwealth, thirty years' continuous possession must be shown to raise the presumption that the Commonwealth has parted with her title.

Act 27 April, 1855, Purd. Dig. 929, pl. 10.

If any shorter period of possession be shown, the presumption is that the title remains in the Commonwealth, which outstanding title will prevent the plaintiff from recovering.

April 1, 1878. THE COURT. The offers in this case did not go far enough. Title out of the Commonwealth was not shown, and the offer was not to show continuous possession for thirty years on part of Bildad Bennett and those claiming under him. Less than this period of continuous possession will not suffice to create the presumption of title out of the Commonwealth under the Act of 27 April, 1855 (Purd. Dig. 929, pl. 10). Nor did the plaintiff offer to show that the defendant came in under him, or had unlawfully ousted him. Hence the offer did not extend to either tenancy or intrusion upon the rights of the plaintiff. As the offer stood, the utmost effect of it was to show an earlier improvement right. But the offer itself showed that this right, which depends on possession, had not existed for more than twelve years, and consequently a conclusive presumption of abandonment had arisen. (Brentlinger *v.* Hutchinson, 1 Watts, 46; Jacobs *v.* Figard, 1 Casey, 45.)

The offer showed no title for recovery, the statute of limitations having no operation in such a case.

PER CURIAM. Judgment affirmed.

Jan. '78, 110. March 20, 1878.

Walter v. Breisch.

Usury—Opening judgment—Practice.

A judgment debtor who has paid usurious interest on a judgment, and who has confessed a judgment of revival, is not precluded by the confession from asking that the latter judgment be opened on the ground of usury, or from crediting the usurious interest on principal as allowed by the Act of 28 May, 1858.

In such a case the Court will open the judgment.

Error to the Common Pleas of Schuylkill County.

This was an appeal by Walter from an order of the Court below, opening a judgment held by him against Breisch on the ground of usury.

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The undisputed facts of the case were as follows: In January, 1871, the defendant borrowed $2300 from the plaintiff, giving his judgment note as security, which was soon after entered up. On this judgment the defendant paid interest to the plaintiff at the rate of three per cent. a month until March, 1875. In the early part of 1875 the defendant paid $300 in reduction of the principal. On November 3, 1875, the parties entered into an amicable action to revive the judgment, in which the defendant confessed judgment of revival to the plaintiff for $2100. No interest was paid after the revival of the judgment.

In June, 1876, the defendant obtained a rule to show cause why the judgment should not be opened and the defendant let into a defence.

The Court below (PERSHING, P. J.) made the rule absolute, whereupon the plaintiff took an appeal under the provisions of the Act of 4 April, 1877 (P. L. 53).

A. P. Spinney, for the appellant, contended that the defendant was concluded by confessing judgment of revival. The Usury Act of 28 May, 1858, provides that it shall be lawful for the borrower or debtor at his option to retain the excess. When judgment is suffered the option is spent; the borrower has then allowed the usurious interest to become merged into the judgment, and it is too late to take advantage of that defence.

3 Parsons on Contracts, 119.
Thatcher *v.* Gammon, 12 Mass. 268.
Thompson *v.* Berry, 3 Johns. Ch. 395; 17 Johns. 436.

The defendant was under no necessity to confess judgment in the amicable *scire facias;* therefore the doctrine of Vantine *v.* Wood (1 Harris, 270) does not apply. He was capable of validating that which was before invalid.

Duncan *v.* McCullough, 4 S. & R. 487.

The Court should not open a paid judgment. It can only order it satisfied.

D. C. Henning, contra.

It appears that on a loan of $2300 made six years ago, the plaintiff has received about $4000 as interest, been paid $300 on the principal, and still has a judgment for $2100. The excessive interest can of course be credited on the principal.

Lucas *v.* The Bank, 28 Smith, 228; 2 WEEKLY NOTES, 135.

The defendant having confessed judgment of revival, no other relief can be afforded him as to interest included therein, other than by opening the judgment.

Hopkins *v.* West, 3 WEEKLY NOTES, 343.

He is not concluded thereby, however, in this application.

Maitland *v.* McGonigle, 1 T. & H. Pr. 658.

April 1, 1878. THE COURT. There was sufficient evidence to show excessive usury intervening between the entry of the original judgment and its revival by amicable agreement. If the amicable revival were conclusive upon the defendant confessing the judgment, usury would seldom be reached. Hard creditors, aware of such law, would always make it a condition of giving time, that a judgment or warrant of attorney to confess it or to revive it should be given. This corrective power of the Court must be exercised to prevent the ruin of unfortunate debtors who are in merciless hands. This case is an apt illustration of the benign effect of the law against usury. The defendant in this case for several years paid interest at the rate of thirty-six per cent. per annum, the usury amounting to a larger sum than the original debt.

Order affirmed and appeal dismissed at the cost of the appellant.

PER CURIAM.

[*Cf.* Rutherford *v.* Boyer, 3 N. 347; 4 WEEKLY NOTES, 364.]

Common Pleas—Law.

C. P. No. 1. Feb. 16, 1878.

Love v. Dobson.

Infancy—The immunity arising from minority is personal, and if waived by the party after his arrival of age, cannot be alleged by another—Affirmance of minor's contract after arriving at majority—Withdrawal of prior disaffirmance—Rights of third parties.

Rule for judgment for want of a sufficient affidavit of defence.

Sci. fa. sur mortgage dated November 14, 1876, executed by the defendant, Dobson, to the plaintiff. Writ exit December 27, 1877.

The affidavit of defence, filed by Dobson on January 26, 1878, set forth that at the time of executing the mortgage in suit he was an infant under the age of twenty-one years, and unable in law to make a valid contract.

On February 6, 1878, T. S. Watson, trustee, upon his own suggestion, was made a party to the record as terre tenant of the mortgaged premises. On the same day he filed an affidavit of defence, reiterating the above averment of the infancy of the mortgagor Dobson at the time he executed the said mortgage, and averring that he was informed and believed, and expected to be able to prove, that at the time said Dobson conveyed the mortgaged premises to the deponent [which was on November 13, 1877, Dobson

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being then of full age], and at all times previous thereto, the said Dobson had in no way knowingly ratified the said mortgage, but, on the contrary, had disavowed it, and had made affidavit to that effect.

On February 9, 1878, the defendant Dobson asked leave to withdraw his former affidavit of defence, filed January 26, 1878, and thereupon filed another affidavit, setting forth that he made the said former affidavit of defence, setting up his infancy, etc., at the request of said Watson, who represented several lien creditors; but that in truth he had no desire whatever to avoid liability on said mortgage, as it was executed by him to the plaintiff, Love, in good faith, and that Love had then and since acted in good faith and performed his part of the contract; that at the time he made said original affidavit he did not fully understand the transaction, and he therefore now desired to withdraw the same. Further, that he attained his majority on February 11, 1877, and subsequently, on December 14, 1877, he assigned to the plaintiff, Love, a policy of insurance to accompany said mortgage, "whereby, he believes, he fully ratified said mortgage and the contract between him and the said Love relating thereto;" and further, that the said Watson holds title to the mortgaged premises as trustee for lien creditors.

Wm. G. Foulke, for the rule.

The defence of infancy is a privilege personal to the infant, and can only be insisted on by him or by his privies in blood. A privy in estate cannot allege the infant's deed to be void. Dobson having withdrawn his original affidavit, and now, being of full age, ratifying his mortgage, it is not in the power of a terre tenant to set up, as a defence, his original want of capacity.

Palmer *v.* Miller, 25 Barb. 399.

T. S. Watson, contra.

Admitting the general proposition that infancy as a defence is a personal privilege, yet the conveyance of the premises to Watson by Dobson, on November 13, 1877, after the latter came of age, and his then disavowal of the mortgage, rendered it *void*, and the mortgagor cannot call it again into life. After a disaffirmance by any act of the minor, after arriving at age, legally sufficient for that purpose, then all persons may take advantage of such disaffirmance, and treat the deed as null, for it is as if it had never existed.

A deed or a mortgage made by an infant is avoided by his executing, upon his arrival at full age, another deed for the same land to a different person.

Hoyle *v.* Stowe, 2 Devereux & Battle, Law (N. C.) 320.
Curtin *v.* Patten, 11 S. & R. 305.
Steger's Estate, 3 WEEKLY NOTES, 368.

Rule absolute.

C. P. No. 1. April 27, 1878.

Johnston et al. v. Penna. R. R. Co.

Practice—Where the Court directs depositions to be filed, it may, in its discretion, order the cost of taking them to be paid by the party applying for the rule.

Rule to show cause why depositions taken by plaintiffs should not be filed.

After the case was at issue, and before trial, plaintiffs took the depositions of some of themselves as going witnesses. When the depositions were taken, plaintiffs called for an original letter, written by them, and in the possession of the defendants, which was produced, offered in evidence, and attached to the depositions. These depositions and the exhibits not having been filed (a copy of one of the exhibits was, however, furnished), as requested by the defendants, they obtained the present rule.

Driver (with him *Coulston*), showed cause.

The witnesses, whose testimony was taken, are some of the plaintiffs themselves, and when the case was last on the trial list, expected to be present, in which case the depositions could not have been used. It is not the practice to file depositions until they are used on the trial. If the Court orders them to be filed, then the costs of taking them should be put on the defendants.

Martin *v.* Dearie *et al.*, 9 Phila. 186.

Simpers (with him *Chapman Biddle*), for the rule.

Depositions taken under a rule of Court should be filed, as a matter of course, within a reasonable time. They are not the exclusive property of the party taking them, but belong to both parties to the suit, and ought to be made a part of the record without delay.

Gordon *et al. v.* Little, 8 S. & R. 549.
Nussear *v.* Arnold, 13 S. &. R. 323.
Bennett *v.* Williams, 7 Sm. 405.

While it is true that in Bennett *v.* Williams, *supra*, there was a rule of Court requiring the depositions to be filed, yet the Court distinctly say that all depositions taken under a rule of Court must be filed.

Any other practice will enable parties to experiment with their witnesses, and lead to the suppression of depositions where they are unfavorable to the side taking them.

In Martin *v.* Dearie *et al.*, *supra*, the defendants were ordered to file depositions taken by them, and the plaintiff required to pay the costs. If depositions taken under a rule of this Court are not to be filed as a matter of course, then this is not a case in which the costs should be put upon defendants. The plaintiffs have obtained possession of an original paper belonging to the defendants, which they refuse to surrender, or to file the depositions.

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Driver, in reply.

The cases cited do not apply. In two of them there were rules of Court requiring the depositions to be filed; and in the other the testimony was taken under a commission.

Martin *v.* Dearie *et al.*, *supra.*

C. A. V.

May 4, 1878. THE COURT. The Supreme Court in several cases have apparently decided that the depositions taken in a case should be filed, as a matter of course. These decisions, however, were reviewed by the old District Court in an opinion delivered by Judge BRIGGS (Martin *v.* Dearie *et al.*, *supra*), and it was there held that the decisions were founded on rules of Court, and were not of general applicability. That in view of our practice, the District Court would not hold that depositions should be filed of course, but would exercise their discretion in each case. In either view, we have the right to make the order, and it is not necessary at present to decide more than that we think this a proper case for such an order.

The defendants having shown that certain original papers belonging to them have been attached to the depositions taken by the plaintiffs, we will make this rule absolute, without requiring the costs of the depositions to be paid by the defendants.

Oral opinion by BIDDLE, J.

C. P. No. 3. Feb. 2, 1878.

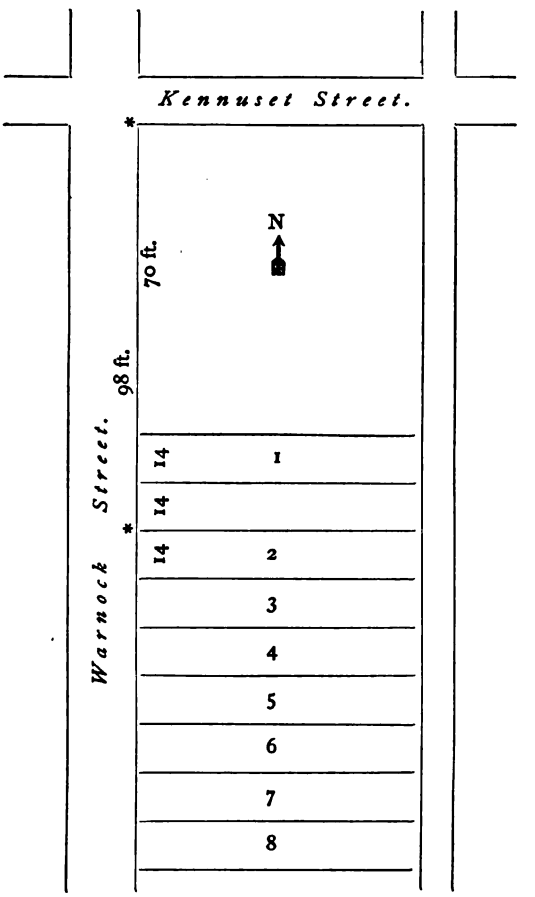
Howell v. Campbell.

Mechanic's claim—Lumping claim of sub-contractor—Act of March 28, 1849, relating to Philadelphia and Chester counties—Effect of giving the dates of the commencement and close of the work under a special contract—Construction of claim—Houses that seemingly do not adjoin.

Rule to strike off a mechanic's claim for defects apparent on its face.

It appeared from the claim that it was filed January 17, 1878, by a sub-contractor against the owner and contractor for the sum of $325 for work done and materials furnished in the erection of eight houses, and was entered against the houses and lots *and the curtilages appurtenant thereto.* The first house was described as situate on the east side of Warnock Street, *seventy* feet south of Kennuset Street, and having a front of *fourteen* feet; the second house was on the east of Warnock Street, *ninety-eight* feet south of Kennuset Street; and the others as adjoining each other in succession, as shown by the following

PLAN.



The bill of particulars annexed to and made a part of the claim, stated the claim to be for work done and materials furnished "from the second day of July, A.D. 1877, when the said work was commenced, to the eighteenth day of July, when the same was finished under a contract for the sum of $325." The sum of $40.63 was apportioned to each house.

R. Alexander, for rule.

It appears from the claim that the buildings are not adjoining. This is fatal. The lots must adjoin.

Goepp *v.* Gartiser, 11 Casey, 130.
Campbell *v.* Furness, 1 Phila. 372.
French *v.* Kaign, 3 WEEKLY NOTES, 495.
Taylor *v.* Montgomery, 8 H. 443.
Allen *v.* Fitzpatrick, 9 Phila. 142.

It is the claim of a sub-contractor who seeks to bind the buildings in a lumping charge. None but a contractor can do this.

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Lee *v.* Burke, 16 S. 336.
Russell *v.* Bell, 8 Wr. 49.
Shields *v.* Garrett, 4 WEEKLY NOTES, 140.
Van Roden *v.* Campbell, 5 Id. 126.

J. T. Snare, contra.

The claim is good under the Act of 24 March, 1849 (Purd. Dig. 1034, pl. 45).

The lien on its face embraces both buildings and curtilage. How can the Court say, on inspection of the claim, that there is a vacant lot between any of the houses? or, if so, that it is not the curtilage of one of them?

C. A. V.

Feb. 16, 1878. THE COURT. Under the authority of Shields *v.* Garrett, 4 WEEKLY NOTES, 140 (affirmed by the Supreme Court, 5 WEEKLY NOTES, 120), and also of the cases cited by the Court in the above-named cause, this lien would be bad, because the sub-contractor here seeks to bind a building in a lumping charge.

Those cases were all decided under the Act of 1845; the legislature, however, by an Act of Assembly passed 24 March, 1849, § 2 (Purd. Dig. 1034, pl. 45), extended the law and thus embraced the present case. This Act declares that "It shall be lawful for *any* mechanic or material man in the city or county of Philadelphia, and county of Chester, who performs work and furnishes materials, to include both in the same claim filed." When the work "shall be done by contract for a stipulated sum, it shall be lawful to file a statement of the time when the work was commenced and when finished, and of the aggregate price of the work and materials." This claim, with its bill of particulars, is, it seems to us, clearly within the law.

Upon the other point made in this case, we cannot say, from the record, that the buildings are not adjoining; the space marked as open on the plan may, for all that we know, be a yard adjoining the houses, and therefore the criticism made will not for the reason assigned destroy the lien.

Rule discharged.

Opinion by LUDLOW, P. J.

C. P. No. 3. March 30, 1878.

Blanchard v. Koller.

Practice—Sci. fa. sur mortgage—Death of mortgagor before suit brought—Semble, that, upon a return of "mortuus est" as to the mortgagor, his personal representatives must be made parties though notice has been given to terre tenant.

Rule for judgment against the terre-tenant for want of a sufficient affidavit of defence.

Sci. fa. sur mortgage against Koller, mortgagor, with notice to Govett, terre-tenant. The writ was returned *mortuus est*, as to Koller, and *served* as to Govett.

The affidavit of Govett set forth, *inter alia*, that: "The mortgagor, Koller, named in the above action is dead, and was so before suit brought, and his death has been returned by the sheriff, and a suggestion thereof filed of record."

George Junkin, Esq., for the rule, argued that the plaintiff was entitled to judgment, notwithstanding the return of *mortuus est;* as it would only bind Govett, and the personal representatives would not be injured if they had a good defence.

A. Thompson, Esq., contra.

The mortgagor being dead, no judgment could be taken in this case even if no affidavit of defence had been filed; because being dead his legal representatives must be first brought in, which has not been done, and the affidavit of defence law does not apply to executors.

Seymour *v.* Hubert, 2 Norris, 346.

C. A. V.

April 20, 1878. THE COURT is of opinion that, upon a return of *mortuus est* as to the mortgagor, judgment should be postponed until the personal representatives are brought in. But since the record now shows that this has been done pending our decision, we make the rule for judgment absolute.

Oral opinion by LUDLOW, P. J.

C. P. No. 4. April 13, 1878.

Thomas v. Born, defendant, and Becks, Garnishee.

Attachment execution—Right of defendant to exemption of $300—Part payment at request of defendant before attachment to be deducted from exemption—When claim may be made—No laches when there is no notice.

Rule for judgment against garnishee for amount admitted to be due in answer. Attachment execution.

The answer of the garnishee admitted an indebtedness to the defendant, arising upon a binding award of an arbitrator for $464.76, and claimed credit for $55 paid at the request of the defendant, as his share of the fee due to the arbitrator. Upon the same day that the answers were filed, the defendant entered of record his appearance, and filed his claim for $300 exemption.

It was alleged, upon the argument, by the defendant, and not disputed by the plaintiff, that service upon the defendant had, in fact, not been made, and that the defendant had learned incidentally from the garnishee that his claim on the award had been attached.

James W. Paul, for the rule.

After the return of the writ, it is too late to claim exemption.

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Strouse's Executors *v.* Becker, 8 Wr. 206.
Zimmerman *v.* Briner, 14 Id. 535.
Barr *v.* Steinman, 2 Sm. 423.
Landis *v.* Lyon, 21 Id. 473.
Bittenger's Appeal, 26 Id. 105.
Ashton *v.* Glass, 9 Phila. R. 510.

[BRIGGS, J. When the sheriff does not serve the notice on the defendant, and he knows nothing of the case till answer filed, to hold that he cannot claim exemption because not made till then, would be to deprive him of that privilege altogether.]

Lewis Stover, for the garnishee.

W. A. Husband, for the defendant, cited—

Holmes *v.* Pettingill, etc., 4 WEEKLY NOTES, 495.

C. A. V.

April 22, 1878. THE COURT. The defendant is clearly entitled to the exemption claimed. He was not served with the *sci. fa.*, and hence not brought into Court until he voluntarily appeared, and simultaneously therewith he filed in Court his claim for the exemption. This was before the garnishee filed his answer. To deny him this right would take from him that which the Act of Assembly secures to him. There can be no laches where there is no knowledge or notice. The authorities, where the latter exists, cannot be said to apply to a case like this.

The answer shows an award for $464.76, less payment on account by defendant's direction, $55, leaving a balance on the award of $409.76. This $55 having been paid for defendant's account, at his request, that sum should be charged against the exemption of $300 allowed by law; doing this, the balance which the garnishee should retain for him is $245. Deducting this from the balance in the garnishee's hands of $409, leaves $164.76, less counsel fee, $144.76.

Judgment against the garnishee for $144.76.

Opinion by BRIGGS, J.

C. P. No. 4. March 13, 1878.

Meloney v. The Third National Bank of Philadelphia.

Statute of limitations—National bank—Usury—In an action against a national bank to recover usurious interest, the Act of Assembly of May 28, 1858, limiting the time of bringing an action to six months, is applicable.

Sur demurrer to plea.

Assumpsit. The narr contained only common counts. The bill of particulars claimed $2393.27 with interest thereon, being the excess of interest over six per cent. taken and received by the defendant in discounts beginning May, 1869, and ending November, 1873. Plea, that the cause of action did not accrue within six months next before the commencement of the suit (Act of 28 May, 1858).

The plaintiff demurred.

C. C. Stein (with whom was *Stover*), for the demurrer.

The limitation to this action is six years.

McCluny *v.* Silliman, 3 Peters, 270.

There may be two actions, one for excess of interest and one for penalty of double interest.

Heath *v.* Page, 13 Sm. 121.

No special limitation of the action for excess of interest having been made by Congress the State limitation applies. This excess of interest was money acquired without right, and the title to the money remained in the plaintiff. Statutes of limitation operate on the remedy. The State Act of 1858 contains a special limitation of six months, thereby excluding the operation of the general statute of limitations. The Act of Congress contains no such limitations, and hence the general State statute applies. As the limitation in the Act of Congress applies only to the action for the penalty, it follows that the plaintiff's claim can be barred only by the expiration of six years.

Lucas *v.* Bank, 28 Sm. 228.

Tharp, contra.

This action is not authorized by the Act of Congress under which the plaintiff claims. That Act gives no other action upon an usurious transaction but that of debt for double the amount of the usury. The remedy adopted by the plaintiff exists only by virtue of the State law, and is therefore subject to the restrictions therein. Lucas *v.* The Bank is not authority. If followed, the effect would be to remove all protection of all limitations of suits to recover excesses of interest.

The Miner's Bank *v.* Roseberry, 31 Sm. 309.
Overholt *v.* The Bank, 1 N. 490.

C. A. V.

May 11. 1878. Judgment for defendant on the demurrer.

Orphans' Court.

April 18, 1878.

Boyles's Estate.

Will—Powers—Creation and execution of—The expression "in such way and manner," etc. in the creation of a power of appointment, gives the donee the right to create a trust for a designated class.—The creation of a trust does not affect the validity of the appointment where the trust really effects the intention of the donor—Interest upon legacies—From what time computed.

Sur exceptions to adjudication.

Upon the audit before HANNA, J., the follow-

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ing facts appeared: James Boyles died leaving a will, by which, after the gift of household goods, etc., absolutely, he gave the income of the residue of his estate to the testatrix, his wife, during widowhood; if she marry, remainder to his children or issue of deceased child; but in case she die without having married, he bequeathed the residue of his estate to such of his children or their issue,

"*in such way or manner, and in such proportions and for such estate and estates* as she, my said wife, by her last will and testament in writing, or by any writing in the nature of, and purporting to be her last will and testament executed in the presence of two or more subscribing witnesses, shall order, direct, limit, and appoint."

The testatrix died June 10th, 1876, leaving a will executing the said power of appointment as follows:—

"Whereas, my late husband, James Boyles, in and by his last will and testament, did (*inter alia*) will in the words following, to wit: 'but in case my said wife shall die without having married again, then I give and bequeath the rest and residue of my said estate to such of my children or their issue in such way and manner and in such proportions and for such estate and estates as she, my said wife, by her last will and testament in writing, or by any writing in the nature of and purporting to be her last will and testament, executed in the presence of two or more subscribing witnesses, shall order, direct, limit, and appoint,' as in and by the above-recited last will and testament, reference thereunto being had more fully and at large appears.

"*Now be it further remembered*, That I, the said Mary Boyles, by virtue and in pursuance of the powers and authority to me given, and in me vested by the said above-recited last will and testament do hereby limit, order, direct, and appoint the said rest and residue of my deceased husband's estate to the persons and in way and manner hereinafter mentioned—that is to say:

"*Item.*—I order and direct the sum of five thousand dollars, to be paid over unto my grandson Harry C. Boyles. . . . . .

"*Item.*—I order and direct that the sum of five thousand dollars, be paid unto my said son-in-law Franz Otto Matthiessen in trust, nevertheless to invest the same and collect the interest thereon from time to time, and pay the same over to the guardian of my granddaughter Emma Matthiessen Boyles during her minority, for the use of my said granddaughter until she attain the age of twenty-four years, and upon my said granddaughter attaining the said age of twenty-four years, I order and direct that said principal sum of five thousand dollars shall be paid to her."

The residue of her late husband's estate she bequeathed to Franz O. Matthiessen in trust, one-half for the separate use of her daughter Mary H. Boyles, and the other half for the separate use of another daughter Janet Boyles with cross remainders.

The auditing judge was of the opinion that the attempt to create a trust of the legacy to Emma M. Boyles was in contravention of the power of appointment conferred by the will of James Boyles, was not contemplated by him, and was, therefore, void (citing Horwitz *v.* Norris, 13 Wr. 213, Wickersham *v.* Savage, 8 Sm. 365, and James M. Smith's Estate, 4 WEEKLY NOTES, 265); and awarded the amount of the said legacy to the Fidelity Insurance Trust and Safe Deposit Company as guardian of the said Emma M. Boyles, the balance due Harry C. Boyles to him in cash, and the residue to Mrs. Matthiessen, Mary H. and Janet Boyles, the daughters of the testatrix, equally; allowing interest on the legacies to Harry C. and Emma M. Boyles from June 10, 1877, one year after the death of the testatrix.

Exceptions were filed on behalf of Franz O. Matthiessen, trustee, and Mary H. Boyles and Janet Boyles, distributees, alleging for error the striking down of the trust for Emma M. Boyles, and the award of the $5000 to the Fidelity Company as guardian; also the failure to sustain the trust as to the residue of the estate.

Harry C. Boyle and the Fidelity Company excepted, inasmuch as the auditing judge did not allow interest from the death of the decedent.

Edward D. McLoughlin, for the trustee and distributees.

Horwitz *v.* Norris, Wickersham *v.* Savage, and Smith's Estate (*supra*), do not apply. An appointment to trustees is a valid exercise of a power of appointment under a will.

Trollope *v.* Linton, 1 Simons and Stuart, 477.
1 Sugden on Powers, *489.

The use of the words "in such way and manner," etc., gives power to create any quantity of estate.

Rex *v.* Marquis of Stafford, 7 East, 521.
1 Sugden on Powers, *483.
2 Ibid. *273, 274.

Legatees are not entitled to interest upon their legacies during the year succeeding the testator's death. The rule of law as to children does not apply to grandchildren.

Leech's Appeal, 8 Wr. 140.
Kerr *v.* Bosler, 12 Sm. 183, and cases there cited.

James W. Paul, for Fidelity Company, and *Wm. Knight Shryock*, for Harry C. Boyles.

The fund distributed is the estate of James Boyles and not of Mary Boyles, except for purposes of distribution to her appointees.

The setting apart of an estate that a power of appointment may operate upon, presupposes a payment of debts and a realization of assets for distribution and when the power is exercised the legacies to the appointees are due, and the legatees are entitled to interest from the death of the appointor.

The legacies being given for maintenance, and as the legatees, under the will of James Boyles, are placed on an equality with the children, the rule of law which allows a child to claim interest from the death of the testator is applicable to these grandchildren.

April 27, 1878. THE COURT. The cases of Horwitz *v.* Norris (13 Wright, 213), Wickersham

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v. Savage (8 Smith, 365), and Smith's Estate (4 WEEKLY NOTES, 265), will be found upon examination to differ from the present one in some very essential points.

In Smith's Estate there was no power to create or limit estates, but simply to decide and distribute; while in the other cases the attempt of the donee of the power was to appoint to persons not of the class in favor of whom it was conferred. The decisions were on these grounds.

Here the power is very ample: "to such of my children, or their issue, in *such way or manner*, and in such proportions and for *such estate and estates* as she, my said wife, by her last will and testament . . . . shall order, direct, limit, and appoint."

The will of the wife, so far from attempting to include persons not of the designated class, seeks to confine the benefit to those who are, and for this purpose directs that the share given to her granddaughter (the child of a deceased son) shall be held in trust until she arrives at the age of twenty-four years, at which time she shall receive it absolutely; but if she should die before that time the principal shall be divided between such of the daughters of the testatrix (children of the donor) as shall then be living

As the vesting of the principal, though postponed until the granddaughter reaches the age of twenty-four, is to take effect during the lifetime of persons who were living at the death of the original testator, there can be no objection on the ground of remoteness.

Nor does the mere fact that a trust is created affect the validity of the appointment, where such trust really effectuates the intention of the donor by confining the benefits to the selected objects.

Of course where the trust is to accomplish that which is not within the terms of the power, as in Horwitz *v.* Norris, and Wickersham *v.* Savage, it is on that ground invalid; not simply *because* it is a trust. There is nothing in these cases which asserts a contrary doctrine. Horwitz *v.* Norris impliedly, if not expressly, admits it.

In Alexander *v.* Alexander (2 Vesey, Sr. 642), it was said by SIR THOMAS CLARK that an appointment under a power to the separate use of a daughter, so far from being an objection, was more strictly carrying into execution the will of the donor.

In Crompe *v.* Barrow (4 Vesey, Jr. 681), after an appointment for life to one belonging to the intended class, with an intermediate remainder to persons who did not, there was an ultimate limitation in default of the latter to others who were proper objects of the power. The intermediate limitation only was held void.

Where, as in the present case, the appointment is to be exercised "*in such manner*" as the donee pleases, the power to create a trust is said to be still clearer. (2 Sugden on Powers, *273–4; Trollope *v.* Linton, 1 Sim. & Stu. 477.)

The trust here being for the protection of those designated by the donor is authorized by the terms of the power. It is the "manner" in which the donee has seen fit to limit the estate. The claim of the guardian to the corpus of the share given to the granddaughter tends to defeat the limitation to the daughters in the event of the granddaughter's death before attaining the age of twenty-four years. The amount must therefore remain in the hands of the trustees for this purpose.

The beneficial estate of the widow in the property of the donor was confined to the term of her own life. It ceased the instant that she died, and the interests of her appointees took effect then, just as if they had been named in the original instrument. Hence they became at once entitled to the income and profits belonging to or arising from their shares.

Interest, therefore, began to run in their favor when the donee of the power died, and not from the expiration of a year thereafter. If this was not so, she would be having the estate not merelv for life, but for an additional year.

The account on its face professes to be of the estate of Mary Boyles (the donee of the power), and the auditing judge therefore very properly made distribution of the residue in accordance with the directions of the will with regard to her own estate. It is said, however, that in point of fact the greater part, if not the whole, was that of her husband, as to which she only had a power of appointment, and as to which she directs the residue shall be held by trustees for the separate use of two only of her daughters, the third being already sufficiently provided for.

So far, therefore, as the residue consists of the assets of Mary Boyles, it is to be distributed under her will among her three daughters; but so far as it consists of assets of the estate of her husband it is to be awarded to the trustee named in her will, to be held for the separate use of her daughters, Mary H. Boyles and Janet Boyles, in accordance with the appointment under the power.

The exceptions in behalf of Franz O. Matthiessen, trustee, and Mary H. Boyles and Janet Boyles, distributees, and of Henry C. Boyles, are sustained.

Decree accordingly.

Opinion by PENROSE, J.

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April 17, 1878.

Moore's Estate.

Assumption of existing mortgage debt by purchaser—When personal estate liable for amount of such mortgage—When vendee took property "under and subject" to a mortgage debt, and did no other act to render him personally liable, such debt must be paid out of the realty—Exoneration of personalty.

Sur exceptions to adjudication.

By the adjudication the following facts appeared: The decedent in his lifetime purchased from Andrew M. Moore a house and lot on Spring Garden Street. The deed was dated February 12, 1877, and the consideration named in it was $9500. The *habendum* contained these words: "under and subject nevertheless to the payment of the aforesaid mortgage debt or principal sum of $8500 and the interest due and to grow due thereon." The receipt at the foot was for $9500, being the full consideration. The value of the property, clear of incumbrance, was $18,000. The property was originally conveyed by James Lyons, subject to the mortgage, to Andrew M. Moore, the decedent's grantor. The mortgage was dated April 13, 1874, payable in five years, and is now held by the Palairet estate.

The decedent died intestate, leaving a widow, mother, and collateral heirs. Upon the question raised as between the heirs and the personal representatives of the decedent, whether the mortgage is a charge upon his personalty or realty, the auditing judge held: "that the words in the deed simply import that the decedent intended to indemnify his vendor, or mortgagee, against the debt in case the real estate was not sufficient to pay it, so the incumbrance must come out of the realty. The decedent neither promised by express words in the deed, nor by any contract with the vendor or mortgagee to be personally liable, nor did he himself create the incumbrance."

To this finding exceptions were filed on behalf of the accountant, Alfred T. Moore.

Geo. W. Thorn, for the exceptions.

John G. Johnson, contra.

May 11, 1878. THE COURT (after stating the facts). The single question presented is as to the liability of the personal estate for the payment of the mortgage and its accruing interest. If the mortgage and accompanying bond and warrant had been given and executed by decedent, the question would be of easy solution. But both were executed by a prior vendee. Still this would be immaterial if it were shown that he had assumed payment of the mortgage, "under and subject" to which he purchased the real estate, and thereby made the debt his own. The personal estate of a decedent is always, in the first instance, applicable to the payment of debts, unless exempted either by express provision in the will, or by implication from surrounding circumstances." (Bispham's Equity, 346, 347.) "And an instance of such implied exoneration may be found in the case of a mortgage debt not created by the decedent, and which has been held, therefore, under certain circumstances, to be payable not out of the personalty, but out of the mortgaged premises." (Idem, 348.) And in Keyzey *v.* Keyzey (9 Serg. & R. 7) TILGHMAN, C. J., says: "There is a distinction between debts originally contracted by the testator and those contracted by another, for in the last the land is considered as the debtor, and shall bear its own burthen. If A. purchases an estate subject to a mortgage, and dies, his personal estate shall not be applied to the exoneration of the land, unless he has done some act by which he has made the debt his own." (See also Mason's Estate, 1 Pars. Eq. Cases, 129.) In all cases, therefore, the first subject of inquiry is, whether the decedent has done any act whereby "he has made the debt his own." If so, then his personal estate is liable, but if not, then the heir or devisee takes the estate *cum onere*. (Hoff's Appeal, 12 Harris, 200; Lennig's Appeal, 2 P. F. Smith, 139.) In the present case there is no evidence of the assumption of payment of the mortgage by decedent; it formed no part of the consideration of the purchase from his vendor, nor was any act done by him whereby he made himself personally liable therefor. It is for these reasons within the rule laid down by TILGHMAN, C. J., *supra*, and the auditing judge was correct in disallowing the credit claimed by the accountant.

The exceptions are therefore dismissed.

Opinion by HANNA, J.

U. S. Circuit Court—Law.

May 2, 1878.

Schollenberger & Son v. The Phœnix Insurance Co. of Brooklyn.

Fire insurance—Policy—Covenant not to sue till award made not a condition precedent—Arbitration clause as to amount only not an ouster of Court's jurisdiction, and good.

A clause in a policy that the amount of the loss shall on request be ascertained by arbitrators, but all other defences shall be reserved, coupled with an agreement that no suit shall be brought until after award made, is not a bar to a

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suit on the policy for the loss, even though an arbitration is pending.

There is a distinction between a covenant to pay such a sum as an arbitrator shall award, and a covenant to refer the amount of liability to arbitration. Though a reference as to amount is still pending, a cause of action in the latter case may be enforced in a court of law.

Motions for judgment *non obstante veredicto*, on point reserved, and for new trial.

Debt on a policy of fire insurance.

The contract was made between the plaintiffs and the company, acting by their local agents in Philadelphia, covering property in Philadelphia. After the service of the writ upon the local agents a general appearance of the company's counsel was entered, and subsequently leave was asked by the defendants to withdraw their counsel's appearance. A rule was also taken to quash the service of the writ, on the ground that original process could not issue (under the Judiciary Act of 3d March, 1875, U. S. Stat. at Large, 1874–5, p. 470) against a foreign corporation, under the proviso in the Act providing that no cause shall be brought before the said Court unless the defendant be an inhabitant of or found within the district at the time of the service of the writ. Service of process in a number of similar cases where no general appearance had been entered, was quashed on the above ground, but in this case the Court held that as the defendants had entered a general appearance, they had thereby submitted themselves to the jurisdiction of the Court, and ordered a special venire for the trial of the case.

A plea in abatement was thereupon filed, to the effect that the plaintiffs could not recover in this action inasmuch as the policy contained conditions precedent not yet performed. The material language of the policy was as follows:—

In consideration of . . . . dollars to them paid by the insured, hereinafter named, the Phœnix Insurance Company of Brooklyn do insure [the plaintiffs] against loss or damage by fire to the amount of $2500 [on certain specified property], and the said Phœnix Insurance Company hereby agrees to make good unto the said insured . . . . all such loss or damage . . . . as shall happen by fire to the property so specified . . . . the amount of loss or damage to be estimated according to the actual cash value of the property at the time of the loss, and to be paid sixty days after the proofs of the same, required by the company, shall be made by the insured, and received at the office in New York, and the loss shall have been ascertained and proved in accordance with the terms and provisions of this policy. . . . .

(9) In case differences shall arise touching any loss or damage after proof thereof has been received in due form, the matter shall, at the written request of either party, be submitted to impartial arbitrators, whose award in writing shall be binding on the parties as to the amount of such loss or damage, but shall not decide the liabilities of the company under this policy; and further, that it shall be optional with the company to repair, etc. . . . .

(12) It is further hereby expressly provided and mutually agreed, that no suit or action against this company for the recovery of any claims by virtue of this policy shall be sustainable in any court of law or chancery until after an award shall have been obtained fixing the amount of such claim in the manner above provided, nor unless such suit or action shall be commenced in twelve months next after the loss shall occur, and should any suit or action be commenced against this company after the expiration of the aforesaid twelve months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding.

This plea in abatement was formally insufficient, not having been sworn to, and the plaintiffs' counsel signed judgment against the defendants on the said plea. The cause was ordered for trial, the defendants pleading issuably; and the plaintiffs having made out a *prima facie* case, the defendants asked for a nonsuit on the ground of variance, the declaration having omitted to state the conditions of the policy hereinbefore cited, arguing that it was a condition precedent to recovery that a reference should be had, and an award made, fixing the amount of the claim. The nonsuit was refused.

The defendants then offered evidence to show that an agreement of reference (but not upon the written request of either party) had been entered into between the parties prior to the beginning of this suit, in which it was agreed that all matters in dispute connected with the *amount of the loss* should be referred to the arbitration of two arbitrators therein named, with power to them to choose a third in case of difference, and that the award of said arbitrators, or a majority of them, should be final, binding, and conclusive upon both parties, as to the value of the property destroyed, but should not decide the liability of the company on the risk. They also showed that an arbitration had been begun, and much testimony taken under the above agreement, and that it was still pending at the time that this action was brought, at which time no award had been made and the case had not been concluded before the arbitrators. The defendants offered no further evidence, whereupon CADWALADER, J., who tried the case, reserving the point whether or not the plaintiffs could recover without showing an award, or that said award had been prevented by the defendant's default, left the case to the jury.

A verdict was rendered for the plaintiffs for the full amount claimed, whereupon the defendants entered this motion for a new trial, and to enter judgment in defendants' favor upon the point reserved.

James H. Heverin and *R. P. White*, for the motions.

The condition of the policy requiring an award was a condition precedent, upon compliance with which only the defendants became liable. As admittedly no award had been made, the judgment must be entered for the defendants.

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Scott *v.* Avery, 5 House of Lords, 811.
Milner *v.* Fields, 5 Exchequer Reports, 829.
Leebrick *v.* Lyter, 3 W. & S. 365.
Herdic *v.* Bilger, 11 Wright, 60.
Quigley *v.* De Haas, 1 Norris, 274.
L. L. & G. Insurance Co. *v.* Craighton, 51 Georgia, 95.

The contract here is not to pay the value of the property, with a collateral covenant to submit, but to pay what shall be determined by a specific tribunal to be due the plaintiffs. It is similar to the case of the United States *v.* Robertson (9 Peters, 326). The exact point has been decided in Yeomans *v.* Insurance Company (5 Insurance Law Journal, 858), by NIXON, J., of the U. S. Circuit Court of New Jersey. The fact that judgment on the plea in abatement was entered against the defendant for an informality in the plea, is not decisive of the case, inasmuch as the point can be raised on motion for a nonsuit on the ground of variance between the contract alleged and that proved.

The reference to the arbitrators was irrevocable.
Monongahela Company *v.* Fenlon, 4 W. & S. 205.
McGeehen *v.* Duffield, 5 Barr, 499.
Paist *v.* Caldwell, 25 Smith, 161.
Abbott *v.* Sheperd, 4 Phila. 90.
Flaherty *v.* German, 1 WEEKLY NOTES, 352.

A. S. Biddle and *R. C. McMurtrie*, contra.

The condition in this case to refer to arbitrators is not a condition precedent, but a collateral covenant, for breach of which the plaintiff may, possibly, be sued by the defendant in a cross action, but which cannot prevent an action by him in a court of law. The rule is that an agreement to oust the jurisdiction of the Court is void, as against public policy. No person is allowed to bind himself by a stipulation which may injure not only himself but the public. See the remarks of Lord Chancellor CRANWORTH on Scott *v.* Avery (*supra*). See also, as to the absurdity of refusing to entertain jurisdiction because of a pending arbitration, which may end in nothing, Scott *v.* Liverpool (3 De G. & J. 368). It is perfectly true that where the liability only arises in respect to a sum stated by a third person, no recourse can be had to the Court before his finding of the amount, unless such finding be excused. But that is not the case here. The agreement is to insure against loss by fire in a certain amount, in consideration of which both parties agree, upon the written request of the other, to submit the amount to arbitration in case of difference. The requirement that the submission is to be made *in case of difference*, and *upon a written request*, shows conclusively that the reference and award are not conditions precedent in every case. Here there has been no written request. The case of Yeomans *v.* The Insurance Company (*supra*) is opposed to all the authority. The point in this case has been decided by the case of Horton *v.* Sager (4 Hurl. and Norm. 643), and Mentz *v.* The Armenia Insurance Co. (29 Smith, 478). There it was held by the Supreme Court of Pennsylvania that such a condition was void, and the judgment of the lower Court granting a nonsuit was reversed. That case was decided before this contract was entered into, and hence formed one of the terms of the contract which was made in Pennsylvania.

[CADWALADER, J. Perhaps the only remedy which the defendants could have would be to ask in a Court of Equity that execution should be restrained until a reasonable time had elapsed in order to enable the arbitrators to make an award.]

White, in reply. The contract is not to be governed by the Pennsylvania decision, which is opposed to the authorities. This Court will not be bound by State decisions on questions of general law.

S. & A. Tel. Co. *v.* N. O. M. & T. R. R. Co., 2 Central Law Journal, 88–9.
Sanford *v.* Portsmouth, Central Law Journal, Feb. 22, 1878.

This case differs from Mentz *v.* The Armenia Co. (*supra*), inasmuch as here the parties entered into the arbitration expressly excluding, by the terms of the agreement, all questions except that of amount. The written agreement of reference is equivalent to a waiver of requirement for the written request.

[CADWALADER, J., having asked the plaintiffs' counsel whether they would object to an allowance of a moderate amount of time, to enable the arbitrators, if possible, to make an award, with the understanding that the verdict should be reduced to their award, if below the verdict, otherwise to stand as found by the jury, counsel answered that such an agreement would be perfectly satisfactory.]

THE COURT. (CADWALADER, J.) We have no hesitation in saying that the conditions to refer, and that no suit shall be brought until award made, do not suspend the plaintiff's right of action. This has been decided in the case of Mentz *v.* The Armenia Insurance Co. (*supra*). The plaintiff on the evidence is therefore entitled to judgment, the covenant being a collateral one, and not a condition precedent. We think, however, that this Court may regard the matter from an equitable light, and that it would be proper, as both parties have submitted to the arbitration, that if an award can be made within a reasonable time they should be bound by it. As the plaintiff's counsel have stated that they have no objection to this course, we suspend the entry of judgment in the plaintiff's favor for sixty days, within which time, if an award is made, its amount is to take the place of the verdict. Otherwise the jury's assessment is to stand. The motions for a new trial, and to enter judgment in the defendant's favor on the point reserved, are refused.

MCKENNAN, J., concurred.

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WEEKLY NOTES OF CASES.

VOL. V.] *THURSDAY, MAY 30, 1878.* [No. 18.

Supreme Court.

Jan. '77, 69. Feb. 25, 1878.

Lewis v. Jeffries, Assignee of the Bank of Brandywine.
Lewis's Appeal.

Constitutional law—Corporations—Banks and banking—Art. XVI., § 7 of the Constitution—Effect of on pre-existing corporations—Increase of indebtedness—Mortgage upon bank building—Act of April 18, 1874.

A State Bank incorporated prior to the adoption of the Constitution of 1874, whose charter authorized it to borrow money by mortgage of its real estate, having mortgaged its bank building as security for a loan, subsequently made an assignment for the benefit of its creditors. The mortgagee began proceedings to foreclose his mortgage, and upon the application of the assignee for the benefit of creditors, the Court below granted a preliminary injunction restraining such proceedings on the ground that the mortgage was unlawfully created under Art. XVI. § 7 of the Constitution, and the Act of April 18, 1874, P. L. 61:

Held (reversing the decree of the Court below), that the injunction should not have been granted.

Appeal from the Common Pleas No. 3, of Philadelphia County.

Bill in equity by William W. Jeffries, assignee of the Bank of Brandywine, against Charles S. Lewis, for an injunction to restrain the collection of a bond and mortgage upon the bank building, of which the defendant was the assignee. The bill, affidavits, and counter affidavits, disclosed the following facts:—

The Bank of Brandywine, of the borough of West Chester, was incorporated by Act of March 15, 1871 (P. L. 364), section 4 of which authorized the company "to borrow money, but not in excess of its capital stock subscribed, and to secure the same by mortgage on its real and personal property, or pledge of stocks or bonds, or otherwise, and on such time as a majority of the directors may deem expedient." Section 5 provided that "the capital stock should be $100,000 . . . . with the privilege of increasing it to an amount not exceeding $300,000, and with the proviso that the bank should commence business as soon as $50,000 of its capital stock was paid in." On June 25, 1874, the bank executed and delivered to Robert S. Paschall a bond and mortgage, payable within three years, upon their bank building, as security for a loan of $15,000, which they applied to the discharge of a mortgage of $17,000, upon the real estate of the Dingee and Conard Company, of which the mortgagee was threatening the foreclosure, and which the bank feared would endanger a large amount of stock and unsecured indebtedness of the company which they held. The bank was in turn secured by a first mortgage upon the real estate of the company, the aggregate balance of the bank's indebtedness not being increased thereby. The mortgage of the bank was made in pursuance of a resolution of the majority of the board of directors, one of whom was Charles Dingee, the President of the Dingee and Conard Company, and subsequently received the approval of a majority of the stockholders at their first annual meeting after its creation, in May, 1875. On July 2, 1874, the defendant, upon receipt from the bank of a declaration of no set-off, purchased this bond and mortgage as a permanent and safe investment, knowing nothing of the officers or affairs of the bank, or of any fact prejudicial to its validity.

The bank, becoming financially embarrassed, made an assignment for the benefit of its creditors, Dec. 22, 1875, to the complainant, who averred that, by reason of the bond and mortgage held by the defendant, he was hindered from making a marketable title to the bank building, a sale of which he had made advantageous to the creditors.

The bill prayed (1) for a declaration that the creation of the indebtedness of $15,000 was unlawful; (2) for delivery of the bond and mortgage for cancellation; (3) for an injunction restraining the defendant from proceeding to collect the alleged debt upon the judgment or upon the mortgage; (4) general relief.

After hearing upon bill and affidavits, the Court continued the special five days' injunction previously granted, FINLETTER, J., delivering the following opinion:—

The Bank of Brandywine was chartered March 15, 1871, with the right to borrow money, "but not in excess of its capital." On the 25th day of June, A. D. 1874, it mortgaged its banking property for the sum of $15,000 to R. S. Paschall, who assigned to Charles S. Lewis, on the 30th of June, with a declaration of no set-off.

On the 22d day of December, 1875, the bank made an assignment to William W. Jeffries, who obtained a preliminary injunction enjoining the said Charles S. Lewis from proceeding to the collection of the said mortgage in any manner whatsoever.

The ground upon which the complaint is based is, that "the bond and mortgage were made without any compliance or attempted compliance with the provisions of the Act of Assembly of

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April 18, 1874, by virtue of which alone could such indebtedness have been lawfully created."

Section 7, Article 16, of the Constitution, is as follows: "The stock and indebtedness of corporations shall not be increased except in pursuance of general law, nor without the consent of the persons holding the larger amount in value of the stock, first obtained at a meeting to be held after sixty days' notice, given in pursuance of law."

A general Act of Assembly, to carry into effect this constitutional provision, approved April 18, 1874, is as follows: "The capital stock or indebtedness of any corporation may be increased from time to time by the consent of the persons or bodies corporate, holding the larger amount in value of the stock of such company . . . .: *Provided*, That no corporation shall increase the amount of its indebtedness beyond the amount of its capital stock subscribed, until the amount of its capital stock subscribed shall be fully paid in."

It is contended by the defendant, that neither the Constitution nor the Act of Assembly has application, because the bank, by its charter, was authorized to borrow money to the extent of its capital, and this loan was within that limit.

That the increase of indebtedness, which is prohibited, means an increase beyond that allowed by laws existing at the time of the adoption of the Constitution, and of the enactment of the general law.

That "even though the section means what complainants contend for, it was not intended to be applied to rights existing under laws then in force." . . . . By the schedule to the Constitution, section 2, it is provided, that "all rights, actions and contracts shall continue as if the Constitution had not been adopted."

It is further contended, that the stockholders, with knowledge of the mortgage, did not object, but acquiesced therein, and thereby ratified it.

The language of the Constitution is plain, direct, and positive. It is an absolute prohibition, without any qualification of any kind. "The stock and indebtedness of corporations shall not be increased, except," etc. By what authority, or by what rule of interpretation, shall we interpolate the words "beyond the amount now allowed by law"?

The proceedings of the convention do not favor the position of the defendants. That the convention did not look with favor upon the legislation which, about this time, with profuse liberality, flowed out to all sorts of corporations, may be seen in the section, as it was originally reported to the convention. It closes thus: "Laws heretofore enacted, by which an increase of stock or bonds, or other indebtedness of any incorporation, has been authorized, are hereby declared void, except so far as may be necessary to maintain the obligations of contracts."

It is not likely that a section born of this spirit would leave this very increase of indebtedness free from all restrictions and restraint.

If there had been any doubt as to the application of the prohibition of this section of the Constitution, it might be expected to be found and settled in the legislation which was to carry out the constitutional provision. The language of the Act is as positive and general as the Constitution. It affords no inference that any such doubt existed in the minds of the legislators.

The manifest object of the Constitution and the Act is, that owners of corporate property shall have some supervision over that property and over their agents.

We do not see how the second section of the schedule helps the argument of the defendant. What right is interfered with by giving the stockholder an opportunity to pass upon the question of mortgaging his property? What right is obstructed in staying for a time the inundation of debt? What vested right has the agent to endanger the property of the principal without his consent?

If, however, this is no answer, a complete one may be found in the fact, that the Legislature, in the charter which created the bank, reserved the right to alter or rescind any of its provisions. The Act of April 18, 1874, is the exercise of that right.

The directors of the bank made the mortgage against the prohibition of the Constitution and the Act of Assembly. This was not merely *ultra vires*, it was unlawful, and therefore void, and could not be ratified. (Fowler *v.* Scully, 22 P. F. S. 456.)

Are bonds and mortgages within the term "indebtedness." There surely cannot be higher or more dangerous debts, as applied to corporations. When it is considered that chattel mortgages may be so generally applied, it becomes evident that mortgages of all kinds are the very debts against which the stockholder might find his only protection in the law which requires his consent.

A mortgage upon the place of business and machinery of a manufacturing, printing, or publishing company; or upon the real estate and rolling stock of a steam or street railway, might be the surest and swiftest means of destruction.

It is not necessary for us to refine upon the word "indebtedness," or to enlarge or restrict its general meaning. If, as has been argued by the defendant, a strict and literal reading of the Constitution and act would prevent the receipt of deposits, and compel a cash business in all cases, we will wait until the exigencies call upon us to act. The present case involves no such

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questions. We now say only, that a bond and mortgage are within the meaning and intention of the law.

This case furnishes a fitting example of the evil which was intended to be guarded against by the Constitution. Three directors create a debt, not to meet an emergency of the business of the bank, but to lend the proceeds to a corporation, the president of which is one of the three directors. From such financiering, what but insolvency can result?

We have followed the plain and obvious meaning of the Constitution and law. In this we think we have also obeyed their spirit and object. If it be necessary in any event to enlarge or restrict this prohibition, it can be done with authority by a higher tribunal.

We would encourage the idea which the Constitution seems to suggest, that stockholders are the real owners of corporate property, and that managers and directors are but their trusted agents.

Injunction continued.

The defendant took this appeal, assigning for error the decree of the Court awarding the injunction.

Edward S. Dixon and *John G. Johnson*, for the appellants.

The debates in the Constitutional Convention show that the intention was not to prevent the creation of corporate indebtedness incurred in the transaction of ordinary business, without which no corporation could exist.

Philadelphia and Sunbury R. R. Co. *v.* Lewis, 9 Casey, 33.

Green's Brice's Ultra Vires, 66.

But the increase of indebtedness contemplated was that which was without the warrant of the charter and could not be created without the sanction of the Legislature. The convention meant to limit the increase of corporate power first granted, not to cripple such corporations as were acting in accordance with their chartered rights.

Debates in Constitutional Convention, vol. iii. pp. 572–577.

The evil meant to be remedied was that of excessive expansion of corporate credit and expenditure by means of an increase of capital stock obtained by corrupt special legislation and without previous consultation with the stockholders. The guard devised was that of general enactments. The increase, not the creation of indebtedness, was forbidden.

The constitutional provision is inapplicable to corporations existing at the time of its adoption, and the case falls within the ruling in—

Ahl *v.* Rhoads, 4 WEEKLY NOTES, 483.

Hays *v.* Commonwealth, 3 Id. 549.

There is nothing in the argument of permanency of indebtedness. The true question is one of interpretation, that is, that there shall be no increase of indebtedness that shall be an increase of corporate power.

[AGNEW, C. J. Perhaps a better distinction lies between the ordinary and extraordinary business of the bank.]

There is no standard by which to ascertain what is ordinary and what is extraordinary. The charter provides the power of creating the mortgage; how can it be said then that the exercise of that power is extraordinary?

Wayne MacVeagh and *Geo. Tucker Bispham*, for the appellee.

This injunction can be set aside only upon the ground that it is not within the legislative power of the people to direct that trustees shall consult the owners before dealing with trust property.

The Legislature still retains all control of corporations, excepting that of contract rights of the charter.

Dartmouth College *v.* Woodward, 4 Wheaton, 518.

In 1857 corporations were lifted out of the rule in the Dartmouth College Case, and the right of changing, altering and amending charters subsequently granted, provided no injustice was done to corporators, was resumed.

The contention here is not for a change of the charter, but that the owners should be consulted before the corporate indebtedness is increased. The word indebtedness in the constitutional provision means indebtedness of a permanent character. They do not intend to interfere with the ordinary business of banking.

[SHARSWOOD, J. Suppose a party makes a deposit of $15,000, and the directors, upon presentation of a check for that amount, are unable to meet it, can they give a mortgage for it?]

That is clearly within their corporate powers, but they cannot create an indebtedness of a permanent character.

[MERCUR, J. How would it be in the case of the bank's giving a certificate of deposit payable within a year?]

The distinction is between deposit *quâ* deposit, and a permanent indebtedness *quâ* indebtedness. The creation of the latter is *ultra vires*.

[SHARSWOOD, J. What is a permanent indebtedness? Is it that of one, two, five or ten years?]

The distinction is between bonded indebtedness like the present, and that of temporary current bank debts created from day to day. The evil was that directors of large corporations were managing them for their own profit. To remedy this, they were required to consult their stockholders. What contract does the constitutional provision impair, or what vested right does it interfere with? Certainly not with any vested rights of the directors. Ahl *v.* Rhoads (4 WEEKLY NOTES, 483), cited on the other side, is

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distinguishable, for in that case there was no increase of indebtedness, but merely an exchange of securities. In Hays *v.* The Commonwealth (3 WEEKLY NOTES, 549), the decision turned upon the power of the constitution to alter the vested rights of stockholders to their prejudice.

March 4, 1878. THE COURT. It is ordered that the special injunction in this case be dissolved, and that the record be remitted for further proceedings. Costs to abide the final decree.

PER CURIAM.

TRUNKEY, J., dissents.

Oct. & Nov. '77, 171. Oct. 29, 1877.

Smith v. Thornton.

Contract of marriage—Slaves—Issue of, when illegitimate where born, illegitimate in Pennsylvania.

When a marriage is void by the laws of the State in which it takes place, the issue of such marriage, born in that State, being illegitimate there, are also illegitimate in Pennsylvania.

Error to the Court of Common Pleas No. 1, of Allegheny County.

Ejectment by Thomas Smith and Harriet Smith against George Thornton for a lot of ground in the city of Pittsburgh.

At the trial (before STERRETT, P. J.) the following facts appeared: Levi Smith and Susan Ball, the father and mother of plaintiffs, were slaves in the State of Virginia, and were united in marriage by a justice of the peace, and with the consent of their respective masters, in the year 1832. They lived together as man and wife for five years, during which time two children, the plaintiffs, were born. In 1837 Levi's master emancipated him, and gave him a sum of money with which he came to Pittsburgh, and began work, with the understanding that he was to return at a future day and purchase his wife and children. In 1842 he returned to Virginia with this purpose, but before he met his family he was compelled to depart, and he returned to Pittsburgh. After his return thither he purchased the lot in suit, and built a house upon it, and took as his wife one Louisa Hawkins, with whom he lived until his death in 1853. This second wife survived him but a few days; she had no children, and the defendant claimed title, and took possession of the property as her next of kin.

Plaintiffs requested the Court to instruct the jury: (1) "That if they believe that the father of the plaintiffs (Levi Smith) and Susan Ball were married, and cohabited together as described by the witnesses for the plaintiffs, and that the plaintiffs are the children begotten by said Levi pursuant to said marriage, and surviving him (or other known kindred), the plaintiffs are entitled to recover in this action. (2) That if the plaintiffs' evidence is believed, they are the heirs of Levi Smith, as well as his children, and entitled to recover in this action. *Answer.* The foregoing points are affirmed *pro forma.* If you find the facts to be as therein stated, your verdict should be in favor of the plaintiffs for the lot in controversy, with six cents damages and costs, subject to the opinion of the Court on the questions of law raised by the points submitted in connection with the admitted fact that in the State of Virginia, prior to the late civil war, to wit, prior to the year 1862, slaves were chattels, and marriage between slaves, even when entered into by and with the consent of the masters of the respective parties thereto, had no legal validity. The issue of such connection had no inheritable blood. They belonged to the owner of the mother."

Verdict for plaintiffs.

After argument on the question of law reserved, the Court entered judgment in favor of defendant *non obstante veredicto*, being of opinion that "upon the death of Levi Smith, intestate, in 1853, his estate descended to such persons as were by law capable of inheriting the same; but if the plaintiffs, his children, had at that time no inheritable blood, they could not take by descent, and no subsequent change in the law could invest them with title as heirs-at-law."

Plaintiffs took this writ, assigning for error, *inter alia*, the action of the Court in entering judgment for defendant on the question of law reserved *non obstante veredicto*.

A. M. Watson, for plaintiffs in error.

That a slave mother, married in Virginia, could give birth to legitimate children, is virtually ruled in the case of

Omohundro's Appeal, 16 Sm. 113.

M. W. Acheson, contra.

The general rule is, that a marriage void where contracted is void everywhere.

2 Parsons on Contracts, 598.

2 Kent's Commentaries, 91.

This rule, which has been adopted by all civilized countries as "one dictated by just and enlightened views of international jurisprudence," should certainly prevail as between the several States of the Union.

Nov. 7, 1877. THE COURT. A marriage between slaves in Virginia, in the year 1832, being void, their issue were illegitimate. Without a statute in Pennsylvania to change their condition, their illegitimacy followed them into this State. They were, therefore, not heirs under the intestate laws, all the births being before the year

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1842. As the plaintiffs must recover on the strength of their own title, and not on the weakness of the title of the defendant, the judgment was right.

Judgment affirmed.

PER CURIAM. SHARSWOOD, J., absent.

Jan. '77, 191. Jan. 23, 1878.

Wister's Appeal.
Humphrey's Estate.

Trustees' commissions — Decedents' estates — Omission to deduct commissions until account filed not an estoppel.

A trustee having paid over income to the *cestui que trust* for five years, without deducting his commissions, and having rendered to her informal semi-annual accounts in which they were not charged, is not estopped from claiming them on his final account, in the absence of an agreement to waive commissions.

Appeal from the Orphans' Court of Philadelphia County.

Appeal of Wm. Wynne Wister, Jr., executor of L. W. Humphreys, deceased, from a decree of said Court allowing the claim of A. A. Humphreys, trustee, for commissions. The facts, as proved before the auditing judge, were as follows:—

Charles Humphreys died in July, 1870, leaving a will, by which he gave all his property, real and personal, to his nephew A. A. Humphreys, in trust, to pay the net income to his widow, L. W. Humphreys, for her life. At her death the whole estate was given to the trustee and his heirs. A. A. Humphreys was also appointed executor, but charged no commissions in that capacity. No trust accounts had ever been filed in Court, but income was collected semi-annually, and statements or accounts of income were rendered, which were signed by the trustee and by the *cestui que trust*, duplicates of which were kept by both parties. No commissions were charged in any of these statements. The *cestui que trust* died August 11, 1876. At the time of her death the semi-annual interest on certain bonds, due on the 1st of July next previous, had not been paid over to the *cestui que trust*. The trustee filed his first and final account in the Orphans' Court, October 5, 1876, claimed a commission of five per centum upon the sum of $53,692.86, being the total amount of income collected during the five years of the trust, less certain small expenses attending such collection, and craved allowance out of the fund then in his hands. Objection was made on behalf of W. Wynne Wister, Jr., executor of L. W. Humphreys, but the claim was allowed by the auditing judge. Exceptions were filed by the executor of Mrs. Humphreys, which were dismissed *pro forma* by agreement, and the executor then took this appeal.

George W. Biddle (with him *N. D. Miller* and *A. Sydney Biddle*), for appellant.

The right of a trustee to compensation is the special and peculiar right to reimburse himself for the trouble by retaining from the income as it passes through his hands the commissions that the law allows. If he does not do so he waives his right, and cannot seek to obtain it from some other fund. A claim is here set up to charge the estate of the life tenant, and to sue the heirs or legatees to recover the same.

Biddle's Appeal, 3 WEEKLY NOTES, 396.

The semi-annual accounts rendered by the trustee to the *cestui que trust*, signed by them both, in which no credit for commissions was claimed, equitably estop the trustee from now making a claim. The conduct of the trustee misled the *cestui que trust*.

Barton's Estate, 1 Pars. S. Eq. C. 24.

Hampton L. Carson, for appellee.

A trustee has no right to compensate himself by deducting his commissions from the income as it passes through his hands. The power to award compensation rests with the Courts, and the amount depends upon the nature of the trust and the fund or property.

Burr *v.* McEwen *et al.*, Baldwin's Rep. 154.
Askew *v.* Odenheimer, Ibid. 380.
Pusey *v.* Clemson, 9 S. & R. 209.
Walker's Estate, Ibid. 225.
McElhenny's Appeal, 10 Wr. 347.
Perry on Trusts, Vol. II. §§ 916–918.
Bispham's Equity, § 144, p. 148.
Spangler's Estate, 9 Harris, 337.
Copely's Appeal, 3 WEEKLY NOTES, 145.

A trustee does not forfeit his right to commissions by permitting them to accumulate until his account is brought into Court for an audit. The cases show that compensation is to be regarded as earned at the time the services were rendered only for the purpose of surcharging the trustee with interest upon balances remaining in his hands uninvested.

Callaghan *v.* Hall, 1 S. & R. 241.
Say *v.* Barnes, 4 S. & R. 112.
Harland's Accounts, 5 R. 323.
Sterrett's Appeal, 2 P. & W. 419.
Adams' Appeal, 11 Wr. 94.
Parker's Estate, 14 Sm. 307.
McElhenny's Appeal, 10 Wr. 347.

The corpus of the life tenant's estate is not looked to for payment. The claim is made to payment out of an instalment of income still in the hands of the trustee.

The semi-annual statements were not formal accounts, nor is there any proof that the trustee did not intend to charge commissions. In Barton's Estate such an intention appeared as a fact. Certainty is essential to all estoppels.

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February 4, 1878. THE COURT. The statements rendered in this case of the semi-annual receipts and disbursements of the income had not the effect of accounts stated between merchants or other dealers. The legal duty of accounting in the proper Court is inconsistent with such an effect. In the absence of an agreement to waive commissions, the mere holding over of them would be no waiver. The owner of the income had the advantage of the use of her whole income, and unless she had been so misled by the other acts of the accountant as to give these semi-annual statements the effect of an estoppel, the mere delay in claiming the commission was not in itself an act of estoppel. We do not discover any error in allowing the commissions in the final account settled according to law.

Decree affirmed, with costs to be paid by the appellant, and the appeal is dismissed.

PER CURIAM

Oct. & Nov. '77. Oct. 3, 1877.

Mackaness v. Long.

Practice—When a writ of error will lie—Sheriff's sale of personalty—When cannot be set aside—Act of April 10, 1849, and supplement of March 10, 1858—When the right of property vests in the vendee—Misapplication by sheriff of proceeds of sale—Validity of sale not destroyed thereby.

A writ of error will lie in all cases where a Court of record has given a final judgment or made an order in the nature of a final judgment.

The setting aside a sale of personal property is a final order or decree, and therefore reviewable on error.

The Court has no authority on the application of the sheriff, made after the return day of the execution, to set aside a sale of personal property regularly and fairly made.

A sale is a contract to pass rights or property for money, which the buyer pays, or promises to pay, to the seller for the thing bought and sold.

If the sheriff gives possession of the property sold before obtaining full payment therefor, and the bid is settled by the purchaser in good faith, the right of property passes.

When the sheriff on his own authority distributes money levied under several executions before the return day of the writ, he does it at his own risk. His misapplication of the proceeds cannot destroy the validity of a sale otherwise good.

Error to the Common Pleas No. 2, of Allegheny County.

This case was heard in the Court below on a rule to show cause why the sale by the sheriff of certain personal property of Henry Long on writs of *fieri facias*, Nos. 132, 133, and 195 of July Term, 1876, should not be set aside. The rule was granted upon affidavit and motion of R. H. Fife, sheriff, under the writ July T., 1876, 195, wherein Frederick Mackaness was plaintiff and Henry Long defendant. The two other writs above referred to were against the same defendant, the Allegheny Valley Railroad Company being plaintiff. The records in the three several cases were united in this proceeding. The following facts appeared, as stated in the opinion of the Supreme Court:—

"The sale was made on three writs of *fieri facias*, issued against the defendant in error, returnable on the first Monday of July. One of the writs was in favor of the plaintiff in error, but was received by the sheriff after the two others. The sheriff having failed to return the executions on the return day, a rule was thereafter granted upon him to show cause why he should not return them and pay into Court the money realized thereon. On the return of this rule, July 15th, he put in an answer, under oath, averring substantially, *inter alia*, that he had levied on a certain leasehold estate with the fixtures and tools, and in pursuance of notice had sold the same to the plaintiff in error on the 31st May for $371. That on the 7th of June the purchaser paid $193 and gave a receipt for the residue of his bid; that immediately after he had thus distributed the proceeds of the sale, he ascertained there was a mechanic's lien on the leasehold, which was entitled to be paid, and that the purchaser had since refused to pay the residue of his bid. Upon this return, and on motion of the sheriff's attorney, a rule on the purchaser was granted to show cause why the sale should not be set aside for non-compliance with his bid. To this rule the plaintiff answered, under oath, averring that he went to the sheriff's office on the 7th of June, and stated to the deputy in charge that he was ready to pay his bid; he was informed by the deputy that he would be required to pay so much only as would satisfy the costs and the amount due on prior executions, and could give his receipt for the residue. That he complied with the request of the deputy by paying the money required, and gave his receipt for the excess to apply on his execution. He further averred that the deputy gave him possession of the property, which in fact he had since the day of his purchase; that he had no knowledge of the alleged defect in the sale until about the 7th of July; that relying on its validity he had entered into divers contracts, so that it would be unjust to him and to innocent parties to set aside the sale. He further denied that there was any trick, collusion, cunning or fraud in the sale or in the payment of the money.

"So far as appears by the record, the case was heard and decided on these two affidavits. The rule was made absolute. It is claimed by the

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defendant in error that additional evidence was given on the hearing contradicting some of the facts averred by the plaintiff; yet it is not alleged that the evidence showed any bad faith in the purchase, nor in the settlement of the bid at the time the money was paid."

Mackaness took this writ, assigning for error the action of the Court in making absolute the rule to show cause why the sale should not be set aside. The writ was sued out in the name of Frederick Mackaness, plaintiff in error, and R. H. Fife, sheriff, defendant in error.

A. N. Sutton (with him *W. H. Sutton*), for plaintiff in error.

The power of the Court below to set aside a sale of personal property is by virtue of the Act of April 10, 1849—extended to all the counties in the State by Act of March 10, 1858. (Purd. Dig. 645, §§ 49, 50.)*

The proceedings in this case were entirely wanting in every essential element necessary to give the Court jurisdiction. There was no inquiry into the only question the Court was competent to inquire into, to wit, as "to the regularity and fairness of the sale," and none "instituted before delivery." The delivery of the property to the plaintiff made his title absolute. The rights so acquired could only be divested by legal process, affording the privilege of a jury trial.

Bowen *v.* Burk, 1 Harris, 148.
Backentoss *v.* Speicher, 7 Casey, 326.
Smith *v.* Smith, Murphy & Co., 9 Harris, 372.
Scott *v.* Wells, 6 W. & S. 366.
Lawrence *v.* Gallagher, 2 WEEKLY NOTES, 261.

It is at his own risk that the sheriff distributes the proceeds of an execution before the return day.

Wortman *v.* Conyngham, 1 Peters C. C. R. 241.
Troubat & Haly Prac., vol. i. part 2, page 920.

R. B. Carnahan, contra.

The proceedings of the Court below in making the rule absolute and setting aside the sheriff's sale are not reviewable by this Court in any form of proceeding, but if so, they can be brought here only on an appeal, and a writ of error will not lie.

The writ of error in this case cannot bring up the records in the two cases of the Allegheny Valley R. R. Co. *v.* Long, nor of the case of Mackaness *v.* Long; nor is there any record below that can be brought into this Court by this writ. There is no case pending below between Mackaness and Fife, and the writ ought to be dismissed.

October 8, 1877. THE COURT. No writ of error lay in this case against the sheriff. The writ of error is therefore quashed.

Per CURIAM.

On October 15, 1877, the counsel for plaintiff in error moved the Court for a re-argument of this case, assigning, *inter alia*, the following reasons:—

R. H. Fife, sheriff, was the plaintiff to the issue upon which the judgment assigned for error was rendered, and appears in this Court as defendant to the issue so raised; said rule having been granted to No. 195, July Term, 1876, in which there was no controversy between the original parties, to wit, Frederick Mackaness, plaintiff, and Henry Long, defendant; the only issue in said case being between said R. H. Fife, sheriff, plaintiff, as to the rule to show cause, and Frederick Mackaness, defendant, as to said rule. Upon bringing the record of said *fi. fa.* No. 195, July Term, 1876, to this Court, the said R. H. Fife, being the only party in interest, was served with notice thereof, that he might appear and defend his action in the Court below, and as such appears as defendant. An inspection of the writ and record returned therewith will show that the record and issue presented therein are properly before this Court.

The petitioner further submitted that said sale having been upon three writs, to wit, *fi. fas.* Nos. 132, 133, and 195 of July Term, 1876, and the records of said several writs having been united in the proceedings below by said R. H. Fife having addressed his affidavit and rule to the said several records, and alike presenting the same issue between said R. H. Fife and said Frederick Mackaness, the plaintiff in error was not in error in thus presenting them by his said writ.

Motion allowed and re-argument had October 31, 1877.*

January 7, 1878. THE COURT. All the errors assigned relate to setting aside the sheriff's sale of personal estate. [Here follows the statement of the facts as already given above.]

* This Act provides: "It shall and may be lawful for any Court from which any execution or order of sale shall issue for the sale of personal property, to inquire into the regularity and fairness of the sale, at the instance of any party interested by execution, foreign or domestic attachment, or under a general assignment, upon affidavit of circumstances, before delivery of the goods; and if it appear that the sale shall have been so irregular or fraudulent as in the opinion of the Court to have produced a sacrifice of the property, to the prejudice of any such party, it shall be competent for the Court to set aside such sale, and the same property may be again exposed to sale, as if no such previous sale had been made."

* It appears that the Supreme Court did not concur in the views of the learned counsel for plaintiff in error, but that on further inspection of the record, finding that the writ of error was directed to the case of Mackaness *v.* Long, 195 July Term, 1876, they were of opinion that Long, not Fife, was the proper defendant in error. They accordingly treat the case, in their further consideration of it, as that of Frederick Mackaness plaintiff in error *v.* Henry Long defendant in error.—REP.

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It is contended by the defendant in error that the action of the Court below is not reviewable in any form of proceeding; but if reviewable, it must be on appeal and not on writ of error. Neither of these objections is sustained by the authorities. The rule is that a writ of error will lie in all cases where a Court of record has given a final judgment or made an order in the nature of a final judgment. (Com'th *v.* Judges of Common Pleas, 3 Binn. 273; Cassel *v.* Duncan, 2 S. & R. 57; Harger *v.* Commissioners, 2 Jones, 251.) The setting aside a sale of personal property is clearly a final order or decree, and therefore reviewable on error.

The answer of the sheriff to the rule upon him contains his only return to the executions. It shows a regular sale and settlement of the bid with the purchaser, prior to the return day of the writ. It alleges no irregularity or unfairness in the sale; nor does it aver any fraud or deceit in the payment of part of the money and in taking the plaintiff's receipt for the residue of the bid. The sole ground for setting aside the sale is predicated on the subsequent refusal of the plaintiff to pay to the sheriff the sum which he had already, at the sheriff's request, receipted on his execution. The question presented is, can a sale of personal property thus fairly made, and the purchase money paid according to the request of the sheriff before the return day of the writ, be set aside on the application of the sheriff made after the return day? The Act of April 10, 1849, and the supplement of 10th March, 1858 (Purd. Dig. 645), authorize the Court to set aside a sale of personal property only in case it "shall have been so irregular or fraudulent as in the opinion of the Court to have produced a sacrifice of the property." The facts before us do not bring the case within the statute. No authority was cited recognizing the power of the Court, on the application of the sheriff made after the return day of the execution, to set aside a sale of personal property, regularly and fairly made. On the contrary, it was held in Harris *v.* Smith (3 S. & R. 21), if a vendor rely on the promise of the vendee to perform the conditions of the sale, and deliver the goods absolutely, the right of property will be changed, although the conditions never be performed. This was in a sale at auction. So in Scott *v.* Wells (6 W. & S. 357), it was held to be a general rule. Wherever there has been any absolute delivery pursuant to a bargain perfect in its members, the ownership of the property is vested by it. Although the terms of a sale be cash, a subsequent delivery without payment passes the property to the vendee, not only as against the rest of mankind, but against the vendor himself. It matters not whether the sale be a private one or at public auction. (Bowen *et al. v.* Burk, 1 Harris, 146.) If on a sale for cash the vendee takes the goods away without payment of the money, the vendor should immediately reclaim them by pursuing the party and retaining them, and this may be done when necessary, even by force. (Leedom *v.* Philips, 1 Yates, 529; Bowen *et al. v.* Burk, *supra;* Backentoss *v.* Speicher, 7 Casey, 324.) The right of reclamation after delivery exists only in case of fraud or deceit in the purchase or in procuring the possession. (Smith *v.* Smith *et al.*, 9 Harris, 367.) Sale is a word of precise legal import in law and in equity. It is a contract to pass rights or property for money which the buyer pays or promises to pay to the seller, for the thing bought and sold. (Williamson *v.* Berry, 8 How. 544.) A sale may be as complete, and the title to the chattel pass as fully in consideration of a promise to pay, as by actual payment, when possession is given. It follows that if the sheriff gave possession of the property sold, before obtaining the full payment therefor, and the bid was settled by the purchaser in good faith, which is not denied, the right of property passed.

We do not mean to question the right of the sheriff, acting with promptness, to have reclaimed the property in case of fraudulent conduct in the purchase or taking possession; but we know of no power in the Court, under the established facts in this case, and at the time of the application, to set aside the sale. When the sheriff, on his own authority, distributes money levied under several executions before the return day of the writ, he does it at his own risk. (Williams' Appeal, 9 Barr, 267.) His misapplication of the proceeds cannot destroy the validity of a sale otherwise good. The learned Judge therefore erred in making the rule absolute.

Order reversed and rule discharged.

Opinion by MERCUR, J. SHARSWOOD, J., dissents.

Oct. & Nov. '77, 265. Nov. 16, 1877.

Hart and Parshall v. Carroll.

Vendor and vendee—Parol contract for sale of lands—Statute of frauds—What necessary to avoid the operation of—Effect of a deed signed but not delivered.

In order to take a parol contract for the sale of lands out of the operation of the statute of frauds, its terms must be shown by full, complete, satisfactory, and indubitable proof. The evidence must define the boundaries and indicate the quantity of the land. It must fix the amount of the consideration. It must establish the fact that possession was taken in pursuance of the contract, and at or immediately after the time it was made, the fact that the change of possession was notorious, and the fact that it had been ex-

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clusive, continuous, and maintained. And it must show performance or part performance by the vendee which could not be compensated in damages, and such as would make rescission inequitable and unjust.

In ejectment for lands claimed to have been purchased under agreement, a deed to the defendant was produced in evidence containing a description of the property, specifying the consideration, etc., and signed by the plaintiff, but which did not appear to have been delivered:

Held (reversing the judgment of the Court below), that such deed, in connection with the other facts in the case, was sufficient evidence of a parol contract to take the case out of the statute of frauds.

Error to the Court of Common Pleas of Fayette County.

Ejectment brought July 16, 1873, by Joseph Carroll against C. A. Hart for ninety acres of land.

The defendant's title to the land was based on a parol sale of the same to him by Carroll made some fourteen or fifteen years before suit brought, since which time Hart had been in possession. A short time before the bringing of the suit Hart became much involved in debt, and among other judgments entered against him was one in favor of Elias Parshall for $2000. A rule of reference was had in this suit in ejectment, and an award was made finding for the plaintiff, to be released upon the payment within thirty days of $784, the amount claimed by Carroll. As a precautionary measure, lest the rights of the judgment-creditors might be precluded by the forfeiture of the land on the conditional award, Parshall was allowed by the Court to become a defendant, and he entered an appeal from the award. The same land was sold on an execution against Hart and purchased by Parshall to whom a sheriff's deed was made.

At the trial (before A. E. WILSON, P. J.) the defendant caused to be produced in evidence a deed of this land to Hart dated December 7, 1867. It was signed by Carroll, and defendants claimed had been delivered. Defendants further claimed and produced evidence tending to show that independently of the fact of the delivery of the deed, there was a verbal sale of the land by Carroll to Hart some fourteen years or more before the bringing of the suit. That the sale was precise in its terms as to the lands sold and the price to be paid. That the defendant took possession of the land immediately after his purchase, and continued in the sole and absolute possession until the bringing of this suit. That the defendant changed the entire character and value of the land by fencing, clearing, and draining, and that he erected part of a valuable distillery on it, which would be ruined by cutting away the part standing on this land, rendering the whole distillery valueless. That the purchase monev had all been paid.

The Court instructed the jury *inter alia* "that if there was no delivery of the deed as claimed by the defendants, then the defendants have no right to hold this land, and your verdict must be for the plaintiff. There is nothing in the evidence of the verbal sale, that would enable the defendants to retain this land, and ask a verdict at your hands outside of the statute of frauds and perjuries."

Verdict and judgment for plaintiff. Defendant took this writ, assigning for error the portion of the charge given above.

Parshall, with him *Minor*, for plaintiff in error.

If all the evidence offered by the defendant had been taken as correct then the contract had been completely executed. The defendants purchased and paid for the land, held possession of it for more than fourteen years, made valuable improvements thereon, while the plaintiff stood by until there was an opportunity to take the land back, and defraud the creditors of Hart. It is certainly against equity and justice to allow the plaintiff to take this land under these facts, and the case ought to have gone to the jury on the facts outside of the statute. In support of these principles we rely on the following authorities:—

Smith *v.* Patton, 1 S & R. 80.
Pugh *v.* Good, 3 W. & S. 56.
Reed *v.* Reed, 12 Penna. St. 117.
Clarke *v.* Vankirk, 14 S. & R. 354.
Miranville *v.* Silverthorn, 1 Grant, 410.
Haslet *v.* Haslet, 6 Watts, 464.
Blakeslee *v.* Blakeslee, 10 Harris, 237.
Ackerman *v.* Fisher, 7 Sm. 457.
Toe *v.* Toe, 3 Grant, 74.
McGibbeney *v.* Burmaster, 3 Sm. 332.
Farley *v.* Stokes, 1 Pars. 422.

The deed signed by Carroll, even if not delivered, was a reduction of the contract to writing, and as Hart then had possession of the land and Carroll then admitted the payment of the purchase money, it was sufficient to take the case out of the statute.

Lowry *v.* Mehaffy, 10 Watts, 387.
Gilhausen *v.* Willink, 3 Pitts. L. J. 214.
Tripp *v.* Bishop, 6 Sm. 424.
Smith's Appeal, 19 Id. 474.

C. E. Boyle, contra. It may be admitted that there was some sort of a contract between Carroll and Hart, but the evidence as to the price, the time of payment, the boundaries, and the possession were all vague and unreliable. It was altogether insufficient to make a valid parol sale, and if it did, the defendant could be fully compensated in damages.

Moore *v.* Small, 7 Harris, 467.
Overmyer *v.* Koerner, 2 WEEKLY NOTES, 6.
Postlethwait *v.* Frease, 7 Casey, 472.
McKee *v.* Phillips, 9 Watts, 85.
Goucher *v.* Martin, Id. 106.
Woods *v.* Farmere, 10 Watts, 195.
Ackerman *v.* Fisher, 7 Sm. 460.
Aitkin *v.* Young, 2 Jones, 15.
Christy *v.* Barnhart, 2 Harris, 260.

[AGNEW, C. J. Was not the signed but unde-

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livered deed evidence of a parol contract sufficient to take the case out of the statute of frauds?]

I do not think it could fairly be used. A writing signed by the vendor alone is a sufficient compliance with the requirements of the statute, if the writing be delivered. Without this it is waste paper.

Jan. 7, 1878. THE COURT. In order to take a parol contract for the sale of lands out of the operation of the statute of frauds, its terms must be shown by full, complete, satisfactory, and indubitable proof. The evidence must define the boundaries and indicate the quantity of the land. It must fix the amount of the consideration. It must establish the fact that possession was taken in pursuance of the contract, and at or immediately after the time it was made, the fact that the change of possession was notorious, and the fact that it had been exclusive, continuous, and maintained. And it must show performance or part performance by the vendee which could not be compensated in damages, and such as would make rescission inequitable and unjust. These rules have been settled by a long series of authorities, including Goucher *v.* Martin (9 Watts, 106), Woods *v.* Farmere (10 Watts, 195), Frye *v.* Shepler (7 Barr, 91), Brawdy *v.* Brawdy (Idem, 157), Aitkin *v.* Young (2 Jones, 15), and Rankin *v.* Simpson (7 Harris, 471). There must be proof of an expenditure for improvements not reimbursed by profits derived from the occupation of the land, and not capable of compensation in damages recoverable in an action for the breach of the contract. (Wack *v.* Sorber, 2 Wh. 387; McKowen *v.* McDonald, 7 Wright, 441.) And it was said in the celebrated charge of Judge GRIER, in Woods *v.* Farmare, that "It must be plain that the party who claims the interference of the Chancellor has the burden of proof thrown on him. He knows, or is presumed to have known, that the law requires, as evidence of the title to land, that the contract must be made in writing. He has acted with great negligence and folly who has paid his money without taking the proper and legal evidence. When, therefore, he requests a Court to interfere for him, and save him from the consequences of his own disregard of the law—when he asks the Court to decree in his favor, in the face of the letter of the law, he should be held rigidly to full, complete, satisfactory, and indubitable proof." These are stringent, but salutary and beneficial rules, in the maintenance of which the public welfare is vitally involved. The inquiry remains whether or not, under these rules, the case of the defendants below embodied elements which ought fairly to have been submitted for the consideration of the jury.

What was meant by Judge GRIER in the requirement of "indubitable proof," was evidence that should not only be found credible, but of such weight and directness as to make out the facts alleged beyond a doubt. In the very nature of things, that conclusive and absolute proof which results from the production of record evidence, or rests on the solution of a mathematical problem, can never be the effect of the verbal testimony of human witnesses. The language of the authorities is to be taken and treated in its connection with and its relation to the subjects and instrumentalities to which it has been applied. In the present case, it was not disputed that Carroll, the plaintiff below, sold the land in controversy to Hart, one of the defendants. Both the parties swore distinctly to the fact. There was some parol testimony, from which the date of the contract could have been approximately fixed in the year 1860. It is true this testimony was so uncertain as to create a difficulty, if it were unaided by other evidence, in settling the amount of purchase-money due at any later period, but that difficulty was removed when the deed from Carroll to Hart was made. The price of the land was shown by both parties to have been two dollars and fifty cents per acre, and the quantity was distinctly ascertained to have been eighty-one acres and a half. In regard to the price, the stenographer's notes contain a statement made at one time by Hart, in the course of his examination, that it was one dollar and fifty cents per acre, and the statement was left apparently unexplained. Its significance would have been a proper subject for the jury to consider. It appeared, also, that Carroll had stated before the arbitrators that the price was four dollars per acre, but he explained that by saying that he meant to include interest. Then there was evidence that the price agreed on was to be paid from time to time as Carroll should require it; that some advances and payments were made in accordance with that understanding; that Hart entered into possession under the contract; that he cleared eighteen acres, and fenced the entire tract; and that a portion of his steam distillery was erected on this land. It was shown, also, in the course of the testimony, in support of the general allegation of the existence of a parol contract, as well as in support of the charge by the defendant Parshall of an attempt on the part of Carroll and Hart to defraud Hart's creditors, that shortly before this suit was brought he had become involved, and judgments had been entered against him; and that, on the day when this writ of ejectment was issued and the rule of reference entered by Carroll, Hart accepted service both of the writ and the rule. Both the parties attended before the arbitrators, Hart making no defence. An award was made in favor of Carroll, to be released on payment of $784 within thirty days.

From this award, on his petition to intervene,

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Parshall was permitted as a joint defendant to appeal.

In addition to the general facts recited, it appeared that Carroll had executed a deed to Hart for this land on the 7th of December, 1867. The jury found by their verdict that it had never been delivered, but it was in existence at the time of the trial, and was produced by Carroll and shown in Court during the examination of the witnesses. Not having been delivered, it conferred no title, and having been retained exclusively in the vendor's hands, it could not serve the purpose of averting the operation of the Statute. But its execution was a fact bearing upon the question of the existence of the contract. It was a deliberate admission that the land had been sold, and an explicit declaration of the terms of the sale, of the quantity and boundaries of the land, and of the amount of the purchase-money. Its production in evidence could not have been enforced for the purposes to which it could extend, not to establish title and not to avoid the Statute, but to show a carefully considered acknowledgment and recognition by Carroll of Hart's contract rights. Can it be doubted that verbal testimony of declarations by the plaintiff made in December, 1867, of the precise facts recited in the deed, would have been admissible in aid of the grounds on which the defence was rested? And how, in view of such clear and definite evidence as would be thus afforded, would a chancellor find embarrassment in decreeing specific performance? The ascertainment of the amount remaining due on the consideration would only be left, and that could be reached by such proof of payments as is required in an ordinary action involving the settlement of accounts. Rigid as the rules are that are prescribed for this class of controversies, it is still the law that "where a parol contract of sale is precise as to the terms and subject-matter, and the vendee has taken possession in pursuance of it, and made valuable improvements, with the assent of the vendor, it is not within the Statute of Frauds; and in such case, if the vendor bring ejectment, the jury ought to find a conditional verdict." (McGibbeny *v.* Burmaster, 3 P. F. S. 332.) There, as here, a deed had been written, and the present Chief Justice said that, "though not executed, it plainly evidenced the terms of the contract." A series of facts appeared on the trial of this cause, in which the jury might have found a sustainable contract adequately proved, and under proper instructions the adjustment of the value of those facts ought to have been left to them.

Judgment reversed, and *venire facias de novo* awarded.

Opinion by WOODWARD, J.

July, '76, 58. March 20, 1878.

In re Contested Election of Simon Marburger.

Election law—Identity of person voted for under different names.

At a township election certain votes for supervisor were cast for Simon Marburger, and other votes for Samuel Marburger. Upon proof that Simon was frequently called and was known by the name of Samuel, and that no other person of that name was voted for at the election, or was resident in the township:

Held, that the votes cast for Samuel Marburger should be counted for Simon Marburger.

Certiorari to the Quarter Sessions of Schuylkill County.

Paul Bock and others, being more than twenty-five qualified electors of East Brunswick Township, presented their petition to the Court below, setting forth that a majority of the officers of the township election held on February 15, 1876, had certified and returned that Simon Marburger received 109 votes for the office of supervisor, and that Christian Koch received 93 votes for the same office; that the return of said election was false, and that Christian Koch was duly elected supervisor, as shown by the following facts:—

There were two supervisors to be elected, and six candidates were voted for, and received votes, viz.: Christian Koch, 93; David Trehn, 94; Simon Marburger, 72; Elias Oswold, 83; Daniel Miller, 34; Samuel Marburger, 37.

After the tally list and return were made out, showing the above result, and when the additional return sheet was about to be made out, a majority of the election officers contended that the votes cast for Samuel Marburger were in reality cast for Simon Marburger, and they did accordingly, in making out the additional return sheet, add the 37 votes cast for Samuel Marburger to the vote for Simon Marburger, thereby raising the latter's vote to 109.

That Simon Marburger had, in truth, received only 72 votes, which was a less number than those received by Christian Koch.

The respondent, Simon Marburger, in his answer averred that he was well and truly known and called in said township and elsewhere by the names of Simon Marburger and Samuel Marburger; that his business transactions were conducted sometimes in one name and sometimes in the other, and that he was interchangeably known and called by said names throughout the township; that there was no other person of the name of Samuel Marburger in the township of East Brunswick, and that no person of that name other than the respondent was a candidate or was voted for at the said election; and that all

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votes then cast for Samuel Marburger were cast for the respondent, and were so intended to be cast by the electors casting the same.

The Court below dismissed the petitition, GREEN, J., saying: "The testimony satisfactorily explains the reasons why Simon Marburger was voted for under two different names. There was a split in the political party to which he belonged, and two tickets were in the field for supervisor on one side. The defendant was put upon both tickets, upon one with Elias Oswold as his colleague, upon the other with Daniel Miller as his colleague. Upon one lot of tickets the defendant's name was printed Simon, upon the other Samuel. The defendant was at the polls nearly the whole day, and was electioneering indiscriminately with both tickets. Under such undisputed facts as these, I can find no merit in the contestants' case, and the certificate of election given was properly given to Simon Marburger."

The petitioners thereupon obtained this certiorari.

W. R. Smith (*S. W. Geer* with him), for the petitioners, contended that a man must be voted for under his real name, and if the elector votes for him under any other, it is exercising the privilege of the ballot so negligently that he ought to lose his vote. It is not a question of the intent of the elector.

Guy E. Farquhar, contra, was stopped by the Court.

April 1, 1878. THE COURT. The identity of the person voted for under the names of Simon and Samuel Marburger is proved beyond all doubt, and that he was known by both names, and also that no other person of that name was voted for. Under these circumstances the Court below could not do otherwise than to count the votes in those names for him as Simon Marburger, the name by which he was most commonly known, and having the larger number of votes.

The order and judgment of the Court of Quarter Sessions is affirmed, and the record ordered to be remitted.

Per CURIAM.

Jan. '75, 220. Feb. 5, 1878.

Woltemate's Appeal. Ditsche's Estate.

Illegitimates—What rights of inheritance secured to, by intestate law—Act of April 27, 1855.

A. and B. were illegitimate children of their mother C., who died in 1844. B. died in 1871 intestate:

Held (affirming the judgment of the Court below), that A. was not entitled to any portion of the estate under the Act of April 27, 1855.

The said Act merely enables illegitimate children to inherit from their mother, or the mother from her children. It does not legitimate bastards.

Grubb's App. 8 Sm. 55, and Stickel's App. 14 Id. 493, affirmed.

Appeal from the Orphans' Court of Philadelphia County.

Appeal of Rosalie Woltemate from a decree confirming the auditor's report upon the account of the administratrix of Xavier Ditsche, deceased. From this report the following facts appeared:—

Xavier Ditsche died in 1871 intestate, and without issue, leaving a widow, the above administratrix and accountant; a sister Rosalie, intermarried with one Woltemate, and a brother Conrad. Xavier, Rosalie, and Conrad were the illegitimate children of Elizabeth Ditsche, who died in 1844. The entire balance of the account, amounting after payment of debts to $15,842.45, was claimed by the administratrix, as widow of the intestate, on the ground that he had died without heirs or known kindred. On the other hand, Rosalie Woltemate and Conrad Ditsche each claimed $3973.11 on the ground that even as illegitimates they were entitled each to a quarter of the estate under the third section of the Act of April 27, 1855 (Purd. Dig. 810, pl. 40), which is as follows:—

"Illegitimate children shall take and be known by the name of their mother. And they and their mother shall respectively have capacity to take or inherit from each other personal estate, as next of kin, and real estate as heirs in fee simple; and as respects said real or personal estate, so taken and inherited, to transmit the same according to the intestate laws of this State."

The auditor held that Rosalie and Conrad were not entitled to any portion of the intestate's estate under this Act. Mrs. Woltemate filed exceptions to this ruling, but the Court overruled her exceptions and confirmed the report. She then took this appeal, assigning for error, *inter alia*, the Court's ruling that the Act of April 27, 1855, created no capacity in the illegitimate children of the same mother to inherit from each other.

W. Wynne Wister, Jr. (with him *Henry M. Phillips*), for the appellant.

The appellant is within the letter and spirit of the Act. The use of the word "respectively" negatives the idea that the Legislature intended to confine the benefits of the Act to the cases of children taking as a class from their mother, and the mother taking from them. "Respective" is a word of distribution. "They shall respectively take from each other," means they shall take "each from each." This is the grammatical signification of the word, and it is the legal signification as given by Lord HARDWICKE.

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Marryat *v.* Townly, 1 Ves. Sr. 102.

The plain meaning of words in an Act must prevail.

Green *v.* Wood, 7 Q. B. 178.
Curtis *v.* Hurlburt, 2 Conn. 315.

The Act of 1855 is supplementary to the Act of 1833. Under the Act of 1855 child inherits from child without reference to any stock. The fact that the mother of the present claimant died before the passage of the Act is unimportant.

In Grubb's App. (8 Sm. 55) there was an attempt to bring the kindred of the bastard's mother within the Act by implication. Here no implication is needed, but there would be every reason for a liberal construction if the words were not broad enough.

Geo. W. Thorn (*B. F. Fisher* with him), for the appellees.

There are but three cases construing the Act of 1855, viz.:—

Opdyke's App., 13 Wr. 373.
Grubb's App., 8 Sm. 55.
Steckel's App., 14 Sm. 493.

These cases confine the scope of the Act to the strict meaning of the words, the transmission from mother to illegitimates and from illegitimates to children.

If bastard brothers and sisters can inherit from each other without reference to the parent stock, they have a greater inheritable capacity than lawful brothers and sisters under the Act of 1833.

February 11, 1878. THE COURT. The interpretation heretofore given to the Act of April 27, 1855, relating to illegitimates, is, that the inheritance of estates is confined to the mother and the illegitimate child, but extends from either to the other. (Opdyke's Appeal, 13 Wright, 373; Grubb's Appeal, 8 P. F. Smith, 55; Steckel's Appeal, 14 P. F. Smith, 493.) This is in accordance with the precise language of the Act, to wit: "And they (illegitimate children) and their mother shall respectively have capacity to take or inherit from each other."

This has been held to be the extent to which the Legislature opened the door to illegitimates. As the mother of both the brother and sister, whose supposed relationship has produced this controversy, died in 1844, not only before the passage of the Act of 1855, but long before the death of the intestate Xavier Ditsche, there was no link in existence, at the time of his death, to bind the brother and sister to each other in a legal bond. Xavier could not transmit to his mother, while his mother only, if alive, could have transmitted to her child, his sister. There was therefore no relationship between Xavier and Rosalie through which his estate could come to her, unless it be held that the purpose of the Act of 1855 was to legitimate bastards, an intent distinctly denied in Grubb's Appeal and reaffirmed in Steckel's Appeal.

Decree affirmed at the costs of the appellant and appeal dismissed.

PER CURIAM.

Oct. & Nov. '77, 41. Nov. 19, 1877.

Gottman et al. v. Shoemaker et al.

Affidavit of defence—When necessary—Rule of Common Pleas of Crawford Co. allowing judgment for want of, construed.

A plaintiff, in order to entitle himself to judgment for want of a sufficient affidavit of defence under a rule of the Common Pleas, must have complied with all the requirements of such rule; and, unless it appear that he has done so, the judgment will be reversed, although the defendant had filed an affidavit of defence.

Error to the Common Pleas of Crawford County.

Covenant by D. O. Shoemaker *et al.* against Henry Gottman *et al.*, on a guaranty contained in a mortgage executed by the defendants as trustees of the Reformed Church at Titusville.

The defendants having appeared and filed an affidavit of defence, the Court entered judgment against them for want of a sufficient affidavit of defence; whereupon the defendants took this writ, assigning the entry of the judgment for error, on the ground, *inter alia*, that the plaintiffs were not entitled to judgment, because, having neither filed a copy of the mortgage nor referred in their præcipe or declaration to the office, book, and page where it was recorded, the action did not come within the provisions of the following rule of Court governing the entry of judgment for want of an affidavit of defence, viz.:—

Rule 6. In all actions founded on book accounts, bills, notes, bonds, and other instruments of writing for the payment of money, and in all actions upon covenants or contracts for the payment of money, or for the performance of some other duty or thing of a specified cash value, whether under seal or not, in all suits upon recognizances, judgments, mortgages, mechanics' liens and other records, and in actions of debt upon foreign judgments, and the judgments of justices of other States, if the plaintiff shall have filed a copy of the account or instrument of writing on which the suit is founded, on or before the return day of the writ, he shall be entitled to a judgment by default for the amount so claimed, at any time after twenty days from and after the return day of the writ, unless the defendant, or some one for him, knowing the facts, shall have filed an affidavit of defence, in which the nature and character of the defence shall be clearly and specifically stated.

Provided, that in suits upon recognizances and instruments on record in any of the Courts or offices in the county, a full copy thereof need not be filed, if the præcipe or narr. contain a full reference to the office, book, and page where the same may be found.

C. B. Guthrie (*Guthrie* and *Byles* with him), for plaintiffs in error.

Roe Reisinger (*Thomas Roddy* with him), contra.

The declaration contained a statement suffi-

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cient to inform the defendants of the character of the claim. This the Court below considered a substantial compliance with the rule, and every Court is the best interpreter of its own rules.

Kountz *v.* Citizens' Oil Refining Co., 22 Sm. 392.
Gannon *v.* Fritz, 29 Ibid. 303.

Jan. 7, 1878. THE COURT. This was an action of covenant on a mortgage; judgment was taken for want of a sufficient affidavit of defence. The first assignment of error presents the question whether any affidavit of defence was required, under the rule of Court. In all actions founded, *inter alia*, on instruments of writing for the payment of money, or on mortgages, it declares the plaintiff shall be entitled to judgment by default unless an affidavit of defence be filed, if he shall have filed a copy of the instrument of writing on which the suit is founded, on or before the return day of the writ. It further provides that, in suits on instruments on record in any of the Courts or offices in the county, a full copy thereof need not be filed, if the præcipe or narr. contain a full reference to the office, book, and page where the same may be found.

In this case the action was founded on an instrument of writing. No copy of it was filed. Neither the præcipe nor narr. contained any reference to any office, book, or page where the same could be found. The plaintiffs below had, therefore, clearly failed to perform an act which was essentially necessary to impose on the defendants the duty of making an affidavit of defence. It is so manifest that the defendants in error were not in a condition to invoke the aid of the rule, we must infer that this fact was not brought to the attention of the Court below.

The necessity for an affidavit of defence must have been assumed, and its sufficiency only considered. An omission, however, to then state an objection so clearly shown by the record does not now preclude the plaintiffs in error from urging it as a ground of objection to the judgment. It was the duty of the defendants in error to show they had complied with all the requirements of the rule, necessary to entitle them to a judgment. They should have shown it then. They must show it now, or the judgment cannot be sustained.

It is unnecessary to elaborate this case. No argument can make the error more clear than a simple statement of the facts. The defendants in error had no right to ask for an affidavit of defence, the other party was under no obligation to file one. As the case goes back for trial, it is not necessary to consider the facts averred in the affidavit, nor to review the other assignments.

Judgment reversed, and a *venire facias de novo* awarded.

Opinion by MERCUR, J.

Common Pleas—Law.

C. P. No. 3. April 6, 1878.

Bowers v. Brice.

Buildings—Act of April 21, 1835—What is a new building within that Act.

Sur petition and answer, etc.

The following facts were agreed upon as the facts of the case:—

(1) The question is, whether or not an alteration of a back building of a house, No. 1084 Beach Street, Kensington, with a new entry-way therefrom through the main building in the front part of the house, is or is not within the provisions of the Act of Assembly requiring every new dwelling-house to have an open space attached to it in the rear or at the side equal to at least twelve feet square, because it is admitted that if said alteration is within the Act, and constitutes four new buildings, there is not such an open space attached to each, or in the rear or side thereof, inasmuch as the side back building fronts on a yard but seven feet wide, and has no other open space attached to it or to said four dwelling-houses. The question as to the frontage on a seven feet wide alley or passage way, is a so submitted.

(2) Externally, the alteration consists in the demolition of two frame walls of the rear room of said back building, leaving the two brick walls thereof standing, and the erection in place of the two demolished walls, of two new brick ones, and in adding one new story in height to the whole rear building which was formerly only two stories high, except the rear room, which was formerly only one story high, and which is now three stories high, and a cellar.

(3) Internally the alteration of said back building, as constructed, is in making four instead of three rooms by a partition in one of the four rooms. Formerly there were only two stairways in said back building and the hall stairway. That now there are four stairways and the hall stairway, each of the said stairways extending to the third story. That formerly there were but two ranges in said back building, but now there are four, each of the ground rooms having one That formerly there were but two outside doorways in said back building, but now there are four, each of the ground rooms having one outside doorway. That formerly all the three rooms of the back building had communicating doors on the first floor, but that now one of those rooms has been divided by a studding partition, which has an opening for a doorway, with jams, etc.; but said door is at present nailed up, and is not

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hung on hinges. It would require not more than fifteen minutes to tear off the strips by which the door is nailed up, and to swing it on hinges. The two rooms next to the main building communicate by open doors, but the door between the rear rooms on the ground floor is nailed up similarly to that in the new partition. That on the second floor none of the rooms are communicating. That on the third floor none of the rooms are communicating. That the only entrance and exit to and from the second and third floors is by the staircase leading from the rooms on the first floor directly below, except as to the first and third floor rooms next to the entry, where there are doorways to the entry.

William P. Messick, for plaintiff.

The alterations made virtually transform the old building into a new one, or several new ones. They have now independent means of access, and are to all intents and purposes separate buildings. Such being the case, they are clearly within the evil attempted to be provided against by the Act of Assembly.

Schultz *v.* Doak, 4 Phila. 151.
Schultz *v.* Wireman, 4 Id. 121.

John G. Johnson, for defendant.

This is simply the alteration of an old building. The character of its construction remains the same, its facilities only being increased.

THE COURT (LUDLOW, P. J.). This is a colorable evasion of the building laws. It is an attempt to create new buildings within the purport of the Act and against its provisions.

The following decree was entered by the Court:—

"And now, April 6, 1878, after hearing upon petition, answer, and statement of evidence agreed upon by counsel in writing, and filed in this case, the Court order, adjudge, and decree that the defendant, William Brice, owner of the property described in the petition, open communication from room to room on each of the three floors of the back building of said property or dwelling described in said petition, and keep open said communication; and that he shall not lease, use, or allow to be used the subdivisions of said back bullding as separate dwellings or tenements, unless they or either of them so leased or used shall be made to front on a street or alley or court of at least twenty feet in width, and have attached in the rear or side to each subdivision so leased or used at least twelve feet square of open space.

C. P. No. 3. April 6, 1878.

Thompson v. Galloway.

Practice—Judgment in cases where the affidavit of defence has been taken out of Court—Setting aside judgment—Promissory note—Suit by holder of accommodation paper who has knowledge of want of consideration—Usury.

Rule to set aside a judgment which had been granted notwithstanding affidavit of defence.

Assumpsit on check given and note endorsed by defendant to R. C. Remmey and by him endorsed to plaintiff.

An affidavit was filed by counsel for defendant setting forth that he had filed an affidavit of defence the day before judgment day; that on judgment day he had taken it out of Court, leaving his receipt, in order to make a press copy, and that the motion for judgment was made without his knowledge. A supplemental affidavit of defence set forth, *inter alia*, that the check in this instance was one of a series of checks which during the past two years have been given by defendant to Remmey as accommodation checks, and which were in renewal of other checks previously given on which loans had been made by plaintiff to said Remmey; that the checks were made payable in advance, running for a term of days; were not collected through bank in regular course of business, but were paid by renewals, of which the present check is the last. That on the loans made by plaintiffs on these checks they exacted interest at a usurious rate, greatly exceeding in amount the value of the checks themselves. That the promissory note in like manner was one of a series given to Remmey by defendant, upon which also loans had been made by plaintiff at usurious interest.

And further, that plaintiff took the said promissory notes and checks and made the said loans upon them with full knowledge of the fact that defendant was merely the accommodation maker or endorser thereof, and at the time of making said loans knew, and it was so understood between him and the said Remmey, that said notes and checks were to be paid and taken up by said Remmey and not by defendant. That Remmey has failed principally by reason of the usurious interest exacted from him by plaintiff, and on account of his failure defendant has also been obliged to suspend payments.

George W. Harkins, for rule, cited—
Voight *v.* Rambo, 1 Phila. 146.
Greene *v.* Tyler, 39 Penna. 365.
Roth *v.* Weisberger, 1 WEEKLY NOTES, 4.
Gaul *v.* Willis, 2 C. 259.
Cake *v.* Firs tNat. B'k of Lebanon, 35 Leg. Int. p. 112.
Campbell *v.* Sloan, 12 Sm. 481.
Brown *v.* Second Nat. Bank of Erie, 22 Sm. 209.
Bryan *v.* Tradesmens' Nat. Bank, 3 WEEKLY NOTES, 421.

Thomas J. Diehl, contra.

C. A. V.

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April 13, 1878. THE COURT. We decide this case on its merits as set forth in the affidavit. We think it sufficient to send it to a jury. The allegation that the check and note were accommodation paper is not in itself sufficient, but in addition to this plaintiff, it is alleged, knew that defendant was not to be held liable, and on this ground we make the

Rule absolute.

Oral opinion by LUDLOW, P. J.

C. P. No. 4, at Nisi Prius. April 18, 1878.

McMurdy v. Connecticut General Life Insurance Company.

Practice—Trial—Pleadings—When a cause is at issue on pleas to one count, and pleas to another count are demurred to, the case will not be continued at defendant's request, if the plaintiff is ready and anxious to try the issue already joined—Quære, where the judgment on the demurrer would necessarily put an end to the case.

Debt on a policy of life insurance.

When this case was called for trial, before BRIGGS, J., the pleadings stood thus: *Narr.* in debt with two counts on a policy of insurance. To each of these counts defendants had pleaded *nil debet.* At bar the defendants filed two special pleas to each count. The plaintiff thereupon filed a replication traversing the two special pleas to the first count, and a demurrer to the special pleas to the second count.

M. Arnold and *Wm. S. Price*, for defendants, thereupon asked for a continuance until the issues of law raised by the demurrers should be disposed of by the Court in banc.

N. D. Miller and *A. Sydney Biddle*, for the plaintiff, urged the trial of the cause, and mentioned two instances before MCKENNAN, J., and LYND, J., in which the causes had been tried before the issues of law were disposed of. If the jury found for the plaintiff on the issues to the first count, the demurrer became immaterial.

BRIGGS, J. If the plaintiff desired a continuance on the ground of surprise, the special pleas being filed at bar, it should be granted, but since the plaintiff desires to try, the defendant cannot, by filing additional pleas at bar, put off the trial simply because those pleas are demurred to. If this could be done, the defendant could always postpone the case by filing demurrable pleas at bar.

It might possibly be different where the judgment on the demurrer would dispose of the case finally. But here, if the plaintiff recovers on all the issues on the first count, the demurrer is unimportant, being confined to some of the pleas to the second count. The trial must proceed.

Orphans' Court.

March 18, 1878.

Mary P. Loxley's Estate.

Lapsed devise—Bill of review—A legacy lapsing by reason of the legatee's death in the lifetime of the testator, does not pass to the residuary legatees, but to the next of kin of the testator—Act of April 8, 1833.

Sur petition for citation and answer.

The petition of Nicholas Murray, executor of Eliza J. Murray, deceased, and Edward L. Perkins, administrator *c. t. a.* of Mary A. Jackson, deceased, set forth that Mary P. Loxley died April 7, 1870, leaving a will and codicils. By the last codicil she, *inter alia*, bequeathed to John Yard, Jr., and Charles Yard $116,300 worth of Philadelphia city six per cent. loan. Letters testamentary on her estate were granted to Charles Yard. After the making of the last codicil, and before the death of testatrix, John Yard, Jr., died.

One moiety of the aforesaid Philadelphia city loan was paid to Charles Yard. The other was sold by him as executor, and the proceeds reinvested in the name of Charles Yard executor, with the interest collected thereon, and are now in the hands of counsel, who hold them under an agreement to use them, upon the determination of the persons entitled to the moiety bequeathed to John Yard, Jr., in the purchase of $38,150 of the loan, and in payment of interest to the party so found entitled. No distribution of said moiety, or the proceeds of its sale, has yet been made.

The petitioners are representatives of first cousins of decedent, who were her next of kin at her decease. The account of the executor was referred to an auditor, who made report on May 20, 1876, whereby he awarded the moiety of the Philadelphia loan to the residuary legatees. Exceptions to this report were filed by Charles Yard and the personal representatives of John Yard, Jr., which were dismissed by the Court November 4, 1876. An appeal from this decision was dismissed and a *remittitur* awarded by the Supreme Court, January 28, 1878. (Yard *v.* Murray, 5 WEEKLY NOTES, 21.)

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The prayer of the petition was that a citation should issue to Charles Yard, executor, S. C. Longstreth, J. B. Townsend, M. J. Mitcheson, Uselma C. Smith, and L. C. Massey, and the residuary legatees of said Mary P. Loxley, to show cause why one-fourth of said lapsed moiety of Philadelphia loan, with interest, shall not be paid to each of the petitioners. An order was made by the Court permitting petitioners to file exceptions, *nunc pro tunc*, to so much of the auditor's report as awarded said lapsed moiety of said loan to residuary legatees instead of the next of kin of testatrix.

The answers of the residuary legatees and respondent, custodians of the moiety of Philadelphia city loan, admitted the facts set forth in the petition, but averred that the Supreme Court by its decree adopted the decree of the Court, and the record was remitted only and solely for the purpose of execution; that the petitioners could have appeared before the auditor at any time during the five years during which the audit progressed, and that the petitioners were not parties to the original proceedings sought to be reviewed, nor are they in privity of estate or interest with any of said parties; nor have they any claim or title to the said moiety of city loan, because the same passed, by reason of the death of John Yard, Jr., to the residuary legatees under the will of the said testatrix.

J. G. Johnson (with whom was *E. L. Perkins*), for the petitioners.

This case is ruled by Murray *v.* Yard (5 WEEKLY NOTES, 21).

L. C. Massey (with whom was *G. W. Biddle*), for the children of Charles Massey, deceased, respondents.

This Court has no jurisdiction to open the proceedings or to review its decree for errors of law, as the decree has been confirmed in the Supreme Court.

Bills of review are of two classes: *first*, those to correct errors of law apparent on the face of the record; *second*, those which introduce new matter which has arisen since the decree.

Riddle's Estate, 7 Harris, 431.

It is settled that a bill of review for errors of law does not lie in the Court below after affirmance on appeal.

Dennison *v.* Goehring, 6 Barr, 402.
Brewer *v.* Bowman, 3 J. J. Marshall, 492.
Bleight *v.* McIlvoy, 4 T. B. Monroe (Ky.), 142.
McCall *v.* Graham, 1 Hening & Munford (Va.), 13.
Southard *v.* Russell, 16 Howard, 547.
White *v.* Atkinson, 2 Call (Va.), 376.
Campbell *v.* Price, 3 Munford (Va.), 227.
Pinckney *v.* Jay, 12 Gill and Johnson (Md.), 69.
Stallworth *v.* Blum, 50 Ala. 46.
Rice *v.* Carey, 4 Ga. 558.
Ryerson *v.* Eldred, 18 Mich. 490.
Act June 16, 1836. (Purd. Dig. 1351.)

Bills of review to admit new matter, and bills under the Act of 1840, may be entertained after appeal to correct mistakes *not of judicial judgment*.

But the petitioners have no interest in the subject matter of the original proceeding as next of kin to testatrix.

Leake *v.* Robinson, 2 Meriv. 392.
Williams on Executors, 1458.
Redfield on Wills, 115, 126, 127.
Nyce's Estate, 5 W. & S. 254.
Woolmer's Estate, 3 Wh. 477.
Gilliland *v.* Bredin, 13 Sm. 393.
Willard's Appeal, 18 Sm. 327.
Little's Appeal, 31 Sm. 190.

The petitioners have forfeited all right to be heard by their delay.

Mitcheson, P. P., respondent.

Jos. B. Townsend, for the respondents Letitia L. Cresson and Joseph A. Massey.

Jos. A. Clay (with whom was *H. G. Jones*), for Radford *et al.*, respondents.

E. S. Miller, for respondents.

Longstreth, for Charles Yard.

Johnson, in reply.

The statute of April 8, 1833, § 19 (Purd. 810, pl. 38), cannot apply when it is impossible to get in the estate and make distribution within seven years.

Parker's Appeal, 11 Sm. 478.

[PENROSE, J. Why was not this claim made before?]

Because the decision of Yard *v.* Murray has put a new phase on the law of Pennsylvania not only in lapsed devises but in lapsed bequests.

Woolmer's Estate, *supra*, was a void bequest.

Nyce's Estate, *supra*, is not to the point.

Gilleland *v.* Bredin, *supra*, was a case of a *contingent* legacy.

C. A. V.

March 30, 1878. THE COURT. It is doubtless true that the prevalent opinion among the legal profession in this city was, that a legacy lapsing by reason of the legatee's death in the lifetime of the testator, in the cases not otherwise provided for by statute, passed to the residuary legatee. This was stated by Sir WILLIAM GRANT in Cambridge *v.* Rouse as having "been long settled." As to a lapsed devise the rule was supposed to be different, the reason given being that a will as to realty spoke only from the time of making it, and the residuary devisee could only take what at that time was intended for him. (Jones *v.* Mitchell, 1 Sim. & Stu. 294.)

This reason for the distinction was taken away when the Act of 1833, providing that the real estate of a testator acquired after making his will shall pass by a general devise, in the absence of words indicating a contrary intention, was enacted.

There was another reason sometimes given, viz., that the "heir could not be disinherited without an express devise or necessary implica-

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tion;" but as the right of succession to personal property of an intestate was conferred by the same Act of Assembly, and in terms quite as absolute as the right of inheritance to real estate, this reason cannot be regarded as a very satisfactory one, and accordingly in Patterson *v.* Swallow (8 Wright, 490), Judge WOODWARD declares that the old distinction between lapsed legacies and lapsed devises no longer exists in Pennsylvania.

That a devise to John Yard, Jr.. which lapsed by reason of his death in the lifetime of the present testatrix, did not, under the language of the residuary clause, pass to the residuary devisees, was the very point decided by the Supreme Court in the recent case of Yard *v.* Murray (5 WEEKLY NOTES, 21). Why should there, in view of what was declared in Patterson *v.* Swallow (*supra*), be a different rule with regard to the lapsed legacy? In both cases the right of the parties claiming the residue rests upon the same clause in the will. If insufficient for one why should it avail the other? That it does not, is clearly within the reasoning of Chief Justice AGNEW in delivering the opinion of the Court in Yard *v.* Murray. It is evident that the language of the Court was not used inadvertently or in forgetfulness of the distinction that had been supposed to exist, because, when the opinion was prepared, the appeal in the case now before us, which involved a question affecting the right to the lapsed legacy, was also under consideration, having been argued during the same week, and the opinion having been delivered on the same day. The very point, therefore, could not fail to present itself to the mind of the Court, although the question argued before it had been, not the destination of the lapsed legacy, but whether there had been a lapse at all. The auditor, however, had discussed the question of destination, and after an elaborate consideration of the authorities, had made distribution among the residuary legatees. No one had excepted to his action in this respect, and this Court had decreed distribution accordingly. The auditor's reasoning and the authorities were therefore before the Supreme Court. That they failed to convince, and that there was a very decided opinion that the distribution, if made in conformity with the decree as it then stood, would not be a proper one, appears from the very significant manner in which attention is called to the point in the opinion affirming the decree: "It is proper before closing, to say that we give no opinion whether the lapsed legacy to Jno. Yard, Jr., fell into the residue. The parties representing that question are not before us." This is what was said. (Yard's Appeal, 5 WEEKLY NOTES, 177.) With the vast accumulation of business in the Supreme Court, it is impossible to suppose that this invitation to further litigation, in an estate which otherwise would have been closed at once, would have been given, had it not been the deliberate opinion of the Court that injustice would otherwise be done.

The case will not rest upon our decision of it. We prefer, therefore, to follow what we are convinced was the view of the Court of last resort. If we are mistaken, our error will be there corrected. We now decide that the legacy which lapsed by reason of John Yard's death did not pass to the residuary legatees, but that the parties entitled are the next of kin of the testatrix, Mary P. Loxley.

If this be so, then, as the distribution which has been decreed is directed to be made to the residuary legatees, the error of law is apparent on the record; and the right of any person interested to have this corrected within five years after the final decree, provided distribution has not been made, is an absolute one. (See Kistler's Appeal, 23 Smith, 393.) That a bill of review may be entertained by the Orphans' Court, notwithstanding a decree of affirmance by the Supreme Court, is the very point decided in Parker's Appeal (11 Smith, 478). The only objection to it is, the very technical one, that the record having been before the higher Court, all errors are supposed to have been considered and to have been disposed of by the affirmance; but the opinion shows that this particular error was not disposed of. Upon this point see Hutchinson *v.* The Commonwealth (Leg. Int., 1877, p. 142); Allen *v.* Liggett (31 Smith, 493).

The objection that the petitioners are barred by the Act of 8th of April, 1833, § 19 (Purd. Dig. 810, § 38), is answered by Logan *v.* Richardson (1 Barr, 372).

So much of the report of the auditor and of the decree thereon as awards any portion of the legacy which lapsed by reason of the death of John Yard, Jr., to the residuary legatees of the testatrix must therefore be reversed and set aside, and the report recommitted to the auditor for correction.

The petition by the residuary legatees for distribution is dismissed.

Opinion by PENROSE, J.

April 17, 1878.

Toner's Estate.

Citation to file an account—Where no account has been filed at the expiration of one year after decedent's death, a citation will be awarded without inquiry into the interest of the petitioner, if a prima facie right is shown—Practice.

Sur petition for citation and answer.

Owen Brady filed a petition praying for a citation to Margaret Toner to show cause why she

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should not file her account as administratrix of the estate of William Toner, deceased. In the petition he averred that he was a creditor of the said estate, and that more than one year had elapsed since decedent's death. An answer was filed, in which it was denied that the estate was indebted to the said petitioner.

George Peirce, for petitioner.

The Court will not determine at this stage of the proceedings whether the relation of debtor and creditor exists; the proper time for settling such controversies is at the audit of the account.

Sarah Wistar's Estate, 5 WEEKLY NOTES, 128.
Dickson's Estate, 1 Id. 534.

Lucas Hirst, contra.

April 27, 1878. THE COURT. To the petition filed by an alleged creditor of decedent, asking for an account, the administratrix replied that the petitioner is not a creditor of the estate. It is not averred that an account has been filed, nor denied that more than a year has elapsed since the granting of letters of administration. The administratrix is in default in not having discharged the duty cast upon her by the Act of Assembly, and assumed by her when she took the oath of office; and Peter's Estate (1 Phila. 581) decides that in such a case it is sufficient to justify the Court to grant an order to file an account, that the petition shall set forth upon affidavit that the party presenting it is a creditor of the estate, and that the full time has elapsed and no account has been filed.

It is accordingly ordered that respondent shall file her account as administratrix of the said estate before Saturday, May 11th, 1878.

Opinion by ASHMAN, J.

April 15, 1878.

Toner's Estate. [No. 2.]

Widow's claim—Property appraised at a greater value than $600, though subject to incumbrances which reduce it below that amount, will not be set apart—Act of April 14, 1851, and supplement.

Sur petition for widow's claim.

The widow of Wm. Toner, the decedent, filed a petition to be permitted to retain $300 in value of real estate of her late husband, under the Act of April 14, 1851.

There was no personal estate, and the only real estate was the house in question in which the widow resides. The property is subject to a ground-rent of $575, and a mortgage of $600. The appraisers valued the premises at $1500 clear, or $575 over and above the incumbrances, and accordingly set apart the premises for the widow, charged with the incumbrances, and the further sum of $225, being the excess after payment of the ground-rent, mortgage, and widow's claim.

Lucas Hirst, for the petitioner.

(There was no objection on the part of the creditors to the petition, and no one appeared contra.)

May 4, 1878. THE COURT (after stating the facts). It was claimed that under the supplement passed 27th of November, 1865, § 1, to the Act of 1851, this property could be set apart for the use of the widow. The Act, however, applies only when the property is appraised at a sum not exceeding $600, and compels payment of the valuation in excess of $300 in cash within one year from the date of confirmation. It was certainly not the intention of the Legislature to burden the widow with the payment of heavy taxes and charges, which might be the case if the tract is large and incumbered within $600 of its value. It may be said that the widow is under no disability, and that it is her choice to take the land. But the Legislature has regarded her as standing in special need of protection, or this law would not have been enacted. It puts the case of the widow upon the same footing with that of the children, giving both the same privilege, and crediting both with the same disability. But it will hardly be pretended that, under any circumstances, the Legislature intended to set apart for the minor children of a decedent, as a provision against their helplessness, a property incumbered by a mortgage, which necessarily adds some risk to the holder of the premises.

The object contemplated by the Act seems to have been to secure to the widow and children of a decedent a manageable portion of real estate as a home. Its language is: "Whenever any widow or children of a decedent shall claim the benefit of the Act, to which this is a supplement, out of the real estate left by said decedent, and the real estate appraised shall consist of a single messuage or tenement, lot of ground or other real estate which cannot be divided without prejudice or spoiling the whole, and the appraisers may have appraised, or shall appraise and value the same at any sum not exceeding $600," etc. These words are throughout descriptive of the particular parcel of ground which is the subject of the exemption, and cannot, by any just rules of construction, be made to refer only to the husband's interest or estate therein. An easy method of transferring the functions of the Legislature to the Court will be secured when the latter body may assume that the former does not comprehend the language of its own acts. If the Legislature had said that the widow should be

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permitted to retain a lot of ground, in which the interest or estate of her husband should be appraised at a sum not exceeding $600, the present petition and appraisement would be within the terms of the Act. But it has chosen to declare instead that the lot itself must be appraised at a sum not exceeding $600, and the appraisers have returned that the lot is worth $1500. To grant the prayer of the petition would be to disregard both the letter and spirit of the Act. It is, therefore, refused.

Opinion by ASHMAN, J.

Dissenting opinion by PENROSE, J.

In construing the Acts relating to widows' claims we must bear in mind what they are. They are *exemption* Acts designed to preserve for the widow, and through her for the children, property of a specified value, which, but for the right thus conferred, would go to the creditors of a decedent. We are to consider, therefore, on the one hand, the creditors, and see that nothing more is kept from them than the law provides, and, on the other hand, the widow and children, who are not to be deprived of their exemption by reason of tacking on to the subject of it something with which creditors have no concern, and which can affect them in no manner whatever.

"The Act," says STRONG, J., in Nevin's Appeal (11 Wright, 232), "has always been construed according to its spirit rather than its letter." . . . . "The Legislature had in view, doubtless, a family broken up by the death of its head; a widow suddenly deprived of her protector and provider, and the children looking to the widow for the support which the father had given. It was to enable the widow to extend that support that the Act was passed.

This was said of the original Act, but it applies with still greater force to the supplements, which were passed with the manifest design to still further enable the widow to take the place of the father, and to furnish the support which he had given.

In the present case the only real estate is the house in which the widow resides, where, by carrying on a small store, she is enabled to support herself and children. Its value, so far as her husband's creditors are concerned, is found by the appraisers to be $575. This value alone is, therefore, to be looked at in determining the question of "exemption."

Under the supplement of November 27, 1865, the widow has petitioned to be allowed to retain the property by giving security for the payment within one year of the amount in excess of the three hundred dollars, which she is entitled to under the original Act.

No creditor objects; indeed, the want of interest would be fatal to such objection even if made.

Why, then, should the application not be granted?

Because, it is said, the appraisement shows, that while the estate of the decedent, upon which creditors had any claim, is worth less than $600, it also shows that the lot itself, including the principal of a ground-rent, which is no part of his estate at all, and including a mortgage, which is a fixed lien, not affected by the exemption, is worth more than that sum.

Perhaps, if regard be had only to the rules of grammatical construction, the Act may be read so as to make the valuation refer to the lot, and not to the decedent's estate or interest in it; but the rules of grammar are not always safe guides in questions of interpretation. *Qui hæret in literâ, etc. etc.* The Act is a remedial one, and to be construed accordingly.

It is said also that the Legislature could not have intended to permit a widow to take an incumbered estate; that the children certainly could not, and her rights could be no greater than theirs. This overlooks what Judge STRONG declared to be the design of the Act, viz., to place the widow in the position previously occupied by the father, and thus let her discretion be exercised for the benefit of the children who lacked it.

The disability which, for the purposes of her own protection, is attributed to a married woman, ceases when she becomes discovert, and she then, in the eye of the law, becomes quite capable of judging what is and what is not for her own benefit.

If she thinks her interests will be promoted by taking an incumbered estate, upon what principle shall she be denied the right to do so? *Quilibet potest renunciare jure pro se introducto.*

To deny this power to a widow, because through want of discretion, it could not be exercised by her children, is to forget that the object of the Act was to substitute her as their head and protector, and to supply that very want.

The amount of ground-rent and interest here is probably less than would be the rent of another house. If her petition is refused the family must be driven from their home, and the business which now supports them be seriously interfered with if not destroyed; and this without the possibility of benefit to any person on the face of the earth. It is safe to say that the construction of a remedial Act which leads to such a result cannot be a correct one.

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WEEKLY NOTES OF CASES.

VOL. V.] *THURSDAY, JUNE* 6, 1878. [No. 19.

Supreme Court.

July '77, 56. April 4, 1878.

The Monroe County Mutual Insurance Company v. Robinson.

Fire insurance—Want of title to premises insured—Examination of witnesses—Control of the Court over.

Want of title of the insured is no defence to an action on a policy of fire insurance, if the insured entered upon his land and took his insurance in good faith, under a reasonable and honest belief that he had title, and if he did not withhold the knowledge of a dispute about his title in bad faith.

A court can exercise a sound discretion in controlling the examination of witnesses. Therefore it was not error to stop a cross-examination of sixty-five minutes relating to trivial matters.

Error to the Common Pleas of Wayne County.

Covenant, by Robinson against the Monroe County Mutual Insurance Company, on a policy of insurance issued to him on a store and dwelling and the goods and furniture therein contained. Pleas, *non est factum*, and specially that the building was erected on land of another on which the plaintiff was a trespasser, and also that facts material to the risk were withheld by the plaintiff.

Upon the trial, before WALLER, P. J., it appeared that the plaintiff purchased a lot of ground from one Sheerer in March, 1872, and immediately began to erect the building afterwards insured, which he finished that spring. On July 30, 1872, the Pennsylvania Coal Company brought ejectment for the lot on which the plaintiff had built. The writ of ejectment was served August 6, 1872, and on the same day the policy in suit was executed. The building insured and its contents were destroyed by fire on June 3, 1875. Some time afterwards the Pennsylvania Coal Company obtained a judgment in ejectment against the plaintiff, and recovered possession of the lot on which his building had stood. It was disputed whether or not the plaintiff wrongfully withheld from the company the fact that his title was imperfect. The plaintiff testified positively that the first notice he had of another claim was the service of the writ of ejectment. While digging the cellar, however, one of the company's employés said that he thought the plaintiff was digging on the company's land. In consequence of this, the plaintiff went to Honesdale to inspect the records, and found that the company's deed, as recorded, did not include his lot. Even after service of the ejectment he had no idea that he was outside of his line. On the other hand, several witnesses for the defendants testified that one Mills, an employé of the company, told the plaintiff, when he first began work, that the land belonged to the company, and that, if he built on it, he would lose it.

During the trial the cross-examination of Mrs. Robinson by the defendants' counsel, on various items in the bill of particulars of the goods destroyed, was stopped by the Court, to which the defendants excepted, and the Court sealed the bill as follows: "After sixty-five minutes' cross-examination, the Court stopped the minute inquiry into trivial matters as embraced in the statement."

The defendants presented these points: (1) If the land on which the building was erected belonged to the Pennsylvania Coal Company, and the plaintiff entered upon said land as a trespasser, and erected his buildings, he had no insurable interest and cannot recover. *Answer.* We affirm this point as a legal principle; but we refer it to the jury under the evidence as a question of fact whether the plaintiff entered upon this land *as a trespasser*, or under a reasonable and honest belief that he had title to it.

(2) If the jury believe that the plaintiff knew at the time of his application for insurance that the title to this property was in dispute, and did not notify the defendants or their agent, he withheld a fact material to the risk, and cannot recover. *Answer.* We leave it to the jury as a question of fact under the evidence whether the plaintiff had such knowledge, and with intent to deceive or practice fraud upon the defendants, withheld such knowledge. If he did, the point is well taken—is affirmed, and the plaintiff cannot recover.

To these answers the defendants excepted, and, a verdict and judgment having been given for the plaintiff, took a writ of error, assigning for error the exceptions noted. The sixth assignment was in these words: "The Court erred in peremptorily stopping the cross-examination of the plaintiff's wife at the time when she was being cross-examined with reference to the items of the written statement of the loss furnished by the plaintiff, about books and other property belonging to her personally."

H. M. Seely (with whom were *E. O. Hamlin* and *C. S. Minor*), for the plaintiffs in error. The policy was void because the insured had no insurable interest. Sweeny *v.* Franklin Fire Insurance Co. (8 Harris, 337) is directly in point.

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In that case the insured erected his buildings on land belonging to the State of Delaware, and it was held that he could not recover. It is a question of title and insurable interest, and not of the insured's opinion and belief on these points. The qualification of the Court was therefore erroneous.

Again, the plaintiff withheld facts material to the risk. This will avoid the policy. The insured is bound to state the facts fully and fairly. A concealment which is only the effect of accident, negligence, inadvertence, or mistake will be equally fatal to the contract as if it were intentionally fraudulent.

Marshall on Insurance, 347.

No matter in cross-examination is trivial that tends to test the accuracy of the witness's recollection or the fairness of his testimony. Mrs. Robinson being interested, a rigid cross-examination was essential.

Geo. G. Waller, contra, was stopped by the Court.

May 6, 1878. THE COURT. Under the charge of the learned Judge in the Court below the jury have found as facts that the plaintiff entered upon the land and took his insurance upon his building and stock of goods in good faith and under a reasonable and honest belief that he had title, and that he did not withhold the knowledge of a dispute about his title in bad faith.

Under these circumstances we cannot perceive any good reason why he should not recover the loss under his policy. To hold the opposite would be to assert that no valid insurance can be effected by any one whose title happens to be questioned by some one, no matter how groundless the claim, or else that in every such case he must prove a good title in himself before recovery.

The sixth assignment of error omits the important ground stated by the Court for stopping the cross-examination of Mrs. Robinson, viz.: "After sixty-five minutes' cross-examination the Court stopped the minute inquiry into trivial matters as embraced in the statement." To hold that a Court can exercise no sound discretion in controlling the examination of witnesses would confer a latitude of privilege upon counsel incompatible with the interests of justice, and make the Judge on the bench a mere cypher. We discover no abuse of discretion on the part of the Court in calling time upon the counsel.

Judgment affirmed.

PER CURIAM. MERCUR and PAXSON, JJ., absent.

Jan. '78, 77. April 4, 1878.

Ham et al. v. Smith.

Election expenses—Act of 18 April, 1874—Promissory note—Illegal consideration—Executed contract—Opening judgment.

A promissory note given by third parties to a candidate for election, in consideration that he will withdraw from the ticket and permit another's name to be substituted for his, is an illegal contract and cannot be enforced, even though the payee may have expended for election purposes a sum of money equal to or exceeding the amount of the note previous to his withdrawal.

A judgment entered upon such a note by means of an accompanying warrant of attorney having been opened by the Court, without condition, and a feigned issue having been framed to try its validity:

Held (reversing the judgment of the Court below), that the order opening the judgment vacated it except for the purpose of lien, and that it was error to charge in the feigned issue that the contract was executed by the entry of the judgment.

Error to the Common Pleas of Wayne County.

Feigned issue on opening a judgment entered in favor of Smith against Ham, Curtis, and Brown on a judgment note for $500. The rule granted on the plaintiff, to show cause why the judgment should not be opened, was made absolute by consent.

On the trial the plaintiff gave in evidence the note drawn by the defendants jointly to him or bearer, and the entry of judgment upon it after maturity.

The defendants then called the plaintiff as a witness, and proved by him and themselves that the plaintiff was the nominee of the Democratic County Convention for Representative in the election of November, 1876. One Nelson having been nominated for the same office by a taxpayer's convention, the Democratic County Committee thought it expedient for local reasons, and proposed that the plaintiff should retire from the ticket for the good of the party, and that Nelson be substituted in his place. The plaintiff at first declined to withdraw, but finally consented on receiving a promise from the committee that they would see paid $500 of his expenses, which he alleged to them had already reached $600. A week after this agreement, and about two weeks before the election, the plaintiff demanded his money, and notified the committee that "if they didn't fix it up, he'd run any way." Thereupon the defendants, who were members of the committee, offered him the judgment note in suit, which he accepted.

The defendants presented several points to the effect that if the note was given in consummation of an agreement that money should be paid or secured to the plaintiff in consideration of his withdrawal, the giving of such a note was in con-

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travention of law, and its payment could not be enforced.

The Court (WALLER, P. J.) charged the jury as follows: "We hold as a rule of law for the purposes of this case that the entry of judgment upon the note constituted the contract in this case an executed contract, and the Court will not unravel the transaction to hunt out illegal consideration. We therefore withdraw the evidence offered by the defendants from your consideration, and direct a verdict for the plaintiff on the judgment. This renders it quite unnecessary to answer the points as presented by the parties, *seriatim*."

Verdict for the plaintiff ($526) and judgment. The defendants took this writ of error, assigning for error the charge, and the refusal of the Court to answer and affirm their points.

H. Wilson (*C. S. Minor* with him), for the plaintiffs in error.

The entry of judgment on the warrant of attorney did not make the note an executed contract, so as to shut out all inquiry into its validity. Were it otherwise, no judgment could be opened for any cause. It is well known that the practice is different. Feigned issues to ascertain the facts have been undisputed for more than a hundred years.

Kellogg *v.* Krauser, 14 S. & R. 143.

In proper cases the Courts will open judgments confessed and judgments by default and let the defendant into a defence.

Hopkins *v.* West, 2 Norris, 110; 3 WEEKLY NOTES, 343.

The general rule is that effect will be given to any substantial matter of defence against such a judgment that might be offered in an action to enforce the contract on which the warrant of attorney is based. Grant that the contract is thereby executed; courts of equity will nevertheless rescind contracts which are in contravention of some well-settled rule of public policy.

Story's Equity Jur., § 298.
Holt *v.* Green, 23 Sm. 201.

The facts in this case call for the interference of the Court. The consideration in making the contract was against public policy and brings it within the decisions in—

Filson *v.* Himes, 5 Barr, 452.
Bowers *v.* Bowers, 2 Casey, 74.
Hunter *v.* Nolf, 21 Sm. 282.

The contract in the present case is void also under the Act of 18 April, 1874 (Purd. Dig. 1866, p. 36).

The note was but the instrument to execute an illegal contract, and is therefore itself tainted with the illegality.

Morris Run Coal Co. *v.* Barclay Coal Co., 18 Sm. 188.

E. O. Hamlin (with whom were *G. G. Waller* and *H. M. Seely*), contra.

The judgment needed no support from the outset from the note or anything else.

Cannell *v.* Crawford Co., 9 Sm. 200.

The facts show that the plaintiff retired for the good of the party, not for the payment of his expenses. He had retired when the note was given to him for his reimbursement. It was an executed contract. Where the action is not on the contract precluded, but upon another instrument unimpeachable on its face, the party will not be allowed to rip up the original transaction to show that the thing sought to be recovered was the result of an illegal transaction.

Lestapies *v.* Ingraham, 5 Barr, 82.
Evans *v.* Dravo, 12 Harris, 62.
Walker *v.* Kremer, 4 WEEKLY NOTES, 544.

The proof of the defendants after all showed no illegal consideration. The proposition was made by them that the plaintiff should retire for the good of the party.

May 6, 1878. THE COURT. The rule to open judgment in this case was made absolute by consent of the parties, and no conditions were imposed upon the defendants. The plaintiff must therefore prove his case as on a new trial. (Carson *v.* Coulter, 2 Gr. 121.) Hence the Court erred in holding the judgment itself to be an important fact in the issue trying. The order opening the judgment vacated it except for the purposes of lien, and whether the plaintiff was ever again to recover it depended upon the case which should be presented to the Court and jury. The only question we have before us is, whether the consideration of the note of Ham *et al.* to Smith could be made the subject of judicial inquiry. That that consideration was, in fact, illegal, is not doubtful. According to Smith's own testimony, it was proposed by a committee of his party, that he, as the nominee for representative, should withdraw, in order that Nelson might be substituted. This he agreed to do if they would pay him the sum of five hundred dollars, at the same time threatening, if his terms were not complied with, to run at all events. The result was the note in controversy. Now it matters not that he had spent this amount or more in securing his nomination, it was, nevertheless, the price to be paid for his withdrawal, and the price to be paid in order to remove a competitor from the way of Nelson; in other words, it was so much to be paid in order to secure Nelson's election. Furthermore, the committee had no choice; his expenses, as he chose to term them, might have been five hundred dollars, or they might have been nothing; that was Smith's price, and they must agree to pay it or run the risk of having Nelson defeated. That this whole transaction was, therefore, corrupt, immoral, and within the prohibition of the Act of 18 of April, 1874, is not doubtful. To cite authority to prove that courts should not lend their aid to enforce contracts such as this, would be spending time to no

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purpose, since no one doubts it. But it is said the contract has been executed, and therefore the courts will not interfere. The law is undoubtedly well stated if the fact were so.

But the contract has not been executed, and the Court is now required to lend its aid for the purpose of its execution. Judgment is asked upon the note, and the proof shows the note to be part of an illegal and void contract; how, then, can the Court enforce it? As was said by Mr. Justice AGNEW, in answer to an argument similar to the above, in the case of The Morris Coal Co. *v.* The Barclay Coal Co. (18 P. F. S. 188): "Where a bill, note, or bond is but an instrument to execute an illegal contract, it is tainted by the illegality, and cannot be recovered. The illegal consideration enters directly into the instrument, and is followed up, because the law will not permit itself to be violated by mere indirection."

Were the doctrine otherwise, every illegal contract, however much opposed it might be to public morality or even to common decency, might be readily and securely covered from judicial inquiry by the mere interposition of a note or bond. Were it only a question between the parties, we might leave them to the consequences of their own contracts; but it is not so; it extends further, and involves the public welfare, and we certainly know that the best way to suppress any public vice is to make it unprofitable.

Judgment reversed, and a *venire facias de novo* awarded.

Opinion by GORDON, J. MERCUR and PAXSON, JJ., absent.

July, '77, 40. January 30, 1878.

Shakespear v. Cain.

Ships and shipping — Attachment of vessels in Courts of Common Pleas — Act of June 13, 1836, § 10 — Bond given thereunder — Effect thereof to discharge vessel from lien and attachment — Co-owners — Execution — Interpleader.

The giving of a bond for the release and discharge of a vessel under § 10 of the Act of June 13, 1836 (P. L. 619), by the master and part-owner, works an absolute discharge of the vessel from the lien acquired by the libellant, and the shares of co-owners cannot be sold upon execution issued against such master and part-owner.

A libel was filed under the Act of June 13, 1836, against a certain schooner, and F. & Son, owners, and S., master; and the vessel was attached. S., who was both master and owner of one-eighth part, gave bond with sureties as provided by § 10 of the Act, and the vessel was thereupon released and proceeded on her voyage. The libellant subsequently obtained judgment in the attachment proceedings and issued a *fi. fa.* thereon against F. & Son and S. The vessel which had returned to port was levied upon, and only the one-eighth share of S. was sold, claim of title to the remaining seven-eighths being made under the Sheriff's Interpleader Act by C. and fifteen others, none of whom were named in the *fi. fa.* On the trial of the issue framed to determine the question of title, it appeared that some of the claimants had obtained title prior to the libel and attachment, and others after the filing of the bond:

Held, that the lien acquired by the libellant was discharged by the filing of the bond, and the return of the vessel to the territorial jurisdiction could not subject her to execution in the hands of the present owners.

Error to the Common Pleas No. 1, of Philadelphia County.

Feigned issue under the Sheriff's Interpleader Act, by Alexander H. Cain and others against William M. Shakespear, to determine the ownership of the schooner "Maggie Cain."

Shakespear commenced proceedings in the said Court against the vessel by libel and attachment "against the *Maggie Cain*, and William Fisher and Son, owners, etc., and Andrew Scull, master," under the Act of June 13, 1836, entitled "An Act relating to the attachment of vessels." (P. L. 616, Purdon's Dig. 94.)

An answer having been filed by Andrew Scull for himself and others as master and owners, Scull alone soon after entered into a bond with sureties, in accordance with section 10 of the Act,* which bond was conditioned as follows:—

"That if the said schooner 'Maggie Cain' and the masters and owners thereof shall answer all the demands aforesaid which shall at this time be filed against the said schooner, and shall fully satisfy all such of said demands and any of them as shall be proved and recovered against the said vessel or the owners thereof, under and by virtue of the said foregoing attachment, then this obligation to be void; otherwise to be and remain in full force and virtue."

Upon the filing of this bond the vessel was released by the sheriff and allowed to proceed upon her voyage.

A replication was filed by the libellant, and upon the issue thus raised a trial was had resulting in a verdict and judgment for the libellant in these terms, "that the libellant do recover of the said respondent, and of the said Andrew Scull and his sureties in the bond filed in this cause, the amount found to be due." (This judgment was affirmed in the Supreme Court. Scull *v.* Shakespear, 25 Sm. 297.)

A writ of *fi. fa.* was then issued by Shakespear "against Fisher and Son and Andrew Scull," and

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* This section provides: If the owner or master of any ship or vessel attached, as aforesaid, or his or their agent, shall enter into a bond to the Commonwealth, with sufficient sureties to be approved of by the Court from which the process issued, or by a judge thereof, with condition to answer all the demands aforesaid which shall be at that time filed against the same, and fully to satisfy and pay all such of them as shall be proved and recovered, such ship or vessel shall be forthwith *discharged from the attachment as aforesaid, and be permitted to proceed on voyage.*

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the vessel which had meanwhile returned to Philadelphia was levied upon.

Thereupon claim of ownership under the Sheriff's Interpleader Act was made by Cain and fifteen others, and this issue awarded to determine the question of title. None of the claimants were named in the *fi. fa.*

Upon the trial it appeared that of the claimants, those representing twenty-five thirty-seconds of the vessel were owners of this portion at the time of the issuing of the attachment and the filing of the bond, while two others had acquired their interest of three thirty-seconds after the release of the vessel from the attachment. The remainder of the vessel belonged to Andrew Scull, and was sold under the *fi. fa.*

The plaintiffs presented the following point: It appearing by the uncontradicted evidence in this case that the plaintiffs were the owners of the interests in the schooner "Maggie Cain," claimed by them at the time the *fieri facias* upon which this issue is founded was levied upon said vessel, the verdict must be for plaintiffs. *Affirmed.*

The defendant presented two points substantially as follows: (1) (After reciting the facts as above set forth.) There does not appear to be any dispute as to these facts, and the jury are instructed to find a verdict for the defendant for all the shares and interests in the said schooner, which are held and claimed by Alexander H. Cain and the other claimants of twenty-five thirty-second parts or shares of the said schooner. (2) It further appears that Henry Crawford and James Mair became the purchasers of three thirty-seconds of said schooner from George W. Fisher, who was owner of said interests at the time that the attachment was issued upon the libel of Shakespear, which was for lumber furnished and used in the building of said schooner; and that said Fisher had previously given security to Scull and the other purchasers of the vessel that the said schooner should be delivered to them free of all charges and incumbrances, according to his written contract with them, and, therefore, the verdict of the jury in this feigned issue should be for the defendant.

Both of these points were declined by the Court.

Verdict for the plaintiffs, subject to the two following points reserved by the Court: (1) Whether the twenty-five thirty-second parts or shares of the schooner "Maggie Cain," which at the time the levy was made belonged to those claimants, who were owners of the schooner when the attachment was made and the bond was given for the release of the vessel therefrom, are legally subject to be sold under the execution upon the judgment in said attachment. (2) Whether the three thirty-second parts of said vessel, now owned by Henry Crawford and James Mair, and which were owned at the time when said attachment was made and bond given, as aforesaid, by George W. Fisher, who had previously contracted with and given security to the other owners or purchasers from him for the delivery of the vessel to them free of all charges and incumbrances, are not also subject to be sold under said execution.

The Court subsequently entered judgment for the plaintiffs upon both the reserved points. (For report of the case in the Court below, with opinion of BIDDLE, J., see Cain *v.* Shakespear, 3 WEEKLY NOTES, 514. See also Id. 167.)

The defendant took this writ, assigning for error the affirmance of plaintiffs' point, the refusal of his own, and the entering of judgment for the plaintiffs upon the points reserved.

Arthur M. Burton (*F. P. Prichard* with him), for the plaintiff in error.

The primary object of the Act of 1836 was to give a *lien*, and this lien ought not to be taken away except by clear and express provision in the Act. The 10th section contains no such provision. If it had been the intention of the Legislature to dissolve the lien upon filing of the bond, it would have so declared in plain terms instead of using the words "discharged from the attachment as aforesaid, and be permitted to proceed on her voyage." These words import merely a release from the immediate process by which the vessel is held, without affecting her ultimate liability to be sold for libellants' claims. Similar statutes in other States have been judicially construed in accordance with the view now contended for.

E. P. Dorr *v.* Waldron, 62 Ill. 221.
"Young Mechanic," 2 Curtis, 404.
"The Avon," Brown's Rep. 170.
Van Valkenburg *v.* Kingsbury, 14 Ohio St., 353.
Raymond *v.* Whitney, 5 Ohio St., 201.

The analogy of the Act of 1836, with the mechanic's lien law, cannot be relied upon, for the latter explicitly states that upon filing a bond "the premises shall be released from the *lien* of the said claim." (Purdon's Dig. 1037, pl. 62.)

The mode of procedure in Courts of Admiralty being fastened upon this statutory remedy, no greater effect should be given to the release of this vessel on bail than is given to the release of a vessel arrested under similar process in admiralty. In admiralty the *res* is not discharged from the jurisdiction of the Court when delivered to the owners upon security. The latter hold subject to all legal dispositions of the Court.

Livingston *v.* "The Jewess," 1 Ben. 21, note.
"The Grand Para," 10 Wheat. 497.
"The Harmony," 1 Gall. 123.
"The Rio Grande," 23 Wall. 465.

C. M. Husbands and *Henry Flanders*, contra.

The *fi. fa.* was process entirely *in personam*, and only the interest of those named in the writ

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could be sold under it. The issue was formed upon the assumption and admission that if the right of property was in the plaintiffs, their interest could not be sold under the writ, they not being named therein.

The Act, having declared that "the lien shall continue until she shall proceed on her voyage and no longer," the giving of the bond under the 10th section by which she is discharged from the attachment and *permitted to proceed on her voyage* explicitly puts an end to the lien.

It is a well-settled rule in admiralty that a bond may be substituted for the *res*, and the latter is then discharged forever from liability for that cause of action.

Coates' Admr. Pr. 23, 90.
Benedict's Admr. Pr. 293.

The cases cited contra were of an exceptional character, where the bond was wrongfully taken or the *res* fraudulently removed from the jurisdiction, etc. See also "The Union" (4 Blatch. 90), Ship "Portland" (2 S. & R. 206), and many others.

February 11, 1878. THE COURT. We are of opinion that the bond given under the 10th section of the Act of 13 June, 1836, to relieve the *vessel* from the attachment and permit her to proceed on her voyage, discharged the *lien* as well as the attachment.

The lien was limited to the time when the vessel should proceed on her voyage next after the work done or materials furnished, and no longer. This expression of the legislative intent as to the primary lien, is strongly indicative of the same intent, when it was provided that on giving the bond the vessel shall be forthwith discharged from the attachment as aforesaid, and be permitted to proceed on her voyage.

The lien being gone, the delivery by the owners, Fisher & Co., to the present claimants passed a clear title so far as the object of the lien is involved. The debt to be protected, being secured by the bond, and the vessel thereby discharged, and the delivery to the new owners being effectual, it is evident no return of the vessel within the territorial jurisdiction of the same Court could subject her to execution in the hands of these claimants, who held a perfect title (as to this debt) by the discharge of the lien and the sale and delivery to them.

Judgment affirmed.

PER CURIAM.

July, '77, 102. March 29, 1878.

Brown's Appeal.
Brown v. Pyle & Brown et al.

Parent and child—Infant—Emancipation of—Contract of a father to give a child wages for work during minority—Insolvency of the father at the time of giving the judgment note to his son for the work—Sheriff's sale—Preference of creditors, when not fraudulent.

A father agreed to pay his child a specific sum for work to be done during its minority; but no note was given, nor was any written agreement made between them. Sixteen years afterwards the father, when insolvent, gave his son his judgment note, payable on demand, in payment of his son's services. To the fund arising from a sheriff's sale of the personal property of the father upon execution under this judgment, the father's creditors contested the son's claim, averring that it was a fraud upon their rights, and therefore void:

Held (reversing the decree of the Court below), that the judgment was valid, and that the preference was not a fraud upon the creditors, the consideration being honest and the debt justly due.

Appeal from the Common Pleas of Chester County.

This case came before the Court below upon exceptions to the report of an auditor appointed to distribute the proceeds of a sheriff's sale of the personal property of John Brown. The facts in evidence before the auditor were as follows:—

In the spring of 1861 Samuel P. Brown, the appellant, who was at that time about sixteen years of age, and who was working upon his father's farm, was about to learn a trade. His father, John Brown, in the presence of his brother, Mendenhall Brown, offered to give his son the sum of $1000 if, instead of learning a trade, he would stay at home and work upon the farm until he was twenty-one years of age. This offer the son accepted, remaining with his father until he became of age, Nov. 21, 1866. His father then agreed to give him the customary wages if he would remain upon the farm. To this agreement, to which there were no witnesses, the son assented, went to work and continued to work for his father until the spring of 1873, when, upon leaving, his father promised to give him the sum of $500—for his seven years' work. No note or written agreement was given the son, nor was anything said at the time the agreements were made as to the time of payment. On December 13th, 1876, the father, finding, upon examination of his affairs, that he was insolvent, gave his son, upon request, his judgment note for $1500, payable upon demand. Execution was issued upon this note upon the same day, and upon the next day a levy was made by the sheriff upon the personal property of John Brown. The fund realized from the sale and in the hands

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of the sheriff amounted to the sum of $772.90, against which the following claims were filed in the order of priority of execution:—

Judgment. Samuel P. Brown, $1500.
1876, Dec. 13. *Fi. fa.*, No. 57, Jan. Term, 1877.
Judgment. Pyle and Brown, $100.
1876, Dec. 14. *Fi. fa.*, No. 59, Jan. Term, 1877.
Judgment. Dennis M. French, $300.
1876, Dec. 21 *Fi. fa.*, No. 82, Jan. Term, 1877.
Judgment. Joseph H. Lewis, $300.
1876, Feb. 27. *Fi. fa.*, No. 47, April Term, 1877.

There was no evidence to show when the debts due the execution creditors were incurred.

The auditor (Joseph Hemphill) reported, *inter alia*, that the promise to give the son $1000, for work done during his minority, when the father was entitled to the custody of his child and the fruits of his labor, was without consideration, and amounted to nothing more than a promise to give his son that amount of money, which he failed to carry out until sixteen years afterwards, when he was in insolvent circumstances, upon his own admission, and when any such gift was a legal fraud upon his creditors. As to the other $500, which went to make up the judgment, there was no contract or agreement for wages either proven or alleged. The son remained at home and continued to work for his father after he was twenty-one the same as before; he lived in his father's family, not as a servant or laborer, but as a son, and was treated as such in every particular. No accounts were kept, no memoranda of settlements made, no notes given, but when about to leave his father's house it was just agreed upon as being $500 that his father owed him. This amounted to nothing more than a promise to make his son a gift of $500, which, remaining unexecuted until after the father had become insolvent, was, as against his creditors, fraudulent and void.

The auditor was of opinion that, under the circumstances of the case, the confession of the judgment for $1500, by the father to the son, was in law fraudulent and void. He therefore disallowed the claim of Samuel P. Brown, and awarded the fund to the execution creditors in the order of priority of execution, assessing the costs of the audit upon Samuel P. Brown.

To this report Samuel P. Brown filed exceptions, which the Court (BUTLER, P. J.) dismissed, confirming the auditor's report.

Samuel P. Brown took this appeal, assigning for error the decree of the Court confirming the auditor's report.

Charles H. Pennypacker, for the appellant.

Can a child enforce a promise or undertaking against a parent? Shall all the other creditors be paid first? Does the relation prevent the collection of an honest debt, and imply that in this case the transaction was a fraud upon the creditors? It is well settled that when a contract is made between a minor and an adult, the adult is bound, though the minor may not be.

Titman *v.* Titman, 14 Sm. 480.
1 Addison on Contracts, § 154.
1 Parsons on Contracts, 330.

The conversation in 1861 between the father and son created a new relation between them; it was, in effect, an emancipation of the son. Undoubtedly a father may emancipate a minor child.

Galbraith *v.* Black, 4 S. & R. 207.
McCloskey *v.* Cyphert, 3 Casey, 220.
United States *v.* Mertz, 2 Watts, 406.

The amount due the son was settled and determined upon four years before the judgment was given. Such a liability may be enforced.

Neel's Adm'r *v.* Neel, 9 Sm. 347.

Wm. M. Hayes, for the appellees.

Upon the facts of the case the claim is clearly fraudulent. The judgment was given when the obligor knew he was in insolvent circumstances, and is therefore as against his creditors absolutely void.

This Court has repeatedly held that the findings of an auditor upon the facts, which has been approved by the Court below, will not be disturbed on appeal, except for flagrant error.

May 6, 1878. THE COURT. This is a case of the distribution of the proceeds of a sheriff's sale of personal property.

The contention is as to the validity of the judgment in favor of the appellant against John Brown. The auditor found it in law fraudulent and void. The Court overruled all the exceptions, confirmed the report, and decreed that the fund be paid on subsequent executions. From that decree this appeal was taken.

The fund for distribution is $772.90. The judgment of the appellant is $1500. It was on a judgment note executed and entered of record on the 13th December, 1876. Execution was issued thereon and put in the hands of the sheriff on the same day. The levy was made on the day following. This execution was first in order of time. The consideration of the judgment was services rendered by the appellant to his father, John Brown, one thousand dollars thereof for services while he was a minor and five hundred dollars for services after he was of full age.

That a father may so manumit his son as to authorize him to contract with an employer, and receive his earnings to his own use, is well established. (Galbraith *v.* Black, 4 S. & R. 407; United States *v.* Mertz, 2 Watts, 406.)

He may do this although he be insolvent. (Holdships *v.* Patterson, 7 Id. 547.) Although he be legally entitled to the wages of his minor son, he is not bound to claim them for the benefit of his creditors. (McCloskey *v.* Cyphert, 3 Casey, 220.) In this last case it was said by Mr.

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Justice BLACK: "This emancipation of the son from the father's control may be as perfect when they both live together under the same roof as if they were separated. The father's renunciation of all legal right to the son's labor is not the less absolute because other family ties continue unbroken." He may so relinquish his right to the services of his minor son that he cannot reassert that right, either against the son or other persons. (Torrens *v.* Campbell, 24 P. F. S. 470.)

The uncontradicted evidence shows that in the spring of 1861, when the appellant was sixteen years old, he was negotiating with one Harris to learn a trade. His father was unwilling that he should leave home, and proposed if he would not go, but remain with him until he became of age, that he, the father, would give the appellant $1000. The son assented to this, and remained. This agreement is sworn to by both father and son, and by Mendenhall Brown, a brother of John's, who was present at the conversation and heard the arrangement. Harris testified that in a conversation he had that same spring with the father in relation to the proposed bargain between the son and the witness, the father said he had arranged with his son to stay with him, and that he the son was to have $1000. The appellant afterwards made the same statement to the witness. About the same time William McFarlan swears the son informed him of this arrangement, and John D. Dorlan swears the father told him the same.

The evidence of an agreement to pay for the appellant's services after he became of age is not so strong, nor need it be, as the father was not then entitled to his wages. Mendenhall Brown swears that when the bargain was made in 1861, the father told the appellant that, after he became twenty-one he would pay him what other people paid. The appellant testifies: "The spring I reached twenty-one years of age I made an agreement with my father. He agreed to give me as much as anybody else would give me, if I staid on with him. I went to work. The wages in the neighborhood that time were $225 to $240 per year." He continued in the service of his father seven years after he became of age, leaving in 1873. He further testified that when he left in 1873 it was agreed that these services should be $500; and his father agreed to allow him that sum. The father swore that he then thought, and always has since the work was done, that his services were worth more than $500. No witness contradicts these facts sworn to in behalf of the appellant's claim. The auditor does not find they are not proved; on the contrary, he says "he has treated the testimony of Samuel P. and John Brown as true." He appears to base his conclusion that the judgment is "in law fraudulent and void" on other grounds. He rests it mainly on the circumstances under which the judgment note was given. It is shown that when John Brown was largely indebted and far beyond his ability to pay, he and the appellant expected other executions would be issued against the former in a few days, and that this judgment was given with the intention of enabling the appellant to issue execution in advance of those likely to be issued by other creditors. If, however, the consideration was honest and the debt justly due, it was no fraud on the other creditors to thus prefer the appellant, except as against a bankrupt law. A debtor may prefer one creditor to another, and such preference is not fraudulent either in law or in fact. (Uhler *v.* Maulfair, 11 Harris, 481; Hart *v.* Covenhovan, 9 Id. 327; Hopkins *v.* Beebe, 2 Casey, 85.) A debtor may even prefer a *bona fide* creditor by a confession of judgment, although the claim were not enforceable at law. (Keen *v.* Kleckner, 6 Wright, 529.) It therefore follows that undue effect was given to the fact that the judgment was confessed, with a view of giving the appellant a preference over creditors. In so holding it is not necessary to impair any of the authorities declaring the effect that should be given to an auditor's finding of facts, but we dissent from the legal conclusions deduced from those facts. All the facts found did not justify the conclusion that the judgment was in law fraudulent and void.

The auditor has not found at what time the debt due to any of the appellees originated. A careful examination of the evidence fails to show that in 1861, or 1866 or 1873, when John Brown made these several contracts with the appellant, he was indebted to any other person who could be injured thereby.

As no just cause is shown for postponing the claim of the appellant, all reason for imposing the costs of the audit on him is removed.

Decree reversed at the costs of the appellees, and it is now ordered, adjudged, and decreed that the costs of the audit be paid out of the fund, and the residue thereof, to wit, $698.90, be paid to the appellant.

Opinion by MERCUR, J.

Jan. '78. March 20, 1878.

Trimble, Britton & Co.'s Appeal. Caroline Williams' Appeal.

Landlord and tenant—Lease to husband and wife—Distress—Landlord's claim on proceeds of sheriff's sale—Husband and wife.

C , a married woman, carried on business with her separate estate in a building which by the lease was expressed to be demised to her alone; her husband, however, also signed the lease, joining her in all the covenants thereof.

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A sale of her goods having been made by the sheriff, the landlord claimed his rent out of the proceeds:

Held (affirming the decree of the Court below), that the demise was to the husband as well as to the wife, and that her goods being on the premises would have been liable to distress; and that consequently the landlord was entitled to rent out of the proceeds of their sale.

Appeals from the Common Pleas of Schuylkill County.

These were two several appeals by Trimble, Britton & Co., and by Caroline Williams from a decree distributing the proceeds of a sheriff's sale of certain personal property belonging to the said Caroline Williams.

Trimble, Britton & Co. had obtained judgment against Mrs. Williams for $794.02, and issued the execution on which the money in court was made. The proceeds of the sale amounted to $332.48, out of which John B. Reber, landlord, claimed $322.28 for arrears of rent. The following facts were stated for the opinion of the Court:—

Mrs. Williams, the defendant in the execution, having a separate estate engaged in business on her own account, with the consent of her husband, John T. C. Williams, who acted as her agent in buying and selling goods. By lease dated May 8, 1876, John B. Reber "let unto Mrs. Caroline Williams" premises in which she carried on the business, and in which the goods sold by the sheriff were found, but the covenants of the lease, among which was a covenant that all property in the premises should be liable to distress, were entered into jointly by her and John T. C. Williams, her husband, both signing the lease.

Under these facts, Trimble, Britton & Co. and Mrs. Williams contested the landlord's claim, on the ground that, there being no demise to the husband, and the contract of the wife being void, no warrant of distress could have issued against either, and consequently that there could be no claim upon the fund.

The Court below entered a decree in favor of the landlord, and these appeals were taken.

James Ryan and *G. E. Farquhar* (with them *F. W. Hughes*), for the appellants.

The only question is whether the demise created the relation of landlord and tenant between Reber and Williams or his wife. The demise is to the wife alone by its terms. Nothing is demised to the husband, who simply joins in the covenants in consideration of the lease to his wife.

It is clear that, at the common law, the wife could not contract in this case, and no power to do so is created by the Act of 1848.

Neither husband nor wife was a tenant then under the lease, and no right to distress existed in the landlord.

Mason Werdman, contra. It is a question of construction whether the lease was not to the husband and wife jointly. If so, the wife's goods being on the premises were liable to distress.

April 1, 1878. THE COURT. The lease in this case on its face is to the husband as well as to the wife. He became bound for all its covenants. As to John B. Reber, the landlord, all property on the premises, whether of the husband or the wife, became liable to his distress for the rent. His right to distrain does not flow from her covenant or his relation as tenant, but from the common law, as an incident to the lease to the husband, a right to distrain for his rent all property found upon the leased premises, not within the well-known exceptions on account of trade, etc. It is this right which the Legislature intended to protect when it gave to a landlord his preference in payment out of the proceeds of sale of the goods found on the premises, and liable for the rent.

We see no error in the record, and therefore affirm the decree, and dismiss each appeal above stated, with costs to be paid by the respective appellants.

PER CURIAM.

Oct. & Nov. '77, 247. Nov. 21, 1877.

Snyder v. The Commonwealth.

Criminal law—Evidence—Inadmissibility of, to prove a different crime from the one charged—General reputation—What evidence admissible to prove.

The defendant was indicted for the murder of an illegitimate child of his daughter. The daughter testified, on the trial, that her father, the defendant, was the father of the child, and that he had killed it by smothering it in a feather bed. The defendant, in order to throw discredit upon this witness, proved that prior to making this charge for murder, this same daughter had charged him with incestuous rape. The Court allowed the daughter to testify, under exception, that the charge of rape was true:

Held, that the evidence was improperly admitted.

The defendant having introduced evidence of his previous good character, the Commonwealth, in order to rebut this evidence, offered to prove by a witness that he, the witness, had heard frequent complaints made by the children of defendant of his cruelty towards them.

Held (reversing the Court below), that the evidence was inadmissible.

Error to the Court of Oyer and Terminer of Crawford County.

Charles Snyder was indicted for the murder of an illegitimate child of his daughter Marietta.

On the trial of the case Marietta, the daughter,

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on the part of the Commonwealth, testified in chief that the child was born in July, 1876, and that the defendant was the father of the child; that soon after the child was born her father wrapped it in a feather bed and put it in a chest in the room, and on the next morning took it away. On cross-examination the witness admitted that she was asleep when the child was put in the chest, and that her mother had told her that her father had disposed of the child in that way.

The defence was founded upon the utter improbability of the case, the good character hitherto borne by the defendant, and the unworthiness of the daughter, Marietta, of any belief. The defendant proved that two charges had been made against him prior to this: one by the daughter for incestuous adultery with her, and another by a friend of the daughter, and using her as a witness, for incestuous rape. The defendant also produced a great number of witnesses from the neighborhood to prove his good character.

In rebuttal, the prosecution recalled the daughter and offered to prove by her that the charge for incestuous rape was true. The defendant objected to this evidence as irrelevant. The objection was overruled, the evidence received, and a bill sealed for defendant. In answer to the testimony as to the defendant's general character, the prosecution called one Davidson and offered to prove by him complaints by the children of defendant of his cruelty towards them prior to the commencement of this prosecution. The defendant objected to this because it was not evidence of general reputation. Objection overruled and bill sealed for defendant.

The jury rendered a verdict of guilty of murder in the second degree, and the defendant was sentenced to the Penitentiary for a term of eight years and two months. The defendant took this writ, assigning for error the admission of the testimony of the daughter to prove the truth of the charge of rape, and the admission of the testimony of Davidson.

H. L. Richmona (*A. B. Richmona* with him), for plaintiff in error.

The testimony of the daughter that the charge of rape was true was inadmissible. The defendant was on trial for murder, and this evidence tended to prove a distinct offence. The object of proving that such charge had been made was to discredit the daughter by showing that she had made these charges and said nothing of the alleged murder at the time, and proof that the charge was true in no wise tended to strengthen her testimony.

Evidence of character must go to show *general* character, and no evidence of particular acts is admissible to prove good or bad character.

Pearson Church, contra, furnished no paper-book to the Court.

Jan. 7, 1878. THE COURT. The paper book of the plaintiff in error is very defective. It lacks much that would assist us in acquiring a clear understanding of the case. Unfortunately the defect is in no manner removed by the defendant, who has omitted to furnish us with any paper-book. We are therefore left to grope our way as best we can. Whenever an argument is needed on the part of a defendant, justice to the cause and to the Court requires that a paper-book be prepared.

The plaintiff in error was indicted for murder. He was charged with the murder of an illegitimate child of his daughter. The daughter was a witness against her father. As we understand her testimony, she swore, at least in chief, to being present and hearing him commit an act which resulted in the death of her child. On the part of the defence it was claimed that this prosecution was a wicked scheme to ruin and destroy him; that the charge of murder was not at first made. To show this fact and thus to cast discredit on the testimony of the daughter, the plaintiff in error gave in evidence two transcripts of complaints against him, made after the alleged killing of the child. One made by the daughter charging him with incestuous adultery with her; the other by a friend of hers, using her as a witness, charging him with incestuous rape. We do not understand that the plaintiff in error affirmed or denied the truth of the facts averred in either of those complaints. His object in giving them in evidence was to show that she did not then charge him with murder; but with other and lesser offences. By proving that those offences only were then charged against him, he sought to impair the force of her testimony in regard to her knowledge of his having previously committed the murder now claimed.

As rebutting, the daughter was called and permitted to testify, under exception, that the complaint charging the rape was true. We cannot see how this evidence was rebutting. It in no manner contradicted the fact, that she did not then charge the crime of murder to have been committed by him.

Its effect, however, was highly prejudicial to the accused. The indictment did not charge him with the commission of any rape. He was not being tried for such a crime. Without notice or opportunity to prepare a defence against a charge of such an infamous crime, this evidence went to the jury. It was in manifest disregard of the rule of law that the evidence offered must correspond with the allegations, and be confined to the point in issue. Here he was on trial for the commission of one felony, but the Court admitted testimony of his having committed another felony of an entirely separate and distinct character. The two could not have been joined in

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the same indictment. In case the direct evidence of the homicide was not entirely satisfactory to the jury, yet they may readily have concluded, if he was such a monster as to have committed a rape on his own daughter, he had a heart sufficiently depraved to commit the murder charged against him. The evidence was not rebutting, nor was it pertinent to the issue. He was denied that protection on his trial which the law gives to every person charged with the commission of crime.

We are not informed at what stage of the case, nor for what purpose, the evidence covered by the second assignment was offered. We infer the object of it was to prove a reputation for cruelty, in answer to a general reputation for good character shown by the accused. If so, it was improperly received. Character can be impeached only by evidence of general reputation, and not by evidence of particular acts of misconduct. It should be what *people in general* say, and not what *others* say. (Wike *v.* Lightner, 11 S. & R. 198.)

The offer in this case fell far short of the requirements of the rule. It was not to prove any general reputation. It was not to show by the oath of a witness that he had actually ever committed a cruel act. It was merely that his children had frequently complained of his cruelty towards them. The complaints of his children did not necessarily establish a general reputation. If they had not, it was error to admit them in evidence. If they had, then the general reputation should have been proved as a fact and the complaints of a few persons should not have been received, for the jury to infer a general reputation therefrom.

Judgment reversed, and a *venire facias de novo* awarded.

Opinion by MERCUR, J.

Common Pleas—Equity.

C. P. No. 2. January, 1878.

The Third Reformed Dutch Church of Philadelphia v. Fox et al.

Estoppel—Co-ordinate jurisdiction—Trustee—Account.

A bill in equity filed on behalf of a church by members claiming to be the rightful corporation, and who are so adjudged in the proceeding, is conclusive on the church in a subsequent proceeding relative to a branch of the same matter.

A bill asking for the removal of a trustee for mismanagement, and that he be compelled to deliver up the property in his hands, implies a prayer for an account, and an account in such a case having been refused by a co-ordinate tribunal, its action will not be reviewed here in a suit between substantially the same parties, but such further relief as the plaintiffs are entitled to must be obtained in the original forum.

Sur demurrer to bill.

The bill set forth the proceedings in the case of Jones *v.* Wadsworth (reported 4 WEEKLY NOTES, 514), and ended the recital of those proceedings with the words, "To that suit your orator was not a party;" that, in obedience to the decree in said suit made, the church property had been surrendered to the plaintiffs therein, without prejudice to the rights of the plaintiff herein to insist upon an account of the rents, issues, and profits of the property so surrendered; that such an account had been demanded and refused; that certain suits had been instituted against the plaintiff by the defendants, severally, upon plaintiff's promissory notes; to which suits plaintiff's right to an account, as aforesaid, was a set-off, not pleadable in law, but cognizable in equity in a bill for an account.

The bill prayed for an account and for an injunction restraining defendants from prosecuting their said actions at law.

The defendants demurred on the ground that the whole question of a right on the part of complainant to have compensation from the defendants, and to have an account of the rents, issues, and profits of the church property, had been finally adjudicated in the suit of Jones *v.* Wadsworth, *supra*.

A. B. Shearer and *Geo. W. Biddle*, for the demurrer.

Plaintiff is estopped from maintaining this suit by the decision in Jones *v.* Wadsworth; the Courts look beyond the nominal party, and treat as the real parties all whose interests are involved in the issue.

Cecil *v.* Cecil, 19 Md. 72.
Manly *v.* Kidd, 33 Miss. 141.
Castle *v.* Noyes, 14 N. Y. 329.
Doty *v.* Brown, 4 N. Y. 71.
Sargent *v.* Fitzpatrick, 4 Gray, 511.
Peterson *v.* Lothrop, 10 Casey, 223.

C. Stuart Patterson and *William A. Porter*, contra.

Since the Court of Common Pleas No. 1 decreed that Jones was entitled to receive the property of the corporation, it becomes the duty of the misappropriating trustees to exhibit an account without regard to what may appear on the face thereof.

Coleman's Appeal, 12 Sm. 252.

The further argument against the demurrer is stated in the opinion of the Court, *infra*.

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Jan. 12, 1878. THE COURT. This case comes before us on a demurrer to a bill filed by the Third Reformed Dutch Church against Henry J. Fox and nine others, praying for an account, and that the defendants be restrained by an injunction from prosecuting certain suits which they have brought against the complainant. It appears that the defendants were, together with one Daniel S. Jones, trustees of the corporation plaintiff, and held or were possessed of its personal and real estate and collected the rents and profits, and that upon a bill filed against them by Jones and others as members of the church, they were removed from the trust and directed to deliver the property in their hands to Jones as the only remaining trustee; but it also appears that the Court refused to order them to account for the rents and profits, thus virtually excepting so much of the fund as had been derived from that source from the operation of the decree. The complainant took an appeal from this portion of the decree, but it was confirmed by the Court above, and the defendants' contention is that the question raised by the present bill is *res adjudicata*, and having been determined by a competent tribunal cannot be again put at issue.

The complainant's counsel made an ingenious argument in reply to this defence, which may be ranged under the following heads:—

1st. This proceeding is instituted by the church as a corporation while the former bill was filed by the church members on its behalf, and as the parties are not the same there can be no estoppel.

2d. The question was not before the Court in the former suit because the bill did not pray for an account, and when the complainant asked for leave to amend it was refused.

3d. Agreeably to Winebrenner *v.* Colder (7 Wright, 244), the point could not arise under a bill filed by the members of the church as such, nor until it was restored to its normal condition through the reorganization which has since occurred.

4th. The decree under the first bill is in its literal acceptation self-contradictory, and should receive a liberal interpretation. It cannot be that the Court meant to declare that the remaining trustee, Jones, was entitled to receive the property of the corporation, and yet deny him the account which might be requisite to ascertain and enforce the right established by the decree. Conceding that the defendants were not answerable for so much of the rents and profits as they had laid out in good faith for purposes which, though not strictly authorized were yet cognate to the trust, it would still be their duty to make good whatever sums were wilfully misappropriated and to pay over any amount that remained unspent.

The argument under the first point is manifestly unsound. Judgments not only bind parties but privies, or in other words, persons who, though not actually before the Court, are yet in contemplation of law represented by those who appear or have been duly summoned. It is not always easy to apply the rule, but we shall seldom err if we follow this criterion: Could the person whom an adverse decree or judgment is alleged to bind rely upon it as conclusive if it were in his favor? Taking this as the test, there can be no doubt here, because the plaintiff concedes, and it is, indeed part of the case set forth in the bill, that the defendants are precluded from alleging that the property in their hands could be diverted from the Dutch Reformed Church, or used for the support of any other sect or denomination. It is a rule of common sense as well as of jurisprudence, that no one shall impugn the foundation upon which he builds, and as the corporation plaintiff has the benefit of the decree, so it must accept the burden and cannot rely on that part which makes for it and reject the rest.

The second ground on which the complainant seeks to escape from the conclusive operation of the decree is also insufficient. In determining whether a question is sufficiently before a court to be a subject of adjudication we must be guided by the pleadings, and there can be no doubt that a bill asking for the removal of a trustee for mismanagement, and that he be compelled to deliver up the property in his hands, implies a prayer for an account as a necessary and proper means to attain the end in view; but if this were not so an account might clearly be decreed under the general prayer for relief, as being incident to it and in accordance with the drift and tenor of such a bill. This proposition does not conflict with the complainant's argument which is in itself entirely just, that the refusal of a court to permit a distinct subject of litigation to be introduced by amendment during the course of a suit at law or in equity, is simply what it purports to be, a declaration that the matter will not be considered then and there, and does not preclude the party from resorting to any remedy that would have been open to him if the amendment had not been proposed and rejected.

The third point made by the complainant cannot be sustained. It is, as we have seen, that the decree when duly interpreted is not that the outgoing trustees shall be exonerated from accounting, but that so much of the fund as was actually expended for the salary of the minister and the maintenance of divine worship shall be viewed as money laid out for the use of the congregation. In plain terms this is an allegation that the Court committed a mistake in declaring that the defendants were not under an obligation to account, when what it meant, and should have

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said was that they might account in a particular way.

If such a mistake had actually been made, it could not be investigated or corrected here, because a court has no power to revise the judgment of a co-ordinate tribunal and set it aside as contrary to the evidence or erroneous in point of law. *Interest reipublicæ ut sit finis litium*, and the rule depends on considerations which concern the parties not less than the community at large. If the first judgment could be thus subverted, the second might share the same fate, and the unhappy litigants would be inclosed in a vicious circle from which there would be no escape.. No hardship, however great, will justify a departure from this principle; and one who reads the able and well considered opinion of Judge Allison, will be slow to believe that there is such hardship here, or that he overlooked the obvious point now pressed with so much earnestness by the complainant. Had it been contended or alleged before him that the defendants held an unexpended balance, or that they had diverted the funds of the church to their own use, he would unquestionably have ordered them to account; but it is not less clear that if it was tacitly conceded that the whole fund had been laid out in keeping the church open for the use of the congregation and supplying them with spiritual food, such a decree might properly be refused on the ground of equitable estoppel indicated in the court below, and adopted by the Supreme Court when the case came before it on appeal.

The fourth point still remains, and is not free from difficulty. If, as the case of Winebrenner *v.* Colder imports, the demand for an account was premature and rejected on that ground, the church is not precluded from renewing its application. An adjudication does not operate as an estoppel unless the merits are before the court, and can legally be considered. A judgment at law speaks for itself and will not be narrowed or enlarged by the reasons given for the decision, but in considering a decree in equity we may look to the opinion of the Court for an explanation of the extent and operation of the decree. If Judge ALLISON relied on the ground of estoppel in refusing an account, he also relied on the want of proper parties and on the authority of Winebrenner *v.* Colder. On the other hand, the Supreme Court gave as their sole reason that there had been such encouragement and acquiescence as justified a chancellor in refusing to interfere.

The question may be a doubtful one in view of these considerations, but I need not pursue the inquiry further because what has been said renders it plain that we cannot proceed in this case without intruding on ground that has been preoccupied. This might not be enough to justify the dismissal of the bill if this were the only court open to the church and it could not knock at any other door, but we think that there is another remedy more in harmony with Winebrenner *v.* Colder, and the fundamental rules of equity procedure.

The proceedings under the former bill culminated in an order on the defendants to surrender the property which they held, to Jones as the duly authorized representative of the church, and the only party qualified to act on its behalf. It is on that decree that the whole fabric of the bill depends, and if the complainant is entitled to an account, it is as a means of carrying the decree into effect. Moreover, the complainant claims, so far as this litigation is concerned through Jones, and is subject to all the considerations which would have affected him. Now, agreeably to the argument which has been pressed upon us, and it is the only one on which the complainant can succeed, what the Court determined in the original suit was in effect not that the defendants were not under an obligation to account, but that such a decree could not legitimately be made until the existing disorder had been remedied, and then only at the instance of the corporation or of its trustees. Adopting this view of the case, and taking it for granted that the defendants have withheld some portion of the fund to which Jones was entitled under the decree, the proper course for Jones, or for the complainant coming forward in his stead, obviously is not to have recourse to another tribunal, but to file a supplemental bill in the court which pronounced the judgment, setting forth the order which it had made, the wrong done by the defendants in refusing to obey, and asking for a discovery and account as a means for making the order effectual. As between co-ordinate jurisdictions that which first attaches is exclusive, and it is not less clear that jurisdiction does not cease on judgment, but extends to all the measures requisite to execute the judgment. Hence, when the object is not to establish a controverted right, but to enforce one that has been adjudicated, the proper tribunal is that which rendered the decree and other courts should refuse to intervene unless the circumstances are such that relief cannot be given in the original forum. If the rule were not legally imperative, it should still be observed in deference to comity and to prevent the conflict of jurisdiction which might otherwise ensue. It follows that if the complainant is entitled to a remedy it must be sought elsewhere, and the bill is consequently dismissed without prejudice to the right to apply to the Court of Common Pleas No. 1 for the decree which we refuse.

Opinion by HARE, P. J.

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Common Pleas—Law.

C. P. No. 2. March 11, 1878.

Conrad v. Smith.

Pleadings—Demurrer—Traverse of matters of inference of law—Ground-rent—Arrears of—Personal liability of a purchaser of land sold under a municipal claim for taxes.

A. being seized of land in fee conveyed it to B., reserving a ground-rent which B. covenanted to pay. The premises were subsequently sold and conveyed by the sheriff to the defendant, under a judgment rendered on a claim filed by the city for unpaid taxes against C.:

Held, that as the judgment was *in rem*, B.'s estate vested under the sheriff's sale in the defendant, and that the defendant was personally liable for the fulfilment of the covenant, whether C. did or did not enter or hold under B., and even if he derived title from a different source, unless A. was not seized or his title is paramount.

Demurrer to pleas.

Covenant for arrears of ground-rent.

The declaration set forth that Elizabeth Jones, the plaintiff's assignor, being seized of certain premises conveyed them in fee to one Sheppard, reserving a yearly ground-rent of $204\frac{1}{3}$, with the usual (express) covenants by Sheppard to pay the rent as and when the same fell due; that after this conveyance a *scire facias* on a municipal claim by the city of Philadelphia for unpaid taxes was issued against the said lot, and against one M. Conrad as the owner or reputed owner; that judgment thereon was obtained, and the lot under this judgment sold at sheriff's sale to James M. Smith the defendant, "whereby all the property, claim, and demand whatsoever of him, the said George Sheppard, the original grantee, and of every one claiming under him became and was vested in the defendant."

The defendant pleaded the general issue, and specially (1) That his estate was not derived from Elizabeth Jones, or any one claiming under her. (2) That it was not derived from Sheppard, the alleged covenantor. (3) That the sheriff's deed conveying the property to him created no privity of estate or tenure between either Elizabeth Jones or Osborne Conrad the plaintiff (her assignee), and the defendant. The defendant demurred on the ground that the pleas, though in form traverses did not deny any fact averred in the declaration, but traversed matters which were inferences of law.

Geo. Biddle, for the demurrer.

The pleas do not traverse any averment of fact in the narr. Whether or not under these averments there does exist such a privity of tenure between James M. Smith who bought the land under a judgment on a municipal claim, and the original covenantee's assignee, is an inference of law. The defendant unless he can traverse the material facts, from which this conclusion follows, should have demurred.

Priddle and Napper's Case, 11 Coke's Rep. p. 10, *b*.

The words "whereby all the claim," etc., quoted above, are like the allegation "*virtute cujus*," the plaintiff became seized, and is not traversable.

Stephen on Pleading, pp. 191–2.

[HARE, P. J. We think that the real question here is whether your declaration is good.]

It is well settled that the assignee of a ground-rent has all the remedies that the original ground landlord had or would have, and that the assignee of the land is liable to pay the arrears of ground-rent accruing during his actual ownership. By the Act of 1849 a ground-rent is not affected by a judicial sale, but is assessed as a separate estate, it must, therefore, remain as before, with all its incidents and rights arising from the relation of tenure existing between the ground landlord and ground tenant, and consequently the land, in whosesoever's hands, must be subject to all the liabilities thereunder. As the incidents of tenure, therefore, remain, the relation of tenure must still subsist between the owner of the rent and the purchaser of the land, and the covenant in the ground-rent deed consequently attaches to the purchaser during his ownership.

Act of 23 Jan. 1849, Purd. Dig. 752, pl. 17.

Charles Gilpin (*H. Gilpin* with him), contra.

A sale for taxes is a proceeding *in rem*. No privity of tenure between the ground landlord and a purchaser attaches thereby. There is no covenant in the sheriff's deed making a purchaser liable for the ground-rent, and no personal liability is, therefore, created in the purchaser.

C. A. V.

March 30, 1878. THE COURT. This is an action of covenant for ground-rent brought by Osborne Conrad, claiming as devisee of Elizabeth Jones the original grantor, against the defendant Smith as assignee of the land. The declaration alleges that Elizabeth Jones was seized in fee of the premises, and conveyed them by deed indented to one George Sheppard his heirs and assigns, to have and to hold the same yielding and paying the yearly rent or sum of $204\frac{1}{3}$, and with an express covenant by Sheppard to pay the rent on the days and in the manner set forth in the deed. The declaration then goes on to allege that after the sealing and delivery of the indenture, certain proceedings were had in the District Court of this city against the said lot and one M. Conrad, on a claim for unpaid taxes, which were prosecuted to judgment and the land sold thereunder to the defendant and subsequently conveyed to him by the sheriff, "whereby all the property, claim, and demand whatsoever of him,

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the said George Sheppard, the original grantee, and of every one claiming under him, became and was vested in the defendant."

Various pleas were filed by the defendant, to which the plaintiff demurred, and from the course of the argument it is requisite to consider the sufficiency of the declaration.

The defendant's main contention is, that an action against an assignee on a covenant running with land is founded on privity of estate, and cannot be maintained unless the defendant is not only in possession of the land, but holds it by the same title as the original covenantor. Or, as the rule is stated in 1 Williams' Saunders, 112 a, note 1, "it is not sufficient to say that the tenements came to the defendant by assignment, but it must be shown that he is assignee of the term, for otherwise it might be an assignment of another estate than the term of the lessee." Such, clearly, is the law, but it is also true that all that need be averred in declaring against the assignee of a term or other estate in land is that "all the right, title, and interest of the lessee came to and vested in the defendant." As the declaration in this case contains such an averment, there would be no room for doubt, did it not also allege that the means whereby the defendant acquired Sheppard's title, were a judgment against one M. Conrad, who for all that appears of record had no estate or interest in the land. Hence an argument that there is no thread or filament of title connecting the defendant with Sheppard, or that can make him answerable for the fulfilment of Sheppard's covenant. This objection might be unanswerable if the proceedings under which the sheriff's sale took place had been *in personam*, but they were as the declaration shows, *in rem*, and not only bound Conrad's interest, but each and every other actual or potential right or title to the land. Sheppard's estate, therefore, passed by the deed as well as Conrad's, and came into the defendant's hands subject to the ground-rent reserved in the deed by which Sheppard acquired title. It was said during the argument, that such a doctrine would interpose a serious obstacle to the collection of the city revenue, by rendering a purchaser at a tax sale subject to all the charges that have been imposed at any time by every one who, though wrongfully, has held or claimed a title to the premises. The answer is, that one who enters under a proceeding *in rem* holds in contemplation of law by virtue of the true title to the land, and may set it up against any charge or incumbrance created by a previous holder without right. If, therefore, Elizabeth Jones was not, as she is alleged to have been, seized in fee, and Conrad was in possession under a right derived from a different source, it may be shown in pleading or evidence, and will be a good answer to the suit.

We may now consider the pleas, which are, that the defendant's estate is not derived from the said Elizabeth Jones; that it is not derived from Sheppard the original covenantor; that the sheriff's deed created no tenure or privity of estate between the defendant and Elizabeth Jones or Osborne Conrad, the alleged devisee, and the plaintiff, in this suit; and finally, that the defendant did not enter into the premises and become possessed thereof in manner and form as set forth in the declaration. The material questions in the cause are, had Elizabeth Jones a good title to the land, and did the estate which she conveyed to Sheppard pass from him to the defendant? It is, therefore, competent for the defendant to deny her seisin, or to show that Sheppard's estate did not come to or vest in the defendant as the declaration alleges, but we think that the pleas actually filed are argumentative and do not raise these issues with sufficient precision. The form, as given in Archbold's Nisi Prius, 284, is that "the right, title, and interest of the original covenantor did not come to or vest in the defendant," and though this may be implied in saying that the defendant did not derive title from the covenantor, it is not said in a way to bring the question directly before the jury. Still, we do not deem it advisable to hinge the cause on a narrow point of pleading, and are of opinion that unless the defendant can show that he has a better title than that which Elizabeth Jones conveyed to Sheppard, the plaintiff will have a verdict on all the issues raised by the present pleadings. The demurrer is consequently overruled, with leave to the defendant to amend by pleading issuably.

Opinion by HARE, P. J.

C. P. No. 2. Dec. 3, 1877.

Shoemaker v. Duganne et al.

Practice—Scire facias sur mechanic's claim—Where service was made on the contractors, one return of "nihil habet and by posting," held to be a sufficient service as to the owner.

Rule to show cause why judgment should not be stricken off.

Scire facias sur mechanic's lien.

The sheriff's return showing service of the writ was as follows: "Made known to H. M. Boyd and Price I. Patton, contractors, *nihil habet* and by posting, as to H. C. Duganne, owner."

Upon this return, judgment was taken for want of an affidavit of defence.

J. L. Jones, for the rule.

It is a general principle that judgment, on a writ of *scire facias*, for want of an appearance, or the non-filing of an affidavit of defence, can only be entered after actual service of the writ, shown by the return of "*scire feci*," or after constructive service shown by two returns of "*nihil habet*."

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Compher *v.* Anawalt, 2 Watts, 492.
Chambers *v.* Carson, 2 Wh. 9.
Magaw *v.* Stevenson, 1 Grant, 402.

A writ of *scire facias* must be served the same as a summons; but by long-continued practice, and for purposes of convenience, though frequent cases of hardship arise, two returns of *nihil habet* are allowed to be equivalent to a service, for the purpose of judgment and execution.

Purd. Dig. p. 45, pl. 17.
Troubat & Haly's Prac., vol. ii. p. 376 *et seq.*

A *scire facias* issued upon a mechanic's claim constitutes no exception to the rule. The authorities furnish no case where *one* return of *nihil habet* confers the right to have judgment entered thereon.

Westmoreland Bank *v.* Rainey, 1 Watts, 26.
Taylor *v.* Young, 21 Sm. 81.

If such a practice has grown up, it stands without judicial or statutory authority. A decision that judgment can be obtained upon such a fictitious form of service as one return of *nihil habet*, will be an assault upon those protective legal principles that insure to every owner of property its possession, and prevent his deprivation of it, except after due notice, and the opportunity for defence.

City *v.* Vandevier, 8 Phila. 334.

The Act of Assembly gives no intimation that such a return is equivalent to service.

Purd. Dig., p. 1035, pl. 51.

The owner in a mechanic's claim is the substantial defendant in the suit. The proceeding on the *scire facias* is against his property, and the contractor is practically unaffected by a judgment against the property. Judgment is therefore entered with propriety where the owner is properly served, even though the return is *nihil habet* as to the contractors.

In Sullivan *v.* Johns (5 Wh. 367) and in Donahoo *v.* Scott (2 Jones, 47), the real owner in each instance was a party to the suit, and had knowledge of the whole proceedings prior to the entry of judgment, and in both cases made a defence. In the present case the owner received no notice of the issuing of the *scire facias*, and judgment was granted against him on one return of "*nihil habet* and by posting."

J. Scollay, contra.

The practice is to enter judgment upon such a return as this.

THE COURT. Practically there is little difference between a judgment entered upon one return of *nihil habet* and one entered upon two returns of *nihil habet*. The section of the Act of Assembly relating to the service of the writ issued upon a mechanic's claim, does not require such a return as is contended for. One return of *nihil habet* and posting the writ would seem to be sufficient. We think this case is ruled by the decision in Donahoo *v.* Scott (2 Jones, 47).

Rule discharged.

Oral opinion by HARE, P. J.

C. P. No. 2. March 30, 1878.

Davis v. Sharpe.

Practice—Discontinuance—Mode of obtaining—When not allowed.

Rule on the prothonotary to file an order for discontinuance and settlement.

The petition filed by the defendant set forth that she received an order from the plaintiff of the following nature:—

Davis *v.* Sharpe. } No. Term C. P. No. 2.

To the Proth'y of the Court of Common Pleas,

Please mark the above case discontinued and settled.
March 16, 1878. R. DAVIS, Plff.

That by her counsel she presented the above order to the prothonotary, tendered him the amount of his costs still due, and requested him to file the same of record. This he refused to do. The petition concluded by asking for a rule on the prothonotary to show cause why he should not file the order.

F. Dickson, for the rule, cited—

1 Trou. & Haly's Pr., pt. 2, 629, note 11

J. O'Byrne, contra.

The plaintiff gave the order to discontinue without the knowledge of his counsel; defendant should reimburse plaintiff's counsel for costs advanced by him for plaintiff.

THE COURT. In order to discontinue a case, leave of the Court must first be had and obtained. This has not been done here.

Rule discharged.

C. P. No. 2. March 13, 1878.

Field v. Johnson.

New trial—Granted where after a verdict it appeared that a juror whose name was called on the panel did not sit, but was personated by one whose name was not on the jury list.

Rule for a new trial.

After the verdict had been rendered it appeared that a juror whose name was called as one of the panel was not impanelled and did not sit as a juror, but was personated by some one whose name was not on the jury list.

E. H. Weil, for the rule.

Hartman, contra.

Rule absolute.

C. P. No. 2. Feb. 23, 1878.

Kochenderfer v. Feigel.

Execution—Proceeds of personal property—Where there are conflicting claims which are liens on the fund, the sheriff may pay the money into court.

Rule to show cause why the fund arising from a sheriff's sale of personalty should not be paid into court for distribution.

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Under various writs of *fi. fa.* issued out of C. P. No. 3, the defendant's personal property was levied on, and upon January 4, 1878, sold for $837. After deducting the costs incident to the execution of the writs there remained in the hands of the sheriff $819.38. Upon this fund claims were filed with the sheriff for rent to the amount of $120, and for wages to nearly the amount of $700. The claims for wages were distributed among thirty-three claimants, many of whose claims were disputed by plaintiff's attorney.

Winship, for rule, cited—

McDonald *v.* Todd, 1 Grant, 17.

J. A. Erdman, contra, cited—

Marble Co. *v.* Burke, 5 WEEKLY NOTES, 124.

THE COURT. Where there are conflicting claims, such as claims of wages and rent, *which are liens on the fund*, we will relieve the sheriff and allow the fund to be paid into court.

Per HARE, P. J.

Orphans' Court.

April 16, 1878.

Friedlinger's Estate.

Allowance for support of minor—Not granted within one year of decedent's death, when no administration account has been filed—Practice.

Sur petition for an allowance, and answer.

The petition set forth that the testator (the petitioner's husband) had bequeathed to his wife $75 in cash and his housefold furniture, and the residue of his estate, amounting to about $200, to his daughter Emma, and had directed that, in case of her death without issue, the same should go to his sister; and had named the respondent his executor and guardian of his child. The petition further alleged the poverty of the petitioner, and her inability to support her child, and prayed an allowance to her for maintenance of the minor out of said legacy. The respondent, in his answer, admitted the facts set forth in the petition, and submitted himself to the direction of the Court. The petition was filed within a year of the testator's death, and before any administration account had been filed.

Van Tronk, for the petitioner.

Tull, contra.

April 27, 1878. THE COURT (after stating the facts). The bequest to the daughter of decedent was a vested interest, which took effect immediately upon the death of testator. It is difficult to distinguish it in any respect from the legacy in Magoffin *v.* Patton (4 R. 113), where a testator bequeathed to each of his children the sum of $6000, to be paid to them as they severally attained full age or married, and in case any died under age and without issue the share of such child to be divided among the survivors. One of the children died in his minority, unmarried, and without issue, and it was held that the bequest vested in him immediately on the death of the testator, and was payable to his administrator, with interest from the date of testator's death, no other provision having been made for the maintenance of the legatee during his minority.

It appears, however, that one year has not yet elapsed since the death of the testator, and that no account of the administration of his estate has yet been filed. To direct an allowance at this time might prejudice the rights of creditors, and the prayer of the petition must, for that reason, be refused. But the suggestion is made that the widow, by claiming her allowance of $300 out of the estate, may reach the result intended by her petition, and be free from embarrassment caused by the claims of creditors.

Opinion by ASHMAN, J.

U. S. Courts—Law.

April 6, 13, 15, 30, 1878.

Schollenberger & Son v. Forty-five Foreign Insurance Companies.

IN THE CIRCUIT COURT OF THE U. S. FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

The United States ex rel. Schollenberger & Son v. The Judges of the Circuit Court of the U. S. for the Eastern District of Pennsylvania.

IN THE SUPREME COURT OF THE UNITED STATES.

Judiciary Act of Congress of 1789—Act of Congress of March 3, 1875—Act of Assembly of April 4, 1873, § 13—Jurisdiction of Circuit Court as to foreign corporation defendant—Construction of the words "in which he may be found" in above Statutes—Practice—Mandamus requiring Circuit Court to assume jurisdiction.

The language of the Act of Congress of March 3, 1875 (18 Stat. 470), re-enacted from the Judiciary Act of 1789

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(1 Stat. 79 § 11), that "no civil suit shall be brought before either of said Courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceedings," etc., is complied with where the defendant is a foreign corporation doing business within the State in which the United States District is situated, and process has been served upon it through its local agent in said district, appointed under a State statute requiring the foreign corporation defendant to have such resident local agent before doing business in the State, on whom service of process for the company may be had.

A foreign corporation, for the purpose of service of original process upon it, may be *found within* the limits of another sovereignty than that in which it was incorporated.

A foreign corporation is *found within* another State when it transacts its ordinary business within the latter State, and has there a local agent, on whom, by the State law, original process may be served.

Although State legislation cannot confer jurisdiction upon U. S. Courts, and consent of parties cannot, yet both combined may. Thus, where a foreign corporation consents to the condition of a State law, viz., to be found within the State for the service of process, the fact that it is so found gives the jurisdiction.

The proviso in the Act of Congress prescribing where a defendant may be sued, is not one affecting the general jurisdiction of the Federal Courts; it is rather in the nature of a personal exemption in favor of a defendant which, if the citizenship of the parties is sufficient, he may waive.

A State law of Pennsylvania prescribed that foreign corporations, doing business therein, should submit themselves to service of process issuing out of "any Court of this Commonwealth having jurisdiction of the subject-matter:"

Held, that the Circuit Court of the United States in Pennsylvania, having jurisdiction of the subject-matter, was within the purview of the Act.

Mandamus is the proper remedy where the U. S. Circuit Court refuses to entertain jurisdiction by quashing the service of the original process.

Semble, that on a rule for a mandamus the U. S. Supreme Court will only look at the petition and return, and not at the record of the cases in the lower Court referred to in the petition.

La Fayette Ins. Co. *v.* French (18 How. 407), and R. R. Co. *v.* Harris (12 Wall. 81), approved and followed.

These were forty-five actions of debt on policies of fire insurance, brought by William Schollenberger & Son, citizens of Pennsylvania, against the defendants, who were respectively corporations incorporated either by the Parliament of Great Britain, or by States other than Pennsylvania.

Writs of summons, issued in this Court, returnable to the first Monday of April, 1878, were duly served by the United States Marshal for this district upon the person who for the time then being was, in each case, the agent of the respective defendant, and who had been, and was then, appointed by the said defendant as its agent, resident in Pennsylvania, under the Acts of Assembly of April 11, 1868, § 2 (P. L. 1868, 83; Purd. Digest, 796, pl. 29); and of April 4, 1873 (P. L. 1873, 27). Declarations were at the same time filed, in which the plaintiffs were described as citizens of the State of Pennsylvania, and each defendant as "a body corporate, created under the laws of [the proper State], and having its principal place of business in said State, and being a body corporate exercising within the State of Pennsylvania, under a license granted by said State, their corporate rights, powers, and privileges, in the making of contracts of insurance such as that on which this action is brought." The declarations showed that the contracts of insurance sued upon were in each case made in this district, insuring property situated here, between the plaintiffs and the respective defendants, acting by their local agents, who in each case were served.

An appearance *de bene esse* was in each case entered for the agent, as an individual, upon whom service had been made, but not for the defendant corporation. Motions were thereupon made to quash the service of the writs in all the cases. The motion in one of the cases was, for special reasons, overruled (reported *ante*, 363).

Heverin and *R. P. White*, for the motions.

Their argument is fully stated in the opinion of McKennan, J., by whom it was substantially adopted.

A. Sydney Biddle and *McMurtrie*, contra.

It is a general rule of jurisprudence that the defendant must be within the territorial jurisdiction of the sovereign, from whose Court the original process issues, in order that service may be made upon him. The defendant must have his day in Court, and unless he has this, the judgment is void, except so far as the proceeding was *in rem*, and it is then good only to the extent of the *res* brought under the control of the judgment of the Court by the original proceeding.

Pennoyer *v.* Neff, 5 Otto, 714.

If, then, a Court entertains jurisdiction of a suit *in personam* where the defendant has never been served, or has not voluntarily submitted to the jurisdiction, the judgment of the Court is void, and will not be recognized by the Court of another nation or State. Now, in the passage of the Judiciary Act of 1789, Congress contemplated for each district a mode of service such as was then in use in the Courts of the State in which the districts were respectively situated. But in several of those States consisting of more than one district, original process ran throughout the whole State. Moreover, as the United States was a nation forming a single sovereignty, with National Federal Courts, process might, if Congress had so willed it, run from one Federal Court throughout the national territory; and a defendant might be served in Massachusetts by a writ

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issuing from a U. S. Court in California. The injustice of this was so obvious that it was deemed necessary to limit the otherwise existing jurisdiction, and confine the service of original process within the limits of the district from the Court of which it issued. For this reason it was declared in that Act (and the proviso has occurred in the succeeding acts), that "no civil suit should be brought before either of said Courts against any person by original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceedings." (U. S. Stat. of 1874–5, p. 470.) It is clear that this proviso was never intended to introduce a new condition essential to the jurisdiction of the United States Courts, but that it was introduced in order to lessen the extent of the territory within which original process might without the restriction have run.

The question, therefore, is whether a corporation can be an inhabitant of, or be found within, any other district than one of the State by which it was incorporated, for the purpose of being served with original process.

The decisions in the State Courts are applicable, inasmuch as no valid judgment *in personam* can be rendered, unless the defendant was actually, or constructively by an agent, within the Court's jurisdiction. (Pennoyer *v.* Neff, *supra.*) This was decided in La Fayette Insurance Company *v.* French (18 Howard, 407), in which it was held that jurisdiction was rightfully entertained by a United States Court on a suit to enforce a judgment which had been obtained in a State Court of Ohio against an Indiana insurance corporation doing business in Ohio by a local agent, as here. The service there was upon the local agent. The Circuit Court examined the question as to whether the State Court had jurisdiction, and decided in the affirmative; and this, as we have seen, could not have been unless the defendant had been "found within" the jurisdiction. Harris *v.* Railroad Company (12 Wallace, 65), approved in R. R. *v.* Whitton (13 Wallace, 285), and Knott *v.* Ins. Co. (2 Woods, 479), are to the same effect. The same principle, *i. e.*, that a foreign corporation could be "found within" another country for the purpose of being served, was reached in Newby *v.* Fire Arms Co. (L. R., 7 Q. B. 293). To the effect that the *residence* of a corporation for the service of process is not confined to the place of its principal office, see—

Cromwell *v.* Ins. Co., 2 Rich. (S. C.) 512.
Baldwin *v.* R. R., 5 Clarke (Ia.) 518.
Richardson *v.* R. R., 8 Clarke (Ia.) 262.
Bristol *v.* R. R., 15 Ill. 436.
Libbey *v.* Hodgson, 9 New Hamp. 394.

The Circuit Court of the United States for the Eastern District of Pennsylvania is a "Court of this Commonwealth" under the language of the Act of Assembly of April 4, 1873 (*supra*).

Newhall *v.* Ins. Co., 28 Leg. Int. 308.
Commonwealth *v.* R. R. Co., 8 Sm. 26.

April 13, 1878. THE COURT. This question is one of considerable importance, and although it had already been decided in this Court, yet, as we were not at that time aware of the decision of Judge WOODS, in Knott *v.* Ins. Co. (2 Woods, 479), who took an opposite view, we have allowed the matter to be argued. Corporations can have no existence outside of the limits of the sovereignty by which they were incorporated; they cannot migrate or pass beyond its boundaries. They can have no residence elsewhere, and hence cannot inhabit or be "found within" the territory of another sovereignty. (Bank of Augusta *v.* Earle, 13 Peters, 588; Wheeler *v.* R. R., 1 Black, 287.) Now these corporations are all inhabitants of the States which created them. No corporation can, therefore, inhabit the territories of two different sovereignties at once.

A corporation, for the purpose of suing and being sued, is no longer considered as being identical with its individual corporators or stockholders, inasmuch as it is now held that there is a presumption of law that the corporation is for those purposes a citizen of the State by which it was incorporated, even though a majority of the stockholders are citizens of another State. (R. R. Co. *v.* Letson, 2 Howard, 497; Marshall *v.* R. R. Co. 16 Id. 329; R. R. Co. *v.* Wheeler, 1 Black, 297.) Now it is expressly required by the Act of the 3d of March, 1875 (18 Stat. 470), that the defendant in the United States Court shall be an inhabitant of, or found within, the district in which he is sued at the time of serving the original process in the suit. How can this condition, essential to the jurisdiction, be said to have been complied with in the case of a foreign insurance corporation if, as we have seen, it cannot exist outside of the territory of the State by which it was incorporated? These views are those which have been entertained in a number of similar cases cited by counsel, in which this very point has been raised. (Pomeroy *v.* R. R., 4 Blatchford, 121; Leonard *v.* Ins. Co., decided at Cleveland in the C. C. U. S. of Ohio; Day *v.* Rubber Co., 1 Blatchford, 628; Tel. Co. *v.* R. R., 2 Central Law Journal, 88; Abbott's Prac., 3d ed. 34; and several cases cited in these.)

There is but one exception to this line of decisions, that is Knott *v.* Insurance Company (2 Woods, 479). But on looking at that case, it appears to us clearly that the Judge has been misled by misreading the case of Harris *v.* R. R., *supra*, upon which the counsel for the plaintiffs chiefly relied. I confess, on first looking at that case, that I was somewhat staggered by it; but,

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on examining it more carefully, it does not appear to be in conflict with the views expressed by the Circuit Courts in a majority of the cases. That decision was expressly based upon a statute which was said to be local to the District of Columbia. No such statute exists generally applicable to the United States Circuit Courts, whereby their jurisdiction has been enlarged, and this case is, therefore, a strong argument against the contention here made.

The restriction as to inhabitancy, existing in the general statute, was removed by that local Act, as regarded the District of Columbia. The English case cited is not applicable, inasmuch as the jurisdiction of the United States Courts depends upon a statute requiring the condition to exist of the defendant's inhabitancy, or of his being found within the District, and not upon the principles of the common law, as does that of the English Courts.

The motions to quash are, therefore, granted. Orders accordingly.

Oral opinion by McKENNAN, J. CADWALADER, J., concurred.

Subsequently, on April 15, 1878, counsel for the plaintiffs presented in the Supreme Court of the United States at Washington a petition for a mandamus, setting forth the facts of the above case, whereupon the said Court awarded a rule, directed to the said Judges of the third circuit, commanding them to show cause why a writ of mandamus should not issue to them, directing them to proceed with the said causes, to reverse their orders quashing the service of the said writs, and to make such orders as ought to have been made if the service of the said writs had not been quashed. (No. 7. Original; October Term, 1877.)

The respondents filed the following return and note appended thereto:—

Whereas, it was, on the 15th day of April, 1878, ordered by the said Supreme Court, that the Judges of the said Circuit Court show cause, etc. . . . .

Now the Judges of the said Circuit Court, in return to the said order, submitting to the Supreme Court the question whether the case is a proper one for the remedy by writ of mandamus, answer as follows:—

The facts in the said petition alleged are truly stated therein.

The respondents have declined to hear and determine the said suits, because, in their opinion, the said Circuit Court has no competent jurisdiction thereof, the several and respective defendants not having appeared therein, or, in any wise, submitted to the jurisdiction of the Court, and not having been at the commencement of the respective suits, or at any time, *inhabitants of, or found in*, the said district, within the meaning of the Act of Congress of March 3, 1875, re-enacting a like provision of the 11th section of the Act of September 24, 1789.

The question under this enactment being one of jurisdiction, and not of mere procedure, the legislation of Pennsylvania, mentioned in the said petition, was, in the opinion of the respondents, inapplicable. The service of the process in the said suits was, therefore, set aside, as unauthorized.

The reasons of the respondents are, in some respects more fully stated in a note hereto appended.

Respectfully submitted,

WM. McKENNAN,
JOHN CADWALADER.

NOTE.

Normally, the seat of justice, when proceedings are *in invitum*, is the home of the defendant, or the place he may be served personally with process. *Actio sequitur reum.* The exercise of original compulsory jurisdiction elsewhere, by local arrest of his property, or by what is called *substituted service* on his local agent, is, when allowed, an exceptional privilege of the creditor. But such a privilege may reasonably be allowed, in certain cases, in the exercise of internal jurisdiction, by the ordinary tribunals of a nation or State. Thus the process of foreign attachment, limited to the property of non-residents which is actually within the territorial limits of the State or country, is not generally considered objectionable.

It seems that, in England, the process in a suit against a foreign corporation upon its contract made by its general local agent, may now be served on such agent. Laws of several of the States of our Union, including the Act of Pennsylvania mentioned in the petition, authorize foreign corporations of certain kinds to transact business within the respective States on the condition of maintaining a local agency in such manner that process against the corporation may be served on the agent. The Supreme Court of the United States has considered such a condition reasonable and proper. (The La Fayette Insurance Company *v.* French, 18 Howard, 404.) On the same principle, Congress, in legislating as to judicial proceedings in the District of Columbia, enacted, in 1867, that in actions against foreign corporations doing business in that district, all process may be so served. (14 LI. U. S. 404.) This is one of the Acts of Congress which are called by the Supreme Court of the United States "local to the district." (Railroad Company *v.* Harris, 12 Wallace, 65, on p. 86.) They do not constitute any part of what may

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properly be called the judicial system of the United States.

Considerations, in many respects different, apply to questions of original jurisdiction, under the judicial system of the United States. As the system has been organized, original jurisdiction is apportioned according to a territorial division into districts, not one of which is composed of two States, or of parts of any two States. But the purposes of this territorial division do not require that as extended a system of internal jurisprudence, in all respects, shall be organized under the Federal government within the limits of each State, as may exist under laws of the State.

Where the Federal jurisdiction is exercisable, Acts of Congress indeed adopt for the Federal Courts the forms and modes of procedure in use in the several States. But these Acts do not enlarge or define the original jurisdiction of the Federal Courts, or assimilate it to that of the State Courts. The Acts merely regulate the exercise of jurisdiction where it is already competent, as originally defined.

In a case in which it was decided that State legislation could not limit or restrain the exercise of the judicial power of the United States under authority given by Congress, the Supreme Court stated also conversely the proposition that "*State legislation cannot confer jurisdiction upon the Federal Courts.*" (Insurance Company *v.* Morse, 20 Wallace, 453.)

The present question is wholly one of original jurisdiction. In organizing the judicial system under this head, Congress has thought it necessary to exclude expressly any sanction, which might otherwise have been implied, of laws or usages of England, or of any State of the Union, enabling a plaintiff to transfer jurisdiction from the normal seat of justice to any other place where a defendant's property, or a defendant's agent, might happen to be. This was the purpose of the provision of the 11th section of the Act of 1789, that no civil suit should be brought against an inhabitant of the United States by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ.

In the absence of such a precautionary express exclusion, it might have been material to inquire whether the Acts of Congress which adopt the laws of the several States, and the practice of the State Courts, would apply to a case like the present, so as to sustain the jurisdiction. What was said in Picquet *v.* Swan (5 Mason, 35, 42, 43), and in Toland *v.* Sprague (12 Peters, 300, 328), would then have required careful consideration. These cases, and Richmond *v.* Dreyfous (1 Sumner, 131), apply to foreign attachments. There are authorities more directly in point, which render the inquiry unnecessary.

In the Bank of Augusta *v.* Earle (13 Peters, 588), and in other cases, it is established that a corporation, although it may have power to make contracts and incur obligations in a foreign State, can have no legal existence out of the boundaries of the sovereignty by which it is created. "It must dwell in the place of its creation, and cannot migrate to another sovereignty." Therefore a corporation created by one of the States of our Union cannot be an *inhabitant* of another State in which it transacts business, though under an established and recognizable agency.

Day *v.* The Newark India Rubber Manufacturing Company (1 Blatchford, 628, 631, 632, 633, 634), was the case of a foreign attachment against a corporation of another State. NELSON, J., said that "in order to give jurisdiction to the Circuit Courts, the party defendant must be an inhabitant of the district in which the suit is brought, or he must be found within it at the time of the service of the original process; and this whether the suit be commenced by writ, summons or attachment, or whatever may be the nature or character of the process used." NELSON, J., said further, that according to the true construction of the 11th section of the Act of 1789, the Court would have no jurisdiction in suits instituted against foreign corporations, even in cases where the State practice, if adopted, would authorize the institution of such suits by the attachment of their goods, found within the jurisdiction.

Pomeroy *v.* The N. Y. and N. H. R. R. Co. (4 Blatchford, 121), cannot be distinguished from the present case. A law of New York, which gave certain privileges to a Connecticut corporation transacting business in New York, declared the corporation suable in the same manner as corporations created by the laws of New York, and that the process might be served on an officer or agent of the corporation. The corporation availed itself of the privileges, and submitted to the conditions. There was no doubt that it was suable in the Courts of the State of New York. But it was decided that the Circuit Court of the United States, for the Southern district of New York, had no jurisdiction of a suit against the corporation in which the process had been served in the manner thus authorized by the Act.

There was a decision of like effect in The Southern Atlantic Telegraph Company *v.* The New Orleans, Mobile and Texas R. R. Co. in the Circuit Court of the United States, for the Southern district of Mississippi (2 Central L. J. 88).

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The re-enactment of the provision in question, in the same words, by the Act of 1875, is not unimportant, because the decisions which have been cited had rendered the question familiar.

It was a subject for the practical application of the rule that the construction of a statute forms a part of the statute. If there was any doubt of the correctness of the past interpretation, the form of the re-enactment would have been changed.

This observation was made, since the re-enactment, by Judge DILLON, in a case decided by him in the same manner (Stillwell *v.* The Empire Fire Ins. Co., 4 Central L. J. 463). The strong leaning of that Judge's mind was in a contrary direction, but he said that his decision was according to the view of the law generally accepted and acted upon, and that this was the third case, in seven years, in which it had been attempted in his circuit, by the service of original process on the agents of foreign corporations, to acquire jurisdiction over the corporations themselves.

In a note to the last-mentioned case (Ib. 464), the reporter cites a similar opinion of the Circuit Court for the Western District of Missouri, in Dollinger *v.* The Farmers', Merchants', and Manufacturers' Fire Ins. Co. The same point had been similarly decided by this Court in an unreported case; and other cases to the same effect are noted in the briefs of counsel.

The only decision to the contrary, which has been mentioned, is that of Knott *v.* The Southern Life Ins. Co. (2 Woods, 479). The case appears to have been ruled upon a misconception of the decision in the Railroad Company *v.* Harris (12 Wallace, 65), already cited. By "An Act concerning the District of Columbia," passed on February 27, 1801, section 6, it was provided that no action should be brought before the Circuit Court of that district by any original process, against any person who should not be an inhabitant of, or found within, said district at the time of serving the writ (2 Ll. U. S. 106). This local enactment was in the same words as the provision of the 11th section of the General Judiciary Act of 1789, which is now in question. So far as the local enactment could, in any wise, have been material to any present question, the provision was repealed by the local enactment of 1867 already cited. This enactment was, that in actions against foreign corporations doing business in the District of Columbia, all process may be served on the agent of such corporation, or person conducting its business aforesaid, or, in case he is absent and cannot be found by leaving a copy thereof at the principal place of business in the district; and such service shall be effectual to bring the corporation before the Court (14 Ll. U. S. 404). That this was a repeal *pro tanto* there can be no doubt. But repeal *pro tanto* of what? Not of the provision of the 11th section of the General Judiciary Act of 1789, which never was applicable to the District of Columbia at all, but of the similar provision of the local Act of 1801. The Supreme Court said expressly that the jurisdiction of the Court below was not governed by the 11th section of the Judiciary Act of 1789, but by Acts of Congress local to the district.

This case in 12 Wallace, therefore, on which the present plaintiff chiefly relied, does not in any wise concern the present question favorably to his contention. But the opinion of the Court refers to the case of the Bank of Augusta *v.* Earle, in a manner unfavorable to the contention, as we understand the subject.

The case was heard in the Supreme Court April 30, 1878.

A. Sydney Biddle and *McMurtrie*, for the rule, presented the same arguments as before. They also argued that mandamus was the proper remedy, and not a writ of error, citing:—

Toland *v.* Sprague, 12 Peters, 300, 331.
Ex parte Russell, 13 Wallace, 670.
R. R. Co. *v.* Wiswall, 23 Wallace, 507.
Ex parte Smith, 4 Otto, 455.

The Judges of the Circuit Court, in distinguishing Railroad *v.* Harris, *supra*, have evidently supposed that that case was decided on the local statute of 1867, printed in the report. But that Act was not passed when that suit was brought, as appears by the report, pp. 69, 74, 77.

Heverin and *White*, contra, in addition to the arguments presented in the Court below, argued that mandamus was not the proper remedy, citing—

High on Extraordinary Remedies, § 173.
Ex parte Flippin, 4 Otto, 350.
Goheen *v.* Myers, 18 Ben. Monroe, 427.

The returns of the writs were defective, and would have been quashed in the State Court.

[FIELD, J. We cannot look at the records of these cases. Does not the petition aver that "the said writs were duly served" upon the proper parties? And does not the return state that "the facts in the said petition alleged are truly stated therein?"]

Stete legislation cannot confer jurisdiction upon the Federal Courts.

Toland *v.* Sprague, 12 Peters, 323.
Levy v. Fitzpatrick, 15 Id. 171.
Nazeo *v.* Cragin, 3 Dillon, 474.
Main *v.* Bank, 6 Bissel, 26.
Chittenden *v.* Darden, 2 Woods, 439.
Minot *v.* R. R. Co., 2 Abbott, 341.
Home Ins. Co. v. Morse, 20 Wall, 445.

May 10, 1878. Mr. Chief Justice WAITE delivered the opinion of the Court.

This is a petition for a writ of mandamus, requiring the Judges of the Circuit Court of the

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United States for the Eastern District of Pennsylvania to hear and determine certain suits brought in that Court in favor of the relators against a number of insurance companies incorporated by the laws of other States, but doing business in that State under a license granted pursuant to a statute regulating that subject. The Circuit Court declines to entertain jurisdiction of the causes for the reason, as is alleged, that the defendant companies were not, "at the commencement of the respective suits, or at any time, inhabitants of or found in the said district." This presents the only question in the case, as it is conceded that the citizenship of the parties is such as to give the Court jurisdiction if the several defendants can be sued in the district without their consent.

A statute of Pennsylvania provides that "no insurance company not of this State, or its agents, shall do business in this State until he has filed with the insurance commissioner of this State a written stipulation, duly authenticated by the company, agreeing that any legal process affecting the company served on the insurance commissioner, or the party designated by him, or the agent specified by said company to receive service of process for the said company, shall have the same effect as if served personally on the company within this State, and if such company should cease to maintain such agent in this State so designated, such process may thereafter be served on the insurance commissioner; but so long as any liability of the stipulating company to any resident of this State continues, such stipulation cannot be revoked or modified, except that a new one may be substituted, so as to require or dispense with the service at the office of said company within this State, and that such service of process according to this stipulation shall be sufficient personal service on the company. The term process includes any writ of summons, subpœna, or order whereby any action, suit, or proceedings shall be commenced, or which shall be issued in or upon any action, suit, or proceedings brought in any Court of this commonwealth having jurisdiction of the subject-matter." (Laws of Penn., 1873, p. 27, sec. 13.)

The return to the rule to show cause admits that all the defendant companies were doing business in the State under this statute, and that their designated agents were duly served with process in each of the suits. For the purpose of this hearing the fact of due service upon the agents must be considered as established. If in reality it is not so, the Court below will not be precluded by anything in this proceeding from inquiring into the truth and acting upon the facts as they are found to exist.

The Act of 1875, determining the jurisdiction of the Circuit Courts (18 stat. 470), and which in this particular is substantially a re-enactment of the Act of 1789 (1 Stat. 79, sec. 11), provides that "no civil suit shall be brought before either of said Courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceedings, except," etc.

It is unnecessary to inquire whether these several companies were *inhabitants* of the districts. The requirements of the law, for all the purposes of this case, are satisfied if they were *found* there at the time of the commencement of the suits, and that question we think was settled in R. R. *v.* Harris, 12 Wall. 81. In that case it appears that when the suit was commenced the statutes defining the jurisdiction of the Courts of the District of Columbia provided that "no action or suit shall be brought . . . . by any original process against any person who shall not be an inhabitant of or found within the district at the time of serving the writ." (2 Stat. 106, sec. 6.) Afterwards, in 1867, the law was changed in respect to foreign corporations doing business in the district, and service allowed upon the agent (14 Stat. 404, sec. 11), but when the suit was begun and the process served the old law was in force. The Baltimore and Ohio Railroad Company, a Maryland corporation, was authorized by Congress to construct and extend its railroad into the District of Columbia. Harris having been injured while travelling as a passenger upon the railroad outside of the district, sued the company in the Supreme Court of the district and caused the writ to be served upon the president of the company within the district. The company objected to the jurisdiction of the Court, and insisted that it was neither an inhabitant of nor found within the district. In ruling upon this objection we held that although the company was a foreign corporation, it was suable in the district, because it had in effect consented to be sued there in consideration of its being permitted by Congress to exercise therein its corporate powers and privileges. The language of the Court, speaking through Mr. Justice SWAYNE, is: "It (a corporation) cannot migrate, but may exercise its authority in a foreign territory upon such conditions as may be prescribed by the law of the place. One of these conditions may be that it shall consent to be sued there. If it do business there it will be presumed to have assented and will be bound accordingly." Then, after an examination of the statute granting the right to extend the road, it was said (p. 84): "We entertain no doubt that it made the company liable to suit where this suit was brought, in all respects as if it had been an independent corporation of the same locality." This language was cited with approbation and adopted as a correct

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exposition of the law by Mr. Justice FIELD, speaking for the Court, in R. R. *v.* Whitton (13 Wall. 285).

Applying these principles to the present case, there cannot be any doubt, as it seems to us, of the jurisdiction of the Circuit Court over these defendant companies. They have in express terms, in consideration of a grant of the privilege of doing business within the State, agreed that they may be sued there, that is to say, that they may be *found* there for the purposes of the service of the process issued "by any Court of the Commonwealth having jurisdiction of the subject-matter." This was a condition imposed by the State upon the privilege granted, and it was not unreasonable. (La Fayette Ins. Co. *v.* French, 18 How. 407.) It was insisted in argument that the statute confines the right of suit to the Courts of the State, but we cannot so construe it. There is nothing to manifest such an intention, and as the object of the Legislature evidently was to relieve the citizens of Pennsylvania from the necessity of going outside of the State to seek judicial redress upon their contracts made with foreign insurance companies, it is but reasonable to suppose that they were entirely at liberty to select the Court in the State having jurisdiction of the subject-matter, which, in their judgment, was the most convenient or desirable. As the company, if sued in a State Court, could remove the cause to the Circuit Court, and thus compel a citizen of the State to submit to that jurisdiction, we see no reason why the citizen may not, if he desires it, bring the company into the same jurisdiction at the outset. While the Circuit Court may not be technically a court *of* the Commonwealth, it is a Court *within* it, and that, as we think, is all the Legislature intended to provide for.

States cannot by their legislation confer jurisdiction upon the Courts of the United States, neither can consent of parties give jurisdiction, when the facts do not; but both State legislation and consent of parties may bring about a state of facts which will authorize the Courts of the United States to take cognizance of a case. (*Ex parte* McNiel, 13 Wall. 243). Thus, if the parties to a suit, both plaintiff and defendant, are in fact citizens of the same State, an agreement upon the record that they are citizens of different States will not give jurisdiction. But if the two agree that one shall move into and become a citizen of another State, in order that jurisdiction may be given, and he actually does so in good faith, the Court cannot refuse to entertain the suit. So, as in this case, if the Legislature of a State requires a foreign corporation to consent to be "found" within its territory for the purpose of the service of process in a suit, as a condition to doing business in the State, and the corporation does so consent, the fact that it is found gives the jurisdiction, notwithstanding the finding was procured by consent. The essential fact is the finding, beyond which the Court will not ordinarily look.

A corporation cannot change its residence or its citizenship. It can have its legal home only at the place where it is located by or under the authority of its charter, but it may by its agents transact business anywhere, unless prohibited by its charter or excluded by local laws. Under such circumstances it seems clear that it may, for the purpose of securing business, consent to be "found" away from home for the purposes of suit as to matters growing out of its transactions. The Act of Congress prescribing the place where a person may be sued is not one affecting the general jurisdiction of the Courts. It is rather in the nature of a personal exemption in favor of a defendant, and it is one which he may waive. If the citizenship of the parties is sufficient, a defendant may consent to be sued anywhere he pleases, and certainly jurisdiction will not be ousted because he has consented. Here the defendant companies have provided that they can be found in a district other than that in which they reside, if a particular mode of proceeding is adopted, and they have been so found. In our opinion, therefore, the Circuit Court has jurisdiction of the causes, and should proceed to hear and decide them.

We are aware that the practice in the Circuit Courts generally has been to decline jurisdiction in this class of suits. Upon an examination of the reported cases in which this question has been decided, we find that in almost every instance the ruling was made upon the authority of the late Mr. Justice NELSON, in Day *v.* Rubber Co. (1 Blatch. 628), and Pomeroy *v.* R. R. Co. (4 Blatch. 120). These cases were decided by that learned justice, the one in 1850, and the other in 1857, long before our decision in R. R. *v.* Harris, *supra*, which was not until 1870, and are, as we think, in conflict with the rule we there established. It may also be remarked that Mr. Justice NELSON, as a member of this Court, concurred in that decision.

Judge WOODS, of the Fifth Circuit, has already decided in favor of the jurisdiction. (Knott *v.* Ins. Co., 2 Woods, 479), and Judge DILLON, of the Eighth Circuit declined to take it only because he felt himself foreclosed by the rulings of other Judges, and especially of Mr. Justice NELSON. (Stillwell *v.* Ins. Co., 4 Cent. Law Journ. 463.)

The writ of mandamus is granted.

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WEEKLY NOTES OF CASES.

VOL. V.] *THURSDAY, JUNE* 13, 1878. [NO. 20.

Supreme Court.

Jan. '78, 78. April 5, 1878.

Foster's Appeal.

Decedents' estates — Wills — Lost wills — Presumption of revocation — What circumstances suffice to rebut — Demand for an issue, when too late — Evidence — Parol, when admissible to prove contents of lost will.

Where a will is proved to have been in existence at the death of a testator, and is afterwards lost or destroyed, its contents may be proved by parol and admitted to probate.

Where a will which has been always in the custody of the testator cannot be found after his death, the presumption is that he destroyed it *animo revocandi;* but this presumption may be rebutted by competent evidence.

F. was known to have made several successive wills, and to have declared the necessity of his having one in force at the time of his death. He spoke of the existence of one within two days of his death, at which time he was too feeble to leave his bed without assistance. He soon afterward became unconscious and so remained until he died. No positive evidence of a revocation was adduced:

Held, that the presumption of revocation was rebutted, and that, the will not being found, a copy of the contents, as proved by parol, was properly admitted to probate.

It is not error for the Court to refuse a demand for an issue which is not made until a motion for reargument after the case has been reported on by an Examiner and heard by the Court.

Appeal from the Orphans' Court of Wayne County. The facts of the case were as follows:—

Isaac P. Foster died November 18, 1876. On December 8th Chas. S. Minor, the decedent's solicitor, and Wm. H. Foster and Isaac N. Foster, two of his sons, appeared before the Register of Wills and offered for probate a copy of the decedent's will, made from notes of instruction furnished by the decedent to his solicitor, from which the original will had been drawn, and coupling this offer with an allegation that the original will had been lost.

The Register, upon testimony hereinafter detailed, admitted the writing to probate as the will of Isaac P. Foster, and an appeal to the Orphans' Court was entered by several of the children of the decedent.

The Orphans' Court referred the case to an Examiner.

Before the Examiner, Chas. S. Minor testified that he had drawn six wills for Isaac P. Foster, to wit, in 1861, 1862, 1865, 1867, 1870, and 1875; that he had been Foster's counsel since 1860; that when Foster came in 1860 he had with him a will; that when any new will was drawn the old will was left in his possession, and was never cancelled until after the other had been executed; that Foster had repeatedly spoken of the necessity of his having a will, "because two of his sons had helped him make his money, and the others had only spent it," etc. That the memoranda from which the will was reproduced were in the decedent's own handwriting, and were those from which the will was drawn.

Wm. H. Foster testified that his father had frequently spoken of his will being kept in a drawer of a secretary in his bed-room. This drawer was locked by a simple lock, and the key kept in the drawer next above, which was unlocked. That during his last illness, and within a day or two of his death, he several times spoke of his will of 1875 as being still in existence, and of a change which he wished to make in it by adding a codicil.

That after his funeral thorough search was made in the house, in Mr. Minor's office, and in "every conceivable place where the will might by any possibility have been placed, but it could not be found."

Isaac N. Foster testified that his father spoke of his will, on Wednesday, November 15th, at noon (exactly three days before his death), and of his wish to have Mr. Minor add a codicil when he should feel better. On Thursday morning he became unconscious, and so remained until he died.

Several witnesses testified that the decedent was not able to leave his bed without assistance for a week before his death, and that there was no open fire in or about the bed-room. There was abundance of testimony to corroborate this, and no important fact was seriously controverted.

The subscribing witnesses testified to the execution of the will.

After argument before the Orphans' Court, a petition for reargument was granted, and with this petition was a request for an issue *devisavit vel non* to the Common Pleas.

The Court (WALLER, P. J.) in the opinion said:—

The first inquiry arising in the case is, whether, under the evidence, reported by the Examiner, any disputed facts material to the issue are disclosed, which render it necessary to certify the case to the Common Pleas to obtain the finding of a jury as auxiliary to the Court in passing upon the questions presented by the papers and argument.

The granting of an issue of fact is not a matter of right, but rests in the sound discretion of the

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Court, and, unless the evidence is contradictory upon material points, it is clearly the duty of the Court, taking into consideration the delay and expense attending it, to refuse such issue. (Comm'th *v.* Bunn, 21 Sm. 412; Graham's Appeal, 11 Id. 45; and Wikoff's Appeal, 3 H. 281.)

There are disclosed by the evidence some contradictions of witnesses, but it does not seem to us that they are upon material points, but are different recollections of conversations which were had after the death of decedent and after probate of the paper, rather than facts which would materially affect the real questions presented in the case. We therefore conclude that a reference to a jury is unnecessary.

The fact that Isaac P. Foster made a will on or about the 5th of June, 1875, which was written by C. S. Minor, Esq., under the instructions of the testator, mainly in writing, is established and not controverted by the evidence.

Decedent died at his own house, surrounded by his family, on the 18th day of November, 1876, after an illness of less than a week. The will had been delivered to or left with the testator by Mr. Minor at the time of his execution of it. After his death diligent search for the will was made by various members of his family, but no will was found.

These facts raise a presumption that the testator destroyed his will, *animo revocandi*. (2 Gr. on Ev. 688, and n.; 1st Redfield on Wills, 331; 1 Jarman on Wills, 231, and 2d Am. Leading Cases, 510, with authorities there cited.) This casts the burden upon the proponents of rebutting the presumption by sufficient evidence. This presumption may be rebutted by such evidence as produces a moral conviction to the contrary. (Davis *v.* Davis, 2 Add. 226; Minkler *v.* Minkler, 14 Vt. 125, and 1 Redfield on Wills, 329.)

After reciting the facts (*ut supra*) his Honor held that the presumption of revocation by the testator was rebutted, and that the loss being thus unaccounted for, evidence of its contents was properly received. The appeal was therefore dismissed, and the action of the Register confirmed. The contestants appealed, assigning for error this action of the Court.

J. M. Moyer and *F. Carroll Brewster* (with whom was *Geo. J. Purdy*), for appellants.

The Act of March 15, 1832 (Purd. Dig. 1256, pl. 22), provides that wherever a dispute upon a matter of fact arises before a Register's Court, the Court *shall* grant an issue. This Act is mandatory, and allows no discretion.

De Haven's Ap., 25 Sm. 337.
Wickersham's Ap., Id. 334.

A testator having taken into custody his will, if it cannot be found on his death, the presumption is that he himself destroyed it.

Loxley *v.* Jackson, 3 Phillimore, 128.
Brown *v.* Brown, 8 Ellis & Bl. 875.

The authorities in Pennsylvania are strong upon the general principle that in order to make a will effective it must be shown to have been in existence at the testator's death; otherwise it is not his will. Until his death it can have no effect; he retains full power and dominion over it, and he may either retain or destroy it at pleasure, and in the absence of the corpus of the will the presumption is that he has destroyed it himself, and no declarations of intent, and condition and circumstances of family are sufficient to rebut the presumption.

Baptist Ch. *v.* Robbarts, 2 B. 110.
Jones *v.* Murphy, 8 W. & S. 275.
Clark *v.* Morton, 5 R. 235.

That there are instances in which the contents of a will may be established by parol testimony is not controverted, but the rule holds only in cases where it is clearly shown that the will was lost or destroyed without the agency of the testator, as in the case of Clark *v.* Wright (3 Pickering, 67), where the codicil was fraudulently destroyed, in which case the Court admitted parol proof of the contents. The case of Idley *v.* Bowen (11 Wend. 227) is another illustration of the same rule. In that case the Court said: "Where a will duly executed by the testator was destroyed in his lifetime without his authority," it might be established by parol proof. In Steele *v.* Price (5 B. Monroe, 58), where the testator was a man of dissipated habits, evidence was admitted to show loss or destruction from accidental causes for the purpose of rebutting the presumption that he intentionally revoked his will.

The declarations of a decedent that he has a will in existence should have but little weight. They are frequently made for the purpose of misleading and stopping the importunities of those around him.

The case of Betts *v.* Jackson (6 Wend. 173) is exactly our case. The decedent had made several wills; a short time before his death he spoke of wishing to have a codicil added. At his death no will could be found, and the Court refused to allow evidence of its contents to be admitted to probate.

Henry M. Seely (*Geo. C. Waller* with him), for appellees.

When once a will is shown to have been executed in conformity with the provisions of law, it remains in force until satisfactory evidence of its revocation is produced.

If a will be lost, or destroyed otherwise than by the act of the testator, and satisfactory evidence of its execution and contents be offered, such contents will be admitted to probate.

Trevelyan *v.* Trevelyan, 1 Phill. 149.
Davis *v.* Davis, 2 Addams, 226.
Patten *v.* Poulton, 1 Swab. & Tris. 55.
Sugden *v.* Lord St. Leonards, L. R. 1 Probate Div. 154; same case, 17 English Rep. 453.

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Clark *v.* Wright, 3 Pick. 67.
Dickey *v.* Malechi, 6 Mo. 182.
Dawson *v.* Elizabeth Smith's Will, 3 Houston, 335.
Minkler *v.* Minkler, 14 Vt. 125.
Youndt *v.* Youndt, 3 Grant, 140.

For this purpose the recollection of a single witness is sufficient.

Lewis *v.* Lewis, 6 S. & R. 497.
Clark *v.* Morton, 5 R. 235.
Sugden *v.* Lord St. Leonards, *supra.*

The contents might be proven by the evidence of declarations of the testator.

This question was fully discussed in the recent case of Sugden *v.* Lord St. Leonards, *supra*, and the rule held as above stated, overruling Quick *v.* Quick (3 Swab. & Trist. 442).

If the contents can be only partially proven they will be admitted to probate so far as they are proven.

Sugden *et al. v.* Lord St. Leonards *et al.*, *supra.*
Steele *v.* Price, 5 B. Monroe, 58.

In Weeks *v.* McBeth (14 Ala. 474) Judge WAYNE said: "It is the invariable rule in the Courts of England to admit the declarations of the testator, either to strengthen or repel the presumption of revocation arising from the non-production of the will after the death of the testator. These declarations are clearly admissible, to prove or disprove a revocation of a will, when the will itself cannot be found."

It is conceded that from the fact of the will having been in the possession of the testator a presumption of revocation arises. But this presumption is slight and may be rebutted.

Jones *v.* Murphy, 8 W. & S. 299.

Declarations of the testator are competent evidence to rebut. The authorities cited on the other side are not in conflict with this view.

In Baptist Church *v.* Robbarts (2 B. 110) the will was found in the locked secretary of the deceased, *cancelled*, and the attempt was to restore a cancelled will by declarations of deceased, which were not so late but that he might subsequently have cancelled it.

In the Goods of Samuel Lewis (1 Swab. & Trist. 31) evidence of the declarations were admitted, but they were not so late that the decedent might not subsequently have cancelled the will, and it was found under his bolster, with the signature and attestation clause torn off. The above two cases are very similar in their facts and ruling.

In Clark *v.* Morton (5 Rawle, 235) it was simply held that the *making* of a will *and its contents* could not be established by parol evidence of declarations of the deceased, without any proof that such will had ever been seen.

It was not error to refuse an issue to the Common Pleas. Waiving all technical objections, there was no serious conflict of evidence, and "it would be a vain thing to award a trial which must result in a particular way."

Wikoff's Ap., 3 H. 289.
Graham's Ap., 11 Sm. 45.
Cozzen's Will, Id. 201.
Comw'th *v.* Bunn, 21 Id. 412.

May 13, 1878. THE COURT. That Isaac P. Foster made and executed in due form of law a will in writing on or about the 5th of June, 1875, is an indisputable fact. That the contents of this will are clearly and fully proved, both by testimony and by written memoranda in the testator's own handwriting, is equally plain, and no question arises as to the number of witnesses, the contents being proved by two, as well as by the memoranda furnished by the testator himself. The will not being found after the testator's death and diligent search, two material questions arise upon the assignment of errors.

(1) Whether the presumption of revocation by the testator himself is rebutted by the evidence.

(2) Whether the contents can be proved by parol evidence.

There is ample evidence to rebut the presumption of a revocation by the testator. Many facts contribute to this result, among which these leading circumstances appear: Isaac P. Foster was never without a will for the last fifteen years of his life, having had seven written under the supervision of counsel, and made necessary by the nature and amount of his estate, the number of his children, and advancements made to some, and these matters were often dwelt upon by himself. He himself regarded his will of 1875 as existing until and while lying on his death-bed, when too feeble to destroy it without assistance. Up to this time he made no efforts to procure a codicil to alter the will in a certain aspect made necessary by the failure in the payment of interest on certain bonds, but being prevented by the extremity of his last illness, died under a belief that he had arranged with his executors to pay these legatees money instead of the bonds. These and corroborating circumstances show that the testator had no thought of a revocation.

That the presumption of a personal revocation can be thus rebutted is shown by the authorities cited by the appellees. The presumption of revocation arises from the fact that the will was known to be in the possession of the testator himself, and that it cannot be found after his death. It is therefore a natural presumption merely, because it cannot be supposed the testator would part with it, unless he intended to put it out of the way; and because it is out of the way, and cannot be accounted for, the presumption that he intended to revoke it arises. Like other natural presumptions drawn from evidence, and not declared *de jure*, for some legal end, it must give way to stronger evidence of the continued existence of the will, and the testator's reliance upon

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it as the disposition he had made of his property.

The will then being in existence at the death of the testator unrevoked by him, its loss or accidental destruction differs not from the loss or destruction of any other solemn instrument, such as a deed, a note, or bond, or a record. The contents, therefore, may be proved in like manner, as shown by the authorities cited.

It is a postulate of the question that the testator left behind him, at death, a last will in writing legally executed and published, and unrevoked by any act or direction of his. That the law will not tolerate any making of a will for him, by other means than his own act in writing duly executed, is clear. But such a will having a legal existence, yet accidentally lost or destroyed, the establishment of its contents is not the making of a new will, but a restoration merely of that which the testator himself made and left behind him to govern his estate. There is no greater sanctity in this respect than the restoration, by parol evidence, of other instruments equally solemn, and having an equal effect in the disposition of property. The law simply comes in aid of his own legally performed act to prevent his intentions from being frustrated or defrauded.

The authorities upon the republication of wills made before the passage of the Act of 1833, have a bearing, and may therefore be cited, some not appearing in the paper-books. (Havard *v.* Davis, 2 Bin. 406; Jones *v.* Hartley, 2 Wh. 103, citing many cases; Campbell *v.* Jamison, 8 Barr, 498; Jack *v.* Shoenberger, 10 Harris, 416; Fransen's Will, 2 Casey, 203.)

We cannot perceive that the learned Judge erred in ruling either point.

In regard to the right to an issue there is no difficulty. True, the right to a jury trial is given in the 41st section of the Act of 15th March, 1832, relating to Registers and Registers' Courts, whenever a dispute upon a matter of fact arises before any Register's Court; but the request for it must come in due time. Here no request was made, but the case was submitted to the Judge of the Orphans' Court, was fully argued, and the papers were in his possession for an opinion and decree.

On application for a *reargument*, he permitted it. But he did not reopen the case for all purposes. If, under the pretext of a request for a reargument, it was intended to cover up an intention to force an issue, and thus delay a cause already fully submitted to a competent tribunal, it was not such a request as the Court was bound to regard. It was in the sound discretion of the Court then to allow an issue or not. There was no abuse of its power in this refusal.

We discover no other matter worthy of serious notice.

The decree of the Orphans' Court is therefore affirmed, and the appeal of the appellants dismissed at their costs, which they are ordered to pay.

Opinion by AGNEW, C. J.

July, '77, 107. January 23, 1878.

Brooke v. The Commonwealth ex rel. City of Philadelphia. Election law.

Select Councils—Terms of members—Unexpired and regular—Time of election—Act of 10 March, 1875—Constitution, Art. VIII. § 3—Act of 20 May, 1864.

Vacancies in the Councils of Philadelphia should be filled at the next general election. The Act of 20 May, 1864 (P. L. 912) is not altered by Article VIII. § 3 of the Constitution, which refers only to regular terms.

The Act of 10 March, 1875 (P. L. 6), does not apply to the case of an unexpired term. Therefore, where D. a member of Select Council, elected in October, 1873, to serve until the first Monday of January, 1877, resigned in July, 1875, and B. was elected in February, 1876, to fill the vacancy; the term of B. ended on the first Monday of January, 1877, and it was regular to elect, in February, 1876, a person to serve for the new term beginning the first Monday of January, 1877. In such case the Act of 1875 applies to the new term which is thereby extended for three months, and not to the unexpired term.

Error to the Common Pleas No. 4, of Philadelphia County.

Quo warranto by the Commonwealth *ex relatione* Theodore F. Jenkins against John G. Brooke, to show by what warrant he held the office of Select Councilman from the Fourteenth Ward of the city of Philadelphia.

The suggestion averred: That on July 8, 1875, R. W. Downing being then a member of Select Council of Philadelphia from the Fourteenth Ward of said city, resigned his office, whereby there became a vacancy in said office, to be filled by the voters of the ward at the next municipal election. That by the laws existing at the time of R. W. Downing's election, his term of office would have expired on the first Monday of January, 1877. That at the municipal election held on the third Tuesday of February, 1876, the respondent John G. Brooke was elected a member of Select Council for the unexpired term of R. W. Downing, and forthwith entered on the duties of his office.

That by virtue of the Act of 10 March, 1875 (P. L. 6),* the unexpired term for which Brooke

* The Act of 10 March, 1875, is as follows: All members of Councils and also all other city, ward, borough, and township officers, excepting School Directors, to be elected on the third Tuesday of February next, or in any year thereafter, whose term of office would, under existing

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was elected, was continued from the first Monday of January to the first Monday of April, 1877, and that the sheriff in his proclamation, prior to the said election, gave notice that the person elected in place of R. W. Downing would serve to that time accordingly.

That at the municipal election held on the third Tuesday of February, 1877, the relator was duly elected a member of Select Council for three years from the first Monday of April, 1877.

That the respondent had since the first Monday of April, 1877, unlawfully held and exercised the office of Select Councilman from the Fourteenth Ward.

That at the meeting of Select Council held on April 5, 1877, the relator duly presented his certificate of election, but was refused admission as a member thereof by reason of the usurpation and intrusion of the respondent.

The respondent, in his answer, set forth that on the third Tuesday of February, 1876, he was elected to fill the said office for the unexpired term of R. W. Downing, to serve until the first Monday of January, 1877, as the Act of 10 March, 1875, in nowise affected the said term. That the said unexpired term so ending, and there being no other municipal election before the date, it became necessary to elect, at the same election, a person to serve for the new term beginning on the first Monday of January, 1877, and continuing three years and three months in accordance with the provisions of the 10 March, 1875, which extended that term for three additional months. That at the said election the respondent was elected to serve for the said new term also. That on the first Monday of January, 1877, he was duly qualified and took his seat as a member of Select Council. That at the time of the pretended election of the relator there was no vacancy, and his election was unlawful.

The Commonwealth demurred to this answer, because the alleged election of the respondent on the third Tuesday of February, 1876, to serve for three years and three months from the first Monday of January, 1877, was contrary to the Act of 10 March, 1875, and was therefore illegal and void.

The Court below, after argument and re-argument, entered judgment on the demurrer for the relator (BRIGGS, J., dissenting), whereupon the respondent took this writ of error.

laws, expire prior to the first Monday of April, shall continue in office from the date at which said term would otherwise expire until the first Monday of April next ensuing thereto, and the terms of their successors shall begin on the first Monday of April, and shall continue for the period now fixed for the duration thereof by existing laws in each particular case; and hereafter all elections for offices which will be vacant on the first Monday of April shall be held on the third Tuesday of February next preceding thereto.

Geo. S. Graham and *Chas. H. T. Collis*, for the plaintiff in error.

Prior to the Act of 10 March, 1875, the Acts regulating the manner of filling vacancies in Councils were the Act of 24 April, 1864 (P. L. 639), and 20 May, 1864 (P. L. 912), which provided that vacancies should be filled at the next general election for the unexpired term. In 1874 the new Constitution went into effect, instituting February elections for Councilmen, who had theretofore been elected in October; but the provision was for *regular terms* of service only (Const. Art. VIII. § 3), and did not interfere with the system of filling vacancies at the general election in autumn. The purpose of the Act of 10 March, 1875, was simply to fix the commencement of terms, as under the law then existing a person elected in February would not enter into office until the following January. The Act was passed simply to remedy the inconvenience. Unexpired terms were still to be filled at the very next election after the vacancy. Downing resigned in July, 1875, and his successor could have been elected in November; but that election passed, and the election for this term was held in the succeeding February. If Downing had not resigned, his term would have ended on January 1, 1877, and could not have been extended, as Article III. § 13 of the Constitution forbade such extension. Brooke being elected for Downing's term, stood in precisely the same position that he would have done, had he not resigned. There is nothing inconsistent between the Acts of 1864 and 1875. One applies to unexpired terms, and the other to regular terms. The new term for which the respondent was elected in February, 1876, began on the first Monday of January, 1877, for three years and three months, by the Act of 1875.

Pierce Archer and *Edward R. Worrell*, contra.

"Term" is generic, and includes regular, irregular, full and unexpired terms. If unexpired terms were not to be included in the Act of 1875, it would have been so expressed. The respondent was not to be elected for the term Downing would have held, but for the term fixed by law; this was the remainder of the unexpired term, and three additional months. Downing's term was not extended, and the respondent had no term when the Act of 1875 was enacted, and therefore was not within the Constitutional prohibition as to the lengthening of the terms of any officer after his election.

May 6, 1878. THE COURT. The contention in this case must be decided by the construction to be given to the Act of 10 March, 1875. A reference to some of the laws changed by this Act will assist in giving a clear understanding of

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its intent and purpose. The Act of 21 March, 1861 (P. L. 165) directed the election of members of Councils in the city of Philadelphia to be held on the second Tuesday of October in each year.

It declared that each ward should have one member of Select Council who should serve for three years from the first Monday of January next succeeding his election, and that one-third of Select Council should be chosen each year.

Under this law, in October, 1873, Downing was elected a member of Select Council for the term of three years from the first Monday in January, 1874. Hence, not only the term of Downing, but the term of all the class or third of which he was a member would expire on the first Monday of January, 1877.

While thus holding an office the term of which was fixed by the Act of 1861, the Constitution of 1874 went into effect.

Art. VIII. Sec. 3, required all elections for city, ward, borough, and township officers for regular terms of service, to be held on the third Tuesday of February. Art. III. Sec. 13 declared that no law should extend the term of any public officer after his election or appointment.

Thus the Constitution designated the only time at which a member of the Councils could be elected for a "regular term," but imposed no restraint on legislative power prescribing the time when an election might be held to fill a vacancy for the unexpired term; nor did it forbid the enactment of any law lengthening the term of such officers thereafter to be elected, provided it was done prior to their election, and it left to legislative discretion to fix the time for them to enter on the duties of their office.

The Act of 1861 did not authorize the election of a member of Councils to fill a vacancy to be held at any other time than at the general election in October. In case the vacancy occurred soon after the election it would leave the office vacant for nearly a year. To obviate this objection the Act of 27 April, 1874 (P. L. 638), was passed. It declared "in case of a vacancy occurring hereafter in either branch of the Councils of Philadelphia, the qualified voters of the ward, at the next election, shall elect a person for the unexpired term." In July, 1875, Downing resigned his office. The vacancy thus created should have been filled by an election in October of the same year. The fact that it was not filled until the election in February following does not affect the question we are now considering. The present purpose is not to decide when the official term of the person elected to fill the vacancy began, but when it ended.

It would seem the words of the Act of 1874 make this sufficiently clear by declaring the voters shall elect a person "for the unexpired term."

It certainly was not intended to give to the *locum tenens*, or substitute, an office to continue beyond the end of the term of the one whose place and unexpired term he was elected to fill. The Act did not contemplate any disarrangement of the three classes, nor of the time when the term of each should expire. Under the law in force at his election Downing's term expired in January, 1877. The Constitution of 1874 forbade its extension by legislative enactment. In the absence of language clearly indicating such an intent we will not assume the Legislature intended to extend the term of the person elected to the vacancy beyond the time fixed by law for the expiration of Downing's term. To extend it beyond would be more than to fill the vacancy which his resignation created. This brings us to a consideration of the first section of the Act of 10 March, 1875 (Purd. Dig. 2047, pl. 53). It declares, *inter alia*, "all members of Councils to be elected on the third Tuesday of February next, or in any year thereafter, whose term of office would under existing laws, expire prior to the first Monday of April, shall continue in office from the date at which said term would otherwise expire, until the first Monday of April next ensuing thereto; and the terms of their successors shall begin on the first Monday of April, and shall continue for the period now fixed for the duration thereof by existing laws, in each particular case, and hereafter all elections for offices which will be vacant on the first Monday of April shall be held on the third Tuesday of February next preceding thereto."

Thus this Act did not direct that the election for members of Councils should be held on the third Tuesday of February; but it recognized the fact that the Constitution required them "to be elected" then, for a regular term.

The Legislature was aware that under the laws then in force the term of a member of Councils began and ended on the first Monday of January, and therefore he could not enter on the duties of his office until more than ten months after his election. The time of his election they could not change; but they could designate the time when he should assume his official duties. To shorten the intervening time, to not permanently lengthen a regular term beyond three years, and at the same time not to disturb the existing division into three classes, the Act provided: 1. For a longer term for each member to be first elected at the expiration of each term which under existing laws would expire in January. The term of each to be so elected was to extend until the first Monday of April next following the January when the term would otherwise have expired. As the term of all members of Council then in office expired in January, this Act necessarily extended the term of all

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members to be elected at the expiration of those terms. This, however, was limited to the first election in each case. 2. As soon as the object of requiring the person elected to enter on the duties of his election within a few weeks after his election, was accomplished, then the regular term was again to be three years only. This was in entire harmony with the Constitution of 1874.

It necessarily follows that inasmuch as Downing's regular term would have expired on the first Monday of January, 1877, that the person elected to fill the vacancy caused by his resignation was elected "for the unexpired term" only. The fact that the sheriff in his proclamation, giving notice of the election, declared that the person to be elected would serve until the first Monday of April, 1877, could not change the statute nor extend the term. The term for which Downing was elected, as well as the term of the person who filled out the unexpired portion of Downing's term, expired on the first Monday of January, 1877. Hence the third Tuesday in February, 1876, was the proper time to elect a successor to enter on his duties in January, 1877. The respondent, John G. Brooke, was at said election in February, 1876, duly and legally chosen a member of the Select Council from the Fourteenth Ward of the city of Philadelphia for a regular term. The learned Court erred in not entering judgment in his favor on the demurrer.

Judgment reversed, and judgment in favor of the plaintiff, John G. Brooke, on the demurrer, with costs.

Opinion by MERCUR, J.

Oct. & Nov. '77, 206. Nov. 15, 1877.

Duff v. Williams.

Action for deceit—Representations as to another's solvency—Defendant not liable for mistaken statements made in good faith.

An action of deceit will not lie against one who erroneously, but in good faith, represents another to be in solvent circumstances.

Error to the Court of Common Pleas of Beaver County.

This was an action on the case brought by Robert Williams against John C. Duff to recover damages for an alleged deceit, whereby the plaintiff was induced to loan to one Agnew Duff (brother of defendant) the sum of $1500, under the belief that he was in solvent circumstances and able to repay the same.

The money was loaned on a note dated September 17, 1874, and payable in one year. It was joint in form, but signed by Agnew Duff only. On the 8th of January following Agnew Duff made an assignment for the benefit of creditors. About a year after the assignment plaintiff, finding his claim would not be paid in full, brought this suit. It was claimed that the representations made by the defendant, and which induced the loaning of the money by the plaintiff, were false and fraudulently made with the intent to deceive the plaintiff; that they did so deceive him and caused the damage complained of.

At the trial (before HICE, P. J.) plaintiff testified: "I was in defendant's store about September 12, 1874. Told him I would give him some money. He said he did not want it, but knew a good man who would want it; a good man; that he would vouch for him. Said he would go on the note as bail along with him as a good borrower. He asked me how much I had to loan. I said $1500. In a few days Agnew Duff came to my house. He said that John had sent him, telling him he could get the $1500, and said that John would go on the note as surety. I would not have loaned the money at all only on the representation of John C. Duff. Awhile after this I went down to see John; laid the note down on the table before him; told him I wanted him to put his name to it. He said it was good enough without. I could not get him to sign it." Defendant testified: "Plaintiff came to our store about middle of September, 1874. Took me to one side and wanted to know if I wanted to borrow some money. I told him not. He then asked me if I knew any one who did. He said he had $1000 to put out; that he did not want to keep it about the house. I told him Agnew might take it perhaps. He said he supposed he was good; I told him I thought he was. He asked me if I would go on his note. I told him I would not, as I was endorser for him in bank a good deal, and it had to be paid when it came due. He then said to me he guessed he was good enough himself; said something about his owning real estate. He then requested me to write to Agnew. I wrote to him that he had $1000 he wanted to put out, as he requested me. I believed that at that time Agnew was solvent and in good circumstances."

Agnew Duff testified: "I received information from John C. Duff that the plaintiff had $1000 to loan. I went to see Mr. Williams; he seemed to know what I was after; said he had got $500 more and wished to put it all out together. He brought out $1500. The note was prepared in his house, on his table. He said he did not know but he ought to have John C. Duff on the note, but he thought it was good enough without. I said I thought it was myself. He said nothing about John having agreed to go on it. The only explanation I can give why I wrote 'we' in the note is, that when Williams made the remark

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about John going on it, I said maybe he would. I alleged to the defendant and all others that I had plenty to pay all my debts and more too. John had no interest in this loan. He was in no position to know anything about my circumstances except from myself."

Defendant presented, *inter alia*, the following points: (4) To enable the plaintiff to recover, the jury must believe that John C. Duff represented his brother Agnew to be in good and solvent circumstances at the time the plaintiff applied to him; that the plaintiff, owing to his relations with the defendant, had a right to rely upon such representation; that such representation was false; that John C. Duff knew and believed, or had reason to know or believe, it to be false, and made such representation recklessly, without any just reason for making the same, and with the design and intent fraudulently and dishonestly to enable his brother to obtain the plaintiff's money. *Answer.* It was not necessary that the defendant, if he made the statements and representations, actually knew them to be false. If he made them recklessly, without sufficient reason for knowing and believing them to be true, and with the intent to enable his brother Agnew thereby to obtain the plaintiff's money, and the representations afterward turned out to be false, and damage resulted, it would be sufficient to create the liability of the defendant, without it appearing that the defendant knew or had reason to know or believe them to be false.

(5) If the jury believe that John C. Duff from time to time sought information as to his brother's standing financially, and with an honest belief that he (Agnew) was solvent and could pay his debts, so represented his circumstances to Williams, the plaintiff cannot recover, even if such representations turned out afterward to be incorrect. *Answer.* This we affirm, if by "so represented his circumstances to Williams" we are to understand, giving or communicating information to plaintiff as information thus obtained merely; but the case would be different if he made the representations and statements as actual facts, as of his own knowledge.

Verdict and judgment for plaintiff for $1491. Defendant took this writ, assigning for error the answers to the points given above.

S. B. Wilson (with him *Frank Wilson*) for plaintiff in error.

John J. Wickham, contra.

January 7, 1878. THE COURT. In answer to the fourth point the learned Judge said to the jury that, if the defendant made the alleged statements and representations, it was unnecessary to show that he "actually knew them to be false. If he made them recklessly, without sufficient reason for knowing and believing them to be true, and with intent to enable his brother Agnew thereby to obtain the plaintiff's money, and the representations afterwards turned out to be false and damage resulted, it would be sufficient to create the liability, without it appearing that the defendant knew or had reason to know or believe them false." This instruction was not strictly correct. It ignored the fact that the defendant may have honestly believed that the statements and representations were true, and it permitted the jury to inquire, not whether, in point of fact, he did so believe, but whether he had sufficient reason for knowing and believing them to be true. They might be satisfied that he had entire confidence in the truth of all that he stated in regard to his brother's solvency, and yet, at the same time, they might come to the conclusion that he had not sufficient reason for the faith that was in him, and thus hold him responsible, not for the want of an honest belief, but for the insufficiency, in their judgment, of the reasons upon which it was founded. The defendant may have spoken inconsiderately or even recklessly, yet if he believed what he said he was not liable. It is said by Chief Justice GIBSON, in Bokee *v.* Walker (2 Harris, 139), that "in actions of deceit the jury have to deal with a question of good faith, and if they are satisfied that the defendant believed his own story, it is their duty to find in his favor. . . . . A man who believes what he says is not chargeable with bad faith; and the state of his belief is a fact for the jury. . . . . Sincerity of belief, however apparently unfounded, is an unmixed matter of fact; and, if it were not the test, every recommendation would be a warranty." If the defendant asserted as facts matters of which he had neither knowledge nor belief, or if he knowingly falsified or wilfully suppressed the truth, and did so, not for the purpose of injuring the plaintiff, but with the view of giving credit to his brother, he was guilty of falsehood, and would be responsible for all the consequences directly resulting therefrom. "A man who asserts what he does not know is guilty of duplicity, though he happen to assert the truth; and whatever the motive, he is not the less dishonest." But this was not the question submitted to the jury. It happens to have been taken for granted that the defendant had some knowledge of his brother's financial condition, and the questions raised by the plaintiff's counsel were whether the statements he made were wilfully false, or whether he had any sufficient reason for believing them to be true. Of course, the grounds of his alleged belief were proper subjects of inquiry in determining whether or not a sincere belief was entertained; but after all it must come back to the question of good faith on the part of the defendant. Did he honestly believe that the statements he made were

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true, or did he know that they were false? We are of opinion that the question was submitted to the jury in a manner that was calculated to lead them into an inquiry that was irrelevant and prejudicial to the defendant, and for this reason the first assignment of error should be sustained.

The defendant was entitled to an unqualified affirmance of his *fifth* point, in which the Court was requested to say: "If the jury believe that John C. Duff from time to time sought information as to his brother's standing financially, and with an honest belief that he was solvent and could pay his debts, so represented his condition to Williams, the plaintiff cannot recover, even if such representations turned out afterwards to be incorrect." This was putting the defence on its true ground—that of good faith. While the learned Judge affirmed this proposition, he did so with a qualification which greatly weakened its force, by saying, "if by the words 'so represented his circumstances to Williams,' we are to understand giving or communicating information to the plaintiff as information thus obtained merely; but the case would be different if he made the representations as actual facts, as of his own knowledge." The jury would likely understand from this that the defendant was bound to inform the plaintiff that he had made inquiry as to his brother's standing, and give him in detail the information he had thus obtained, so that he might have the *data* from which to draw his own conclusions. Of course there could have been no objection to this mode of imparting information to the plaintiff, but it is not the only way in which it could be honestly done. He could with equally good faith state, as conclusions of fact, the inferences which he drew from the information he had obtained. If, as the result of inquiry, he came to the conclusion that his brother's financial standing was as good as his own, what would be the impropriety of honestly stating this to the plaintiff as a fact, instead of communicating to him the items of information upon which he had formed his judgment and belief? Taking into consideration all that was said and done, it must, after all, resolve itself into a question of sincerity and good faith. The principles involved are so clearly stated in Bokee *v.* Walker (*supra*); Boyd's Ex'rs *v.* Browne (6 Barr, 310); Huber *v.* Wilson (11 Harris, 178); Rheem *v.* The Naugatuck Wheel Co. (9 Casey, 358); Graham *v.* Hollinger (10 Wright, 55), and Dilworth *v.* Bradner *et al.*, decided at the present term (4 WEEKLY NOTES, 505), that it is unnecessary to pursue the subject any further.

Judgment reversed and a *venire facias de novo* awarded.

Opinion by STERRETT, J.

Oct. & Nov. '77. Oct. 16, 1877.

First Baptist Church v. Caughey et al., Adm'rs.

Corporation—Implied powers—Power of trustees of a religious society to borrow money—Purposes of corporation—Evidence.

The trustees of a religious society, having borrowed money to pay a debt incurred in the reconstruction of the society's meeting-house, gave a note therefor. In an action upon the note:

Held (affirming the decision of the Court below), that, although, in the absence of an express provision in the charter, the trustees could not bind the society by such a note, yet, the construction of the meeting-house being one of the legitimate purposes of the society, there was an implied power to borrow money therefor, and the plaintiffs could recover under a count for money had and received.

Held further, that the note was properly admitted in evidence.

Error to the Common Pleas of Erie County.

Assumpsit by S. S. Caughey and H. B. Fleming, administrators of Joseph Neeley, deceased, upon a note for $900, with waiver of exemption, stay of execution, etc., drawn by four of the five trustees of the First Baptist Church and Society of Erie, in favor of Neeley, the plaintiff's intestate. Upon the face of the note it was stated that the money was "for the use of the First Baptist Church." The narr. contained the common counts in assumpsit; plea, the general issue.

Upon the trial, before GALBRAITH, P. J., the evidence showed that the corporation defendant was duly incorporated in 1834 for the purpose of "the building of a meeting-house, and the settlement and support of a pastor for the worship of Almighty God." Power was given the trustees to raise money by a tax upon the pews, but no power to borrow money was conferred. In 1865 their necessities required that a new and larger meeting-house should be built. One Walter J. F. Liddell was at that time the treasurer of the Society, and, in addition to a subscription of $4000 of his own, was obliged to expend additional sums for the benefit of the Society. In furtherance of this purpose he borrowed from one Mrs. Smith the sum of $1200, and (she being informed that a note signed by the trustees would not bind the corporation) gave his individual note therefor. The sum of $300 was paid upon the note, and subsequently the trustees borrowed the balance from Neeley and gave him the note in suit. The money thus borrowed was passed by Neeley immediately over to Mrs. Smith, who thereupon cancelled the original note. There was, however, no testimony tending to rebut the presumption that the money borrowed by Liddell from Mrs. Smith was used in the erection of the building. The plaintiffs offered the note in evidence; objected to; objection overruled; exception.

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In the charge to the jury His Honor said: "On the part of the plaintiffs it is claimed that whether the trustees had the right to bind the church by such an obligation, a judgment note waiving exemption, etc., or not, yet, if the money obtained from Mr. Neeley was actually used in the construction of the church edifice, the church receiving the benefit of the same, there would be an implied obligation to pay, and the plaintiffs would be entitled to recover, under the general indebitatus assumpsit counts in their declaration. This I conceive to be a correct position. The trustees of a corporation may not bind it by such specialty, containing such stipulations as these, in the absence of some express authority contained in the charter, but there are implied as well as express powers incident to every corporation, and in this case, if the jury believe from the evidence that the money for which the note was executed by the trustees was used by them or by other officers of the church in rebuilding the church building, and so went to the benefit of the Society, then the law raises an implied obligation in equity and good conscience, as well as in law, on the part of the church to repay it, and the verdict should be for the plaintiff."

Verdict and judgment accordingly for plaintiffs. Defendant took this writ, assigning as error, *inter alia*, the admission of the note in evidence, and the portion of the charge above quoted.

Allen and *Rosenweig*, for plaintiff in error.

The powers of a corporation must be in its charter, or arise by necessary implication.

Pitts & Steubenville R. R. *v.* Allegheny Co., 29 Sm. 210.

The words "by necessary implication" mean, of course, such powers as are necessary to carry into effect the legitimate purposes of its erection. The power of the trustees of a religious society to borrow money and bind the corporation for its repayment is not such a power.

Miller *v.* The Church, 4 Phil. 48.

Beach *v.* Bank, 3 Wend. 573.

If the note in suit was void, it should not have been admitted in evidence.

James C. Marshall (*F. F. Marshall* with him), for defendants in error.

The charge of the learned Court was more favorable to the plaintiff in error than they could have expected. The testimony showed that the money was borrowed under the eyes of the trustees, and the question whether it was used in the erection of the building was finally submitted to the jury. This being found in the affirmative, their liability was fixed.

Allegheny City *v.* McClurkun, 2 H. 81.

The admission of the note as evidence under which the plaintiff below could recover for money had and received was in harmony with a ruling of this Court.

Hoskinson *v.* Eliot, 12 Sm. 393.

Jan. 7, 1878. THE COURT. All the assignments of error may be answered in the consideration of two questions: The one, whether the corporation had the power to incur the alleged liability; the other, whether there was sufficient evidence to submit to a jury that the liability was actually incurred.

1. The original charter declares one of the objects of the association to be "the building of a meeting-house, and settlement and support of a pastor or minister of the Gospel for the worship of Almighty God and the religious instruction of the congregation, . . . together with that of the purchase and tenure of such lands or lots as may be necessary and convenient for the site of a meeting-house, of a burial ground, and of a parsonage of convenient size for their minister." A supplement to the charter gives the corporation power to assess and collect a tax on the pews; but not to exceed in any one year twenty per centum upon a fixed valuation, for the purpose of defraying the expenses of repairs, insurance, and minister's salary, together with incidental expenses. The charter is silent on the subject of borrowing money.

Some thirty years after the corporation was formed, the church edifice became unsuitable and inadequate for the enlarged congregation. It, therefore, resolved to rebuild and enlarge the meeting-house. This required an expenditure beyond the sum subscribed by voluntary contributions for that purpose. The meeting-house was rebuilt. Had the corporation power to contract a debt in rebuilding, beyond the amount subscribed? We think it had. The object of its incorporation could not be fulfilled without the meeting-house. No clause in its charter forbade its contracting a debt in the erection of its necessary buildings.

Whether it hired laborers and bought materials on a credit, or whether it borrowed money with which to pay for the labor and materials when procured, the liability incurred was for the same purpose. As it could not have successfully defended against the wages of a laborer employed in the erection of the house, through want of power to employ him, so it cannot defend against the payment of money borrowed and actually expended in the erection of the church. As to the policy of a church erecting a house of worship far beyond its available means, we do not now feel it necessary to indicate an opinion. Certain it is that the small sum here in controversy is trifling compared with the large debts resting upon many of the churches in towns and cities.

2. The charter declared that the business and affairs of the association should be under the direction and management of five trustees, a majority of whom should constitute a quorum. It further declared that the trustees should "have the general

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care, superintendence, and management of the concerns of the same." During the progress of the work Mr. Liddell, one of the trustees, appears to have been the financial agent and manager in behalf of the board of trustees. In raising the funds necessary he borrowed $1200 from Mrs. Smith, and gave his individual note therefor. Subsequently, the trustees borrowed $900 of Joseph Neeley, to pay so much of the debt due to Mrs. Smith, and four of them executed and delivered the note for the sum thus borrowed. The Court doubted the power of the plaintiff in error to give the note and the consequent liability of the corporation thereon alone; but substantially charged that there were certain implied powers incident to every corporation, and if they were satisfied from the evidence that the money for which the note was given was actually used in rebuilding the church, and thus went to the benefit of the society, the law raised an implied obligation on the part of the church to repay it. It was contended on the argument that there was no evidence that the money was used in rebuilding the church.

The answer to this objection is shown in several parts of the record. The note itself contains the written declaration of four of the trustees jointly, when engaged in making the loan, that the $900.00 were "for use of First Baptist Church." The settlement which Liddell subsequently made, as appears by the receipt signed by the President of the Board of Trustees, and one other trustee, declares "We hereby assume all liabilities of said church for which said W. J. F. Liddell, as trustee, has become responsible, including note given to Mrs. Catharine Smith, signed by himself individually, for the use of said church, according to settlement made this day." On the trial of the cause, James Dunlap, President of the Board of Trustees, was called by defendants in error as a witness, and in his testimony in chief said: "In repairing church had to borrow money; were advised by counsel that church could not borrow it; must be individual; the money borrowed from Neeley was paid to Mrs. Catharine Smith, to discharge a debt to her, for money borrowed by Mr. Liddell for the church." It is true, on cross-examination, his evidence goes to impair the validity of the receipt to which his name was subscribed, and he further said: "None of the Neeley money was received by the church." I think the fair interpretation of his testimony is that the money was not actually paid into the hands of the trustees, but was paid directly by Neeley to Mrs. Smith. It was, however, a question for the jury to determine. It is further shown by the evidence that the plaintiff in error made a payment of $300 on the note given to Neeley; the indorsement thereof being in the handwriting of the treasurer, now deceased, of the corporation.

This chain of evidence, both written and verbal, tending to show how the business was conducted, settled, and ratified by a partial payment, was certainly sufficient to submit to the jury to find that the money was used in rebuilding the church.

Judgment affirmed.

Opinion by MERCUR, J. SHARSWOOD, J., absent.

Jan. '78, 12. March 6, 1878.

Weiss's Appeal.

Practice—Execution—Distribution.

S., the holder of shares in a building association, procured a loan from the association, giving a judgment to secure it. Afterwards he assigned his stock to G. Real estate of S. having been sold under a lien subsequent to the judgment, and the money paid into Court, the association directed the sums already paid on the stock to be applied in payment of the original loan to S.

Held, that G., who appeared before the auditor and claimed that the judgment should be paid in full out of the proceeds of sale, had no standing in the proceeding for distribution, his remedy, if any, being in another action.

Appeal from the Common Pleas of Bucks County.

Appeal by George W. Weiss from a decree distributing the proceeds of a sheriff's sale on a *levari facias* issued at the suit of Jacob S. Reiff against Samuel W. Weiss.

It appeared by the auditor's report that Samuel W. Weiss on April 1, 1872, executed a mortgage of certain real estate to Jacob S. Reiff who neglected to record the mortgage until April 6, 1874.

After executing this mortgage, Weiss subscribed for stock in two building associations from each of which he borrowed money, giving in each case a judgment to secure the loan, and transferring his stock to the association as collateral. The entry of these judgments and the transfer of stock were prior to the recording of the mortgage held by Reiff. On September 20, 1876, Samuel W. Weiss assigned his stock in both associations to George W. Weiss, the appellant, and each association had notice of the assignment.

Subsequently Reiff issued a *scire facias* on this mortgage and sold the premises, the sheriff paying the money into court. While the matter was before the auditor, each of the associations declared the stock forfeited for non-payment of dues and interest, and ordered the amount already paid in to be applied to the payment of the loan to Samuel W. Weiss.

This was resisted by George W. Weiss, who claimed that the stock was his, and that the judg-

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ments must be paid in full from the proceeds of sale. The auditor reduced the judgments by the amount paid on the stock, and awarded the balance of the fund to Reiff on his mortgage. Geo. W. Weiss excepted, and, the report being confirmed, took this appeal.

George Ross (*L. L. James* with him), for the appellant.

The associations could not apply the amounts previously paid on the stock to the loan to Samuel W. Weiss, because the title to the shares had vested in a third party who had no other source of reimbursement than the stock purchased; while the associations had ample means to repay themselves by the judgments.

[AGNEW, C. J. What interest has the appellant in this fund? He may have rights, but a decision either way in this case won't give him a dollar.]

That difficulty of course presented itself, but we were afraid that if the appellant stood by and let this fund be distributed, he might be estopped in assumpsit.

[AGNEW, C. J. A simple protest would be sufficient to prevent that.]

Lewis B. Thompson and *R. L. Cope*, contra.

March 18, 1878. THE COURT. We do not perceive that the appellant in this case has any claim upon the fund in distribution. He has therefore no standing in this proceeding. If the building associations have injured him by a wrong in forfeiting his stock, his remedy is in a different proceeding.

Appeal quashed at the costs of the appellant.

PER CURIAM.

WOODWARD, J., absent.

Oyer and Terminer.

Commonwealth v. Sayre.

Insanity as a defence in criminal cases—Murder—General insanity—Partial insanity, hallucination or delusion—Homicidal mania.

Indictment for murder.

CHARGE OF THE COURT.

June 6, 1878. LUDLOW, P. J. (after reviewing the evidence, and commenting at length upon the law of murder and its degrees):—

. . . . . .

GENTLEMEN OF THE JURY: We have said that the defence in this case rests upon the broad ground of insanity. What particular form the disease in this case assumed has not been specified, and, therefore, we consider it to be our duty to charge you upon three general divisions of the subject, which will embrace:—

1st. General insanity.

2d. Partial insanity, hallucination or delusion.

3d. Homicidal mania.

Some years ago I expressed my views at length upon the subject; I have at this time given very careful and protracted consideration to the subject, and have reviewed what was then said. With advanced knowledge and additional experience, I, without hesitation, adopt, with some slight modifications, the views then expressed, as the best expression I can now give to what I believe to be the law of Pennsylvania upon the subject of insanity.

(1) General Insanity. The defence then, in this case, is that the prisoner at the time of the commission of this offence was not an accountable being. If, gentlemen of the jury, this allegation is true, it would be monstrous to punish him, and therefore we find the law to be, that if one charged with the commission of crime is so entirely devoid of understanding as to be either an idiot or a madman, he is thereby acquitted of all guilt—he is not criminally responsible to the offended majesty of the law, but becomes at once rather an object of pity than the subject of punishment.

Gentlemen, it is unnecessary for me to say to you, that we will be obliged to investigate a most delicate and dangerous subject; nevertheless, we will endeavor to lay down such rules and tests as will enable you to arrive at a satisfactory conclusion.

If the prisoner at the bar, at the time he committed the act, had not sufficient capacity to know whether *his act* was right or wrong, and whether it was contrary to law, he is not responsible; that is in fact general insanity, so far as the act in question is concerned, and it must be so great in extent and degree as to blind him to the natural consequences of his moral duty, and must have utterly destroyed his perception of right and wrong.

The test in this instance, as you perceive, *is the power or capacity of the prisoner to distinguish between right and wrong in reference to the particular act in question;* for although a man may be sane upon every other subject, yet, if he be *mad*, to use an expressive phrase, upon this subject, and so far as the act under immediate investigation is concerned, he thereby loses that control of his mental powers which renders him a responsible being. The test thus suggested has been adopted by the Judges of England, and by

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the Courts of our own State, and is too well settled to be shaken.

(2) Partial Insanity. But suppose that the prisoner was able to distinguish between right and wrong, and yet was laboring under *partial insanity, hallucination or delusion*, which drove him to the commission of the act as a duty of overwhelming necessity, is he in such cases responsible for his acts?

If the delusion were of such a nature as to induce the prisoner to believe in the *real* existence of facts which were entirely *imaginary*, but which, if true, would have been a good defence, he would not be responsible. We, however, desire at this stage of our remarks to refer rather to other delusions than the class thus spoken of, reserving for future consideration our remarks on this branch of the subject.

That partial insanity, hallucination or delusion, coupled with the power of discriminating between right and wrong, is an excuse for crime was held in the charge of Ch. J. GIBSON, in Commonwealth *v.* Mosler (4 Barr, 266), where the Chief Justice says: "It (insanity) must amount to delusion, or hallucination, controlling his will and making the commission of the act a duty of overruling necessity." And again, he says: "The law is, that whether insanity be general or partial, it must be so great as to have controlled the will of its subject, and to have taken from him the freedom of moral action."

We cannot, however, leave this branch of the subject to doubt or uncertainty, and our conclusion is, after a somewhat extended investigation of the law, that the proper rule to be adopted upon the point in question is the following:—

If the prisoner, although he labors under partial insanity, hallucination or delusion, did understand the nature and character of his act, had a knowledge that it was wrong and criminal, and mental power sufficient to apply that knowledge to his own case, and knew if he did the act he would do wrong and would receive punishment; if, further, he had sufficient power of memory to recollect the relation in which he stood to others and others stood to him, that the act in question was contrary to the plain dictates of justice and right, injurious to others and a violation of the dictates of duty, he would be responsible.

A man must, therefore, labor under something more than "a mere moral obliquity of perception," and "a man whose mind squints, unless impelled to crime by this very mental obliquity, is as much amenable to punishment as one whose eye squints."

The jury must, therefore, even though they believe the prisoner labored under a diseased and unsound state of mind, be satisfied that this diseased or unsound state of mind existed to such a degree, that although he could distinguish between right and wrong, yet with reference to the act in question his reason, conscience, and judgment were so entirely perverted as to render the commission of the act in question a duty of overwhelming necessity.

But, gentlemen, there is another species of delusion entirely distinct from those which we have just considered, which is recognized by the law, and which, when the jury believe that it clearly exists, will entitle the prisoner to an acquittal. I refer to that delusion by reason of which the prisoner commits the act under a fixed, *bona fide* belief (which is a delusion) that certain facts existed which were wholly imaginary, but which, if true, would have been a good defence.

The Judges of England, in their answer to the fourth question propounded to them by the House of Lords, say—supposing that one labors under partial delusion and is not in other respects insane, "We think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if, under the influence of delusion, he supposes a man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge, he would be liable to punishment."

(3) Homicidal Mania. Besides the kinds of insanity to which I have already referred, and which, strictly speaking, affect the mind only, we have moral or homicidal insanity, which seems to be *an irresistible inclination to kill or to commit some other particular offence.* We are obliged by the force of authority to say to you that there is such a disease known to the law as homicidal insanity; what it is, or in what it consists, no lawyer or Judge has ever yet been able to explain with precision. Physicians, especially those having charge of the insane, gradually, it would seem, come to the conclusion that all wicked men are mad, and many of the Judges have so far fallen into the same error as to render it possible for any man to escape the penalty which the law affixes to crime.

We do not intend to be understood as expressing the opinion that in some instances human beings are not afflicted with a homicidal mania, but we do intend to say that a defence consisting exclusively of this species of insanity has frequently been made the means by which a notorious offender has escaped punishment. What, then, is that form of disease, denominated homicidal mania, which will excuse one for having committed a murder?

Chief Justice GIBSON calls it, "that unseen ligament pressing on the mind and drawing it to

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consequences which it sees but cannot avoid, and placing it under a coercion which, while its results are clearly perceived, is incapable of resistance"—"an irresistible inclination to kill."

If by moral insanity is to be understood only a *disordered* or *perverted* state of the affections or moral powers of the mind, it cannot be too soon discarded as affording any shield from punishment for crime; if it can be truly said that one who indulges in violent emotions, such as remorse, anger, shame, grief, and the like, is afflicted with homicidal insanity, it will be difficult, yes, impossible, to say where sanity ends and insanity begins; for, by way of illustration, the man who is lashed into fury by a fit of *anger* is in one sense insane.

As a general rule it will be found that instances are rare of cases of homicidal insanity occurring wherein the mania is not of a *general nature*, and results in a desire to kill any and every person who may chance to fall within the range of the maniac's malevolence, as it is general, so also is it based upon *imaginary* and not *real* wrongs; if it is directed against a particular person (as is sometimes the case), then also the cause of the act will generally be imaginary. When, therefore, the jury find from the evidence that the act has been the result not of an imaginary but *real* wrong, they will take care to examine with great caution into the circumstances of the case, so that, with the real wrong, they may or may not also discover revenge, anger, and kindred emotions of the mind to be the real *motive* which has occasioned the homicidal act.

Orfila has said, "That the mind is always greatly troubled when it is agitated by anger, tormented by an unfortunate love, bewildered by jealousy, overcome by despair, haunted by terror, or corrupted by an unconquerable desire for vengeance. Then, as is commonly said, a man is no longer master of himself, his reason is affected, his ideas are in disorder, he is *like a madman*. But in all these cases a man does not lose his knowledge of the real relations of things; he may exaggerate his misfortune, but this misfortune is real, and if it carry him to commit a criminal act, this act is perfectly well motived."

The man who has a clear conception of the various relations of life, and the real relations of things, is not often afflicted with insanity of any description; he may become angry, and in a fit of temper kill his enemy, or even his friend, but this is not, and I hope never will be, called in courts of justice insanity. Again, one who is really driven on by an uncontrollable impulse to the commission of a crime will be able generally to show its "contemporaneous existence evinced by present circumstances, or the existence of an habitual tendency developed in particular cases, and becoming in itself a second nature." We say generally, for it is possible that by a sudden impulse one may kill another, but such a case would be an exceptional one, and is likely to be surrounded by circumstances indicating the insane character of the act, and that it is perpetrated without a motive. Such cases should be examined by the jury with the utmost caution.

Chief Justice LEWIS has said that moral insanity "bears a striking resemblance to vice," and further, "it ought never to be admitted as a defence until it is shown that these propensities exist in such violence as to subjugate the intellect, control the will, and render it impossible for the party to do otherwise than yield." And again, "this state of mind is not to be presumed without evidence, nor does it usually occur without some premonitory symptoms indicating its approach."

Gentlemen of the jury, we say to you, as the result of our reflections on this branch of the subject, that if the prisoner was actuated by an irresistible inclination to kill, and was utterly unable to control his will or subjugate his intellect, and was *not* actuated by anger, jealousy, revenge, and kindred evil passions, he is entitled to an acquittal. As the law presumes sanity to be the normal condition of the prisoner, and insanity an abnormal condition, the burden rests upon him to prove his insanity as an excuse for an act which would otherwise be criminal. The evidence, therefore, which is intended to establish this defence must be satisfactory to the jury, and the conclusion such as fairly results from the evidence.

Upon all the other questions of this cause it is the duty of the Commonwealth to establish the guilt of the prisoner by evidence beyond a doubt. This doubt should be reasonable, and it should be something which causes the jury to pause before coming to a conclusion upon a candid and conscientious consideration of all the testimony in the case. If such a doubt exists, it is the property of the prisoner, and he is entitled to the benefit of it.

The law permits the jury in all cases to declare the grade of the offence in the event of a verdict against the prisoner. It is right to remark, without intending to disturb your right to fix the degree of crime, that in a case in which if the jury believe a deadly weapon has been used under circumstances of atrocity, and with wilful deliberation and premeditation, and with intent to kill, it is difficult to perceive how a verdict less than that of murder of first degree could be rendered. The grade of offence, however, is for you. If the jury believe the prisoner to have been insane, then the Act of Assembly requires the jury "to find specially whether such person was insane at the time of the commission of the offence, and to declare whether he was acquitted by them on the ground of such insanity."

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Common Pleas—Equity.

C. P. No. 4. March 13, 1878.

Wood et al., Exec'rs, etc., v. Ellis et al.

Stock—Certificate of, with blank power—Constructive notice of trust—Executor—Power over assets as against co-executor.

Sur exceptions to master's report.

The facts, as they appeared from the bill, answer, and the report of the master, were as follows:—

In 1873, Charles S. Wood died, and letters testamentary were issued on his estate to the plaintiffs, George R. Wood and R. Francis Wood, his sons, and Dr. John H. Packard and Charles S. Wurts, his sons-in-law. There was a general understanding among them that George R. Wood and R. Francis Wood should collect the income, pay bills, and keep an account of the estate. In the summer of 1873 George R. Wood speculated in stocks through McDowell & Wilkins, stock brokers, and deposited with them as collateral security, among other things, a certificate of stock for 4123 shares of the Cambria Iron Company, belonging to the decedent's estate. This certificate was in the usual form, in the name of Charles S. Wood, with a blank bill of sale and power of attorney attached, signed by "George R. Wood, acting executor." On October 2, 1873, George R. Wood called on the defendants, Rudolph Ellis & Co., and told them *he* wanted a loan of $12,000, to prevent a sacrifice of some securities he had pledged with McDowell & Wilkins, on which he owed them money, and which he wished to get out of their possession. Ellis, however, in his answer and evidence, maintained that he made the loan to him *as* executor only, and there was no evidence *aliunde*. Ellis & Co. advanced the requisite amount, and took the stock from Wilkins, giving therefor a check to the order of McDowell & Wilkins, which was duly paid. Before the delivery of the check, Ellis was told by Wood that the Cambria stock belonged to Charles S. Wood's estate, and Wilkins told Ellis that McDowell & Wilkins had executors' stock in the name of Charles S. Wood pledged with them. On the following day George R. Wood gave R. Ellis & Co. his personal due bill for the loan. No part of the $12,000 came into the possession of the decedent's estate. George R. Wood had no consent from his co-executors to sell or pledge stock. R. Ellis & Co. were freed by the master from any intention to defraud the estate, and the evidence was that they supposed they took the 4123 shares as a merchantable and valid security for their loan. The question, then, was whether under this state of facts, the plaintiffs were entitled to this stock, free from any lien for the advance of R. Ellis & Co. to George R. Wood of $12,000 upon it.

The master reported that there was enough in the transaction to excite the suspicion of the defendants, and to put them on inquiry; that they were not *bona fide* purchasers from, or lenders to, Charles S. Wood's estate, without notice. That they had notice, either actual or constructive, that their loan to George R. Wood, one of the executors, was not for the benefit of the estate; that they acquired, therefore, no title to the stock in question, but that it remained in the estate of Charles S. Wood.

To this report the defendants excepted, on the grounds: (1) That the defendants paid $12,000 at the request of an executor to redeem the stock; (2) that though the executor had pledged the stock for an individual debt, the defendants were entitled to relieve the stock from the peril of a sale at the request of an executor, and so save it for the estate; (3) that the defendants did not deal with and trust George R. Wood for his personal benefit, the evidence being that they declined to advance him personally, but only as executor.

David W. Sellers, for the exceptions.

The defendants had a right to take the stock from McDowell & Wilkins, who had the certificate with a blank power attached, and to presume, as a matter of law, that they thus received an undoubted title. One executor can pledge choses in action, and can pass title to them.

D'Invilliers *v.* Abbott, 4 WEEKLY NOTES, 134.
Petrie *v.* Clark, 11 S. & R. 377.
Miller *v.* Ege, 8 B. 352.

Having been told, therefore, by the pledgees that they held executors' stock, there was no duty of inquiry beyond that, and no liability on a *bona fide* purchaser to see to the proper application of the purchase-money by the executor. Wood was the acting executor having control of this stock, the plaintiffs should, therefore, be estopped from denying his right to pledge it, and, therefore, the defendant's title to it.

Turnpike Co. *v.* Ferree, 2 C. E. Green, 216.
McNeal *v.* Bank, 46 N. Y. 325.
Finney's Appeal, 9 Sm. 398.

Jos. B. Townsend and *R. C. McMurtrie*, contra.

The control of executors over the assets of the estate is qualified. All parties who come into possession of trust property which has been parted with by a breach of trust, are affected by such breach when they have notice of it, actual or constructive. The defendants here dealt with Wood personally; they never inquired of McDowell & Wilkins whether they had advanced money to the estate, but on Wood's saying that

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he wanted the money, they took his personal paper for the loan. The rule of law is not the same as 'to pledging and selling; an executor cannot pledge the assets of the estate without the presumption arising that he is doing so for his own account, and if he aver the contrary, the lender takes the risk of seeing to the proper application of the purchase-money. The co-executors had no right to prevent George R. Wood from having possession of the stock, but they certainly are not estopped from asserting the rights of the estate when he fraudulently makes use of his possession for his own debts.

Lowry *v.* Bank, 1 Taney's C. C., Dec. 310.
Gairard *v.* R. R. Co., 5 C. 154.
Elliot *v.* Merryman, 1 L. C. in Eq. 59.

C. A. V.

March 25, 1878. Exceptions dismissed and report confirmed.

Common Pleas—Law.

C. P. No. 3. May 25, 1878.

Thornton v. Aubrey Hotel Co. et al.

Practice—Execution—Exemption—Defendant's interest in a partnership—The Court will not instruct a sheriff in advance as to exemption.

Rule to show cause why sheriff should not allow claim for exemption and appraisement.

Under the *fi. fa.* the sheriff levied on all the right, title, and interest of the defendant Thomason in and to the firm of Wm. J. Thomason and Sons, of which he is a member. After levy was made defendant claimed his exemption (there being no waiver).

The sheriff refused to allow the same or appoint appraisers, alleging that exemption did not apply to such property, and proceeded to advertise the same for sale.

Sloan, for the rule.

The Act of April 9, 1849, exempts property to the value of $300 owned by any debtor. Partners are allowed separate exemption out of their separate property which is appraisable within the meaning of the Act.

Lippincott's Estate, 8 Phila. 236.
Van Kirk *v.* Allen, 1 WEEKLY NOTES, 231.

In this case, however, it matters little whether the rule is granted or not; what we want is to have the Court direct us how to act under the circumstances.

S. W. Pettit, contra.

This is not a question for the Court; the sheriff must decide whether or not to allow the exemption, and on his own responsibility.

Houston *v.* Smith, 1 Phila. 221.
Pile *v.* Grambo, 1 WEEKLY NOTES, 7.
Chestnut *v.* Meace, 3 Ibid. 240.

THE COURT. In this case we do not think that we can instruct the sheriff what he shall do; we cannot anticipate his action, but will correct it if improper.

Rule discharged.

Per YERKES, J.

C. P. No. 3. March, 1878.

Wireman v. Ditson et al.

Practice—Execution—Act of May 13, 1876, exempting pianos—When notice may be given under that Act.

Case stated, showing the following facts:—

Wireman, the plaintiff, being landlord of certain real estate in the city of Philadelphia, distrained, March 8, 1878, for rent in arrear, upon goods found in the demised premises, among which was a piano. On the following day, the defendants notified the plaintiff that the piano belonged to them, and was rented to the tenant, and that by virtue of the Act of Assembly of 13 May, 1876 (P. L. 171), it was exempt from levy and sale for rent due by the tenant. If the Court should be of opinion that the notice of defendants was not given in time, judgment to be entered for plaintiff, otherwise judgment for defendants, the possession of the piano to follow the judgment.

Wireman, for plaintiff, argued that the notice given was not given in time, that it ought at law to be given before distress made. The Act was for the benefit of the landlord, as well as piano owners.

Swayne, contra, cited—

Hammer *v.* Freese, 7 Harris, 255.
Keller *v.* Bricker, 14 Sm. 379.

THE COURT. Judgment for defendant, FINLETTER, J. remarking that it was time enough for the defendants to give the notice required by the Act when the piano was in danger.

C. P. No. 4. June 3, 1878.

Hicks v. Funston.

Mortgage—Bond and warrant—Where an action has been brought upon a mortgage, and an affidavit of defence thereto sustained by the Court, the plaintiff cannot, without discontinuing, issue execution upon a judgment entered on the bond and warrant accompanying the mortgage.

Rule to set aside *fi. fa.*, condemnation, and *venditioni exponas*, and let defendant in to a defence.

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This was a judgment entered upon a bond by warrant of attorney annexed, on which execution had issued, and the real estate been advertised to be sold at sheriff's sale.

It appeared that an action had already been brought upon the mortgage given to secure the bond; in which action an affidavit of defence was filed, which being considered sufficient by the Court, the case had been laced at issue and put down for trial.

J. W. Paul, for the rule.

J. Otterson, contra.

[THAYER, P. J. During the pendency of the suit upon the mortgage the plaintiff ought not to be permitted to proceed to execution upon the judgment upon the bond, the defence to that being the same.

BRIGGS, J. If you discontinue your action on the mortgage, you will then be in a position to proceed on the bond.]

Rule absolute.

Orphans' Court.

Feb. 18, 1878.

Philip M. Hanbest's Estate.

Executors—Legatees—An executor who is also a legatee may, by assenting to his own legacy, vest the thing bequeathed in himself as legatee—Election, express and implied.

Sur exceptions to auditor's report.

T. P. Hanbest by his will appointed Isaac Norris and Philip M. Hanbest his executors, and directed as follows:—

"My brother Philip is to have the collection of all the rents of my real estate and interest of mortgages, and to pay the same over to my executor, and to receive for doing so a commission of two and a half per cent." "All my real estate is to be kept in good order and condition under the direction and care of brother Philip."

Philip was appointed executor by a codicil, and letters testamentary were granted to both executors.

Philip died August 28, 1875, some three years after assuming the office of executor, and the Fidelity Safe Deposit Co. were appointed administrators of his estate.

On a petition by the surviving executor, praying that the Fidelity might be cited to file an account of the assets of the estate of T. P. Hanbest, collected by said Philip M. Hanbest, an auditor was appointed, with directions to state such account, and also an account of P. M. Hanbest as executor of T. P. Hanbest, deceased. [See Hanbest's Estate, 3 WEEKLY NOTES, 520; T. P. Hanbest's Estate, 4 Id. 402.]

The auditor found the following facts: That Philip M. Hanbest, immediately after his brother's death, employed Jacob C. Freno as his bookkeeper, and also as his agent for collection of rents belonging to the estate. The entries of these rents were made by Mr. Freno immediately upon their receipt, in a book kept by himself, and given him by Philip, and from which he settled with Mr. Hanbest. The pages in this book were headed "Philip Hanbest, executor of T. P. Hanbest," "Philip Hanbest, Executor," "Philip Hanbest," and "The Estate of T. P. Hanbest," but the entries comprised one continuous account. This book was examined by Mr. Hanbest at these settlements, and the items were checked off by him as the moneys were paid. The book was also made the basis of settlement between Mr. Hanbest and Mr. Norris, his co-executor, during the lifetime of Hanbest.

The book showed a balance due by Mr. Hanbest of $3749.02, after deducting credits.

It was also found as a fact by the auditor that at the suggestion of his bookkeeper Mr. Hanbest opened an account with the Fidelity Company, in which he deposited the rents of his brother's estate, very probably intermingling these rents with some moneys of his own. The account was in his individual name. Many of the deposits were made by Mr. Freno, and they were always of rents belonging to the estate. After opening this account, Mr. Hanbest settled with his co-executor by checks upon the Fidelity Company. The balance on deposit, after Mr. Hanbest's death, was found to be $2465.58.

The auditor accordingly reported that the assets collected by decedent, and owing by him at his death, as executor of T. P. Hanbest's estate, amounted to $3749.02, of which $2465.58 had passed into the custody of the Fidelity Company as his administrator.

To these findings exceptions were filed by the Fidelity Company, because the auditor erred (1) in finding that the book of accounts was a book of original entry, and the account of P. M. Hanbest as executor; and (2) in finding that the deposits made with the Fidelity Company by P. M. Hanbest, were moneys belonging to the estate of T. P. Hanbest.

W. H. Livingood, for the exceptions.

J. Parker Norris and *F. C. Brewster*, contra.

April 6, 1878. THE COURT (after stating the facts, *ut supra*). There is no reason to doubt the accuracy of the auditor's reasoning. The

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book kept by Mr. Freno was properly admitted to charge the estate of decedent. It was furnished by the decedent for the express purpose of recording his receipts of the rents of his testator's estate, and it was used constantly by him in effecting settlements with his agent and the co-executor. In addition to this, the entries on their face showed that they were accounts of moneys received by him as executor. In tracing these funds into his possession, his account with the Fidelity Trust Company was equally conclusive matter of evidence. The legal presumption that the deposits in his own name were of his own moneys, was rebutted by the uncontradicted testimony of his agent. He testified that the decedent had opened the account solely for the safe keeping of these rents; that the agent made very many of the deposits, and only of the rents derived from the estate; and that in settling with his co-executor, the decedent, after the account had been opened, always drew checks upon this account in the Fidelity Company.

But the decedent, in addition to the commissions and monthly allowance, to which he was entitled under his brother's will, was a distributee to the extent of one-fifth of his brother's estate. Subject to the payment of debts he had a clear right in his capacity of executor to retain out of the funds of the estate, sufficient for the payment of his claim as legatee. An executor who is also a legatee, may, by assenting to his own legacy, vest the thing bequeathed in himself in the capacity of legatee. (1 Williams on Executors, 649; Hudson *v.* Reeve, 1 Barb. 89.) And his assent may be either express or implied. (Chester *v.* Greer, 5 Humph. 26.) If an executor in his manner of administering the property does any act which shows he has assented to the legacy, that shall be taken as evidence of his assent. (Doe *v.* Sturges, 7 Taun. 223; see Harrison *v.* Henderson, 7 Heis., Tenn. 315.)

It was in evidence before the auditor that the decedent in his settlements with his co-executor always deducted his commissions and the monthly allowance under his brother's will, from the rents which were the subject of settlement. The large balance of those rents in his hands at the time of his death, and which he had allowed to remain on deposit in his own name, are legitimate proof of an intention to retain them in part payment of his share as legatee. The presumption that he made such election is justified by the authorities just quoted, and relieves the question of the possible complications which might arise from the fact that the Fidelity Trust Company have already accounted for and in part distributed the fund as the proper estate of decedent.

The second exception is therefore sustained, and it is ordered and decreed that said sum of $3749.02 be deducted from the share of the said Philip M. Hanbest in the estate of the decedent as a part payment on account of said share.

Opinion by ASHMAN, J.

March 18, 1878.

Howell's Estate.

Trust for accumulation—Semble, that a devise in trust for maintenance and support of minor and at majority to pay her the whole income for life, entitles the cestui que trust to the surplus income arising during the operation of the trust—When a former decree of the Court is made under a misapprehension, a bill of review is the proper remedy—Act of October 13, 1840.

Sur petition for citation and answer.

The petition of Charles W. Spooner and Sally H. A. Spooner, his wife, in right of the said wife sets forth: That Robert Howell died January 4th, 1856, leaving a will, of which he appointed Joseph Howell and Joshua R. Howell executors. The testator gave all the residue of his estate to his executors in trust to invest the same in certain securities, and to pay the income thereof to his granddaughter, Sally Howell Abrams, "if she should attain the age of twenty-one years," with a devise over in case of her decease before attaining that age; and during her minority to make liberal allowance for her board, education, and clothing. Should his granddaughter attain the age of twenty-one years, she was to have the power of disposition of one-half of such residuary estate. That Sally Howell Abrams received from the trustees sums necessary for her maintenance and support during her minority, but in no case did the sum amount to the full income arising out of the capital which the testator left for her use and benefit. That the petitioners were united in marriage in 1875, and that on May 28th, 1876, the said Sally Howell Spooner became of age, and thereupon became entitled to the net income of the residuary estate and the surplus income, together with interest which had accrued during her minority above the amount necessary for her support. That the trustees have failed to pay her this surplus, but have paid her the whole income arising since she arrived at full age.

The petition prayed for a citation requiring the trustees to show cause why they should not file an account setting forth the sums due the petitioners, in right of said Sally H. Spooner, arising out of said surplus income, and pay the same to petitioners. A citation having been awarded, a petition for an order to file an account was presented, to which the trustees filed an answer admitting the facts of the petition, but averring that they had filed accounts as executors in 1860 and 1872, both of which had been audited and

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confirmed; that in August, 1876, another account was filed, and in October, 1876, it was adjudicated by the Court, and the decree made that "the balance in the hands of the accountants be retained by them for the purposes of the trust, declared in the will of said decedent." That the full accounts of the trusteeship being on file in the Court, the filing of such partial account is not within the scope of the respondents' duty. Under the decree of the Court, the petitioners are entitled to nothing more than what shall hereafter accrue; and that the petitioners are not entitled to any such account until the decree of this Court is reversed or modified upon a bill of review.

T. De Witt Cuyler and *C. S. Patterson*, for the petitioners, cited—

Washington's Appeal, 25 Sm. 102.
Stille's Appeal, 1 WEEKLY NOTES, 249.

J. G. Johnson, for respondents.

This is a proceeding *in rem*, and the Act of Oct. 13, 1840 (Purd. Dig. 447, pl. 203) shows that a bill of review is the proper method to pursue.

C. A. V.

March 30, 1878. THE COURT. It cannot be doubted, under the decisions with reference to trusts for accumulation since the Act of 1853, that the petitioner, Mrs. Spooner, upon attaining her majority became entitled to the surplus income which had until then accumulated.

But by the adjudication of the account filed by the trustee in August, 1876, it was decreed that the balance, which included such surplus, should be retained by the accountant, "for the uses and purposes of the trust declared in the will of said decedent." Had the attention of the auditing Judge been called to the question of fact and law involved in the present application, no doubt the decree would have been different, but while it stands as it is it cannot be disregarded.

The remedy of the petitioner is by petition for review and not by citation to file a supplemental account. (Downing's Estate, 5 Watts, 90.) The decree upon the previous accounts may also require modification.

The order awarding a citation directing the filing of an account is set aside and vacated, and the petition dismissed without prejudice to the right of the petitioner to file a bill or petition of review.

Opinion by PENROSE, J.

April 15, 1878.

Edwards's Estate.

Executors and trustees—Causes for removal—Letters testamentary to an executor whose insolvency is likely to occur, may be vacated—Substitution of executor in case of death of appointee—Act of May 1, 1861.

Sur petition for removal of executor and answer.

The petition of Athalia L. Edwards sets forth the will of Ignatius L. Edwards, the decedent, whereby he appointed his wife, the petitioner, and his brother, John H. Edwards, his executors, trustees, and the guardians of his children, and directed that—

"In case of the death of my dear wife I appoint my friend Jackson M. Elwell, to be executor, etc. in her place, and in case of the death of my brother John, I appoint my brother George W. Edwards to be executor, etc., in his place."

That John H. Edwards died in February, 1877, subsequent to the death of the testator; and that George W. Edwards had, thereupon, without notice to the petitioner, applied for letters testamentary upon the estate of the testator, which were issued to him. The petition further alleged that at the time of his nomination by the testator, George W. Edwards had been a business man of good financial standing but had since failed, owing large sums of money, which he was still unable to pay, and had made an assignment for the benefit of his creditors; that the petitioner was desirous, on account of ill health, of resigning her executorship in favor of one of the trust companies to be selected by the Court, but was unwilling to do so as long as there was any danger of the estate of her testator coming into the hands of the said Geo. W. Edwards. The petition prayed for the removal of the said Geo. W. Edwards, for an injunction to restrain him from interfering with the petitioner in the discharge of her duties as trustee and guardian, and for general relief.

The answer of Geo. W. Edwards sets forth that the whole of the testator's estate consists of his interest in his father's estate, the greater portion of which is made up of very large and valuable properties not capable of division, and which were not intended to be divided either by the decedent's father or by the decedent himself; and that the respondent's brothers and sisters all agree that it would not be judicious to divide the estate; and, further, that it is manifest from the terms of the will, and a fact known to all his brothers and sisters that the decedent intended and provided that the care of his estate should remain among persons of his own selection, who had his confidence, and were aware of his wishes. The answer further alleged the respondent's willingness to enter security in any amount or to

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resign in favor of any of his brothers, and denied that he was insolvent; it admitted that he had in 1876 made a temporary assignment for the benefit of his creditors, but alleged that the said assigned estate had been reconveyed to him in March, 1877, in pursuance of a decree of court, and claimed that he was worth a large amount over and above all his liabilities.

The petition and answer were referred to an examiner to take testimony, and upon the filing of his report came on to be heard.

J. G. Johnson, for petitioner.

According to the examiner's report, the respondent is hopelessly insolvent. He has a large amount long over due on notes, and has already made an assignment and got an extension. He is now insolvent, though in the future his assets may be sufficient to meet his liabilities. He is not a proper person to be appointed trustee.

Act of May 1, 1861, Purd. Dig. 1424, pl. 59,
Act of April 9, 1868, Purd. Dig. 1425, pl. 65.

Under the will the contingency, on which Geo. W. Edwards was appointed executor was the death of the first trustee named, John H. Edwards, *in the lifetime of the testator*. This contingency did not arise, John having survived the decedent. This interpretation is confirmed by the subsequent provisions of the will, where he leaves his estate "to his trustees and the survivors of them, and the heirs or assigns of them."

Theobald on Construction of Wills, 336.
Hawkins on Wills.

Crawford and *Hirst*, contra.

On a careful examination of the testimony and crediting him with his share of his father's estate, it will be found that the respondent is worth a large amount over and above his liabilities. The respondent is willing to give any security that may be desired. He is simply a trustee, and would do no act alone without the consent and approval of the widow. There could be no danger to the estate. The clause appointing the respondent executor, in case of the death of John H. Edwards, cannot possibly mean death in the testator's lifetime, as the will was made by the testator on his death-bed.

It is not in the power of *cestuis que trustent* to remove a trustee on a mere whim; good and sufficient cause must be shown.

Stevenson's Appeal, 18 Smith, 102.

April 27, 1878. THE COURT. The office of executor is necessarily only for life, and a provision by the testator for the substitution of a successor, involves no inconsistency and violates no principle of law. Whether the words used to indicate the termination of the first executorship are "at his death," or "in case of his death," is not very material. It is true that these latter words, in case of an absolute gift of property, with a limitation over in the event of the contingency, are referable to a death in the lifetime of the testator, but that is because any other construction would be repugnant to the previous absolute gift, and would interfere with the right of alienation, and this reason does not apply to the mere appointment to an office. (*In re* Lighton, 1 Hagg. 235; 1 Williams on Ex. *202.)

Regarding then the respondent as fully entitled to hold the office of executor under the will of the testator, the predecessor having died, it becomes necessary to consider whether he should be removed for the reasons shown by the petition and evidence.

It is very clear that in the sense of an inability to meet his obligations as they mature he is insolvent. Whether his liabilities will exceed his assets depends upon not only the intrinsic value of the latter, but the manner in which their sale may be effected. If the valuation made by the Board of Revision be acccepted, there is an actual as well as a legal insolvency now existing. This would not be the case if the respondent's own estimate be adopted; but the fact must not be overlooked that his estate consists principally of an individual interest in property held in common with others, and that under the most favorable circumstances such an interest will rarely sell for its full value; while, should a forced sale be made under proceedings by creditors a great sacrifice would be inevitable. Such a sale, in view of the legal insolvency, cannot but be regarded as probable, and we have, therefore, the case of an executor, if not now actually insolvent, in the sense intended by the Act of Assembly, is at least "likely to prove insolvent."

Under the Act of 1832, the only remedy in such case is by requiring security from the executor. But the Act of May 1, 1861, goes further, and provides that the letters testamentary to the executor whose insolvency already exists, or is likely to occur, may be vacated.

Under all of the circumstances of this case we think it proper to pursue the course there indicated, and our decree will be accordingly.

Opinion by PENROSE, J.

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WEEKLY NOTES OF CASES.

VOL. V.] *THURSDAY, JUNE* 20, 1878. [NO. 21.

Supreme Court.

Jan. '75, 141. Jan. 15, 1878.

Connecticut Mutual Life Ins. Co. v. Groom, Adm'r.

Life insurance—Self-destruction by insane person, when not suicide within terms of policy.

A policy of life insurance providing that it should become void if the insured should die by suicide is not avoided by the self-destruction of the insured when insane, though intending to take his own life and conscious that death would result from his act.

Error to the late District Court of Philadelphia County.

Covenant, on a policy of insurance, by Grace A. Boileau against the above corporation. After the trial the plaintiff's death was suggested and E. J. Groom, her administrator, substituted in her place on the record.

The declaration set forth that the corporation defendant had, in consideration of a certain premium, issued to the plaintiff a policy of insurance whereby the life of her husband, James M. Boileau, was insured in the sum of $5000; that the said J. M. Boileau died on May 24, 1873; that although the plaintiff had duly proved the death, and had otherwise fulfilled the conditions of the policy, the corporation defendant had refused to pay her the said sum of $5000, for which she brought suit.

The defendant pleaded, specially, that the said policy of insurance had been issued by the company and accepted by the insured upon the express condition that if the insured should die by suicide the policy should be void; and that on May 24, 1873, the said insured did die by suicide, to wit, by drowning himself in Neshaminy Creek.

The plaintiff replied, that J. M. Boileau, the said insured, at and previous to the time of his death, was insane; that his death was not the result of his voluntary and intelligent act; and that he, therefore, did not die by suicide within the true intent and meaning of the policy.

At the trial, before HARE, P. J., it was agreed that it should be reserved as a question for the Court in banc "whether the policy in suit was forfeited by the suicide of J. M. Boileau, he being insane at the time, but intending to take his life, knowing that death would result from what he did. . . . . If the Court should be of opinion that such insanity does not avoid the forfeiture, judgment to be entered for the plaintiff in the sum of $5194.50, otherwise for the defendant. This consent not to take effect unless the jury find that J. M. Boileau was insane."

The plaintiff admitted that Boileau intended to take his own life and knew that death would follow his act.

The policy contained, *inter alia*, the following stipulation:—

"If he shall die by suicide, or in violation of any law, ... then in each and every of the foregoing cases this policy shall become null and void."

HARE, P. J., having reserved the question as agreed on above, instructed the jury that they should find a verdict for the plaintiff if they found that J. M. Boileau was insane at the time of his death, remarking, *inter alia*, that if Boileau's fancies "so entirely overpowered his mind that he could no longer exercise his sense of right and wrong, he was no longer a responsible being."

The material portions of the charge were substantially as follows:—

The defendants in this case contend that suicide is synonymous with self-destruction, and occurs whenever one designedly takes his life, although he has lost the power of self-control, or is unable to distinguish between right and wrong. If this be conceded, the insurance came to an end when Boileau threw himself into the water and was drowned, whether he was or was not in his right mind. It may be true that suicide is sometimes used in this sense, but such is not its general signification. In the legal acceptation of the term it is self-murder, the felonious taking of one's own life. It is a crime punishable with an ignominious burial and the forfeiture of the offender's goods. (4 B. Com. 189.) Such is the definition give by Blackstone; and if we turn to Johnson and Walker's dictionary, or to Webster's, we shall find that these authors give the legal meaning of the word as that in which it is commonly understood.

It would be contrary to legal analogy that one who is not morally responsible for what he does should be visited with penal consequences; accordingly, Blackstone says, the party must be in his senses and arrived at years of discretion, or it is no crime.

In this aspect of the case, Boileau's death by his own hands during a paroxysm of insanity would not invalidate the policy. If the meaning of the clause is doubtful, the decision should be in favor of the plaintiff. It is a general principle that where the terms of a contract admit of two interpretations, that should be adopted which will avoid a forfeiture or prevent a breach of condition. This is only just, because it is always in

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the power of the party who makes such a stipulation to use language which cannot be misunderstood. I am the more willing to adopt this view, because it will enable me to leave the question of fact to you, and reserve the law for the consideration of the Court above.

The Court then left the question, "Was Boileau insane?" as one of fact to the jury, but with the qualification that insanity in the sense in which they were to consider it must not be a mere disturbance of intellect, but such a complete change in the moral and mental condition of the patient as would put an end to his responsibility as a free and intelligent being. Unless the deceased was insane in this sense, his death by his own hand was "suicide," within the legal meaning of the term, and a forfeiture of the condition of the policy. It was for them to determine whether the painful ideas which had beset Boileau for many months, and which, agreeably to the evidence, were recurring with an ever-increasing force, at last so entirely overpowered his judgment as to render him unable to distinguish between right and wrong. If they found that he was not a responsible moral agent when he did the act which occasioned his death, they might find that it was not suicidal under the terms of the contract in suit. If they believed that when these ideas occurred to this man they *so entirely overpowered his judgment that he could no longer exercise his sense of right and wrong, he was no longer a responsible moral being*, and that such was the nature of the suffering he was enduring that he could not withhold himself,—although that may be a crime, I think it would be insanity within the meaning of this policy. If, on the other hand, they found that although mortified by his inability to pay his creditors, apprehensive of the future, and suffering from painful thoughts which he could not repress, he was still able to discern that self-destruction was criminal, and might have resisted the impulse to which he succumbed, it would be their duty to render a verdict for the defendant without regard to the pity which they might feel for Boileau, or the sympathy which must naturally exist in their breasts for his widow.

Verdict for the plaintiff. The corporation defendant moved for judgment on the reserved point, but the Court—BRIGGS and MITCHELL, JJ., dissenting—refused the motion and entered judgment on the verdict. The defendant then took this writ, assigning the entry of judgment for error.

M. Arnold and *W. S. Price*, for the plaintiff in error.

The question is the one reserved—whether the policy was forfeited by the suicide of Boileau, who was insane at the time, but intended to kill himself, and knew that death would result from his act. This question is decided in the affirmative in—

Borradaile *v.* Hunter, 5 M. & G. 639.
Clift *v.* Schwabe, 3 M. G. & Scott, 437.
Dean *v.* The Ins. Co., 4 Allen, 96.
Cooper *v.* The Ins. Co., 102 Mass. 227.
Van Zandt *v.* The Ins. Co., 10 Sickles, 169.

No distinction has been recognized in these cases between the phrases "die by his own hand" and "die by suicide." They were held to be synonymous in—

Eastabrook *v.* The Ins. Co., 54 Maine, 224.

The only case deciding the question negatively is—

The Ins. Co. *v.* Terry, 15 Wall. 580.

This Court, which has not yet decided the question, ought not to be bound by a decision of the Supreme Court of the United States on the subject of insurance, which should be of State jurisdiction.

G. R. Snowden, contra.

Granting that Boileau knew that throwing himself into deep water would produce death, the fact remains that the jury found he was insane, and therefore without moral or intellectual capacity. His act was not suicide, which is a *felonious* self-killing.

4 Sharswood's Blackstone, 188.

The precise question at issue, as the plaintiff in error admits, was decided in the Supreme Court of the United States. Mr. Justice HUNT, in delivering the opinion, reviews most of the cases cited by the plaintiff in error. There are peculiar reasons why this decision should be followed here. Many life insurance companies, among them the corporation here sued, have offices in several States. If this action had been brought, as it might have been, in the United States Court, Terry *v.* Ins. Co. (*supra*) would certainly have been binding.

In the Ins. Co. *v.* Issett's Adm'r (24 Sm. 176) the Court was requested to charge, "If Issett at the time of his death was conscious that death would follow the discharging of the pistol in his own hands there can be no recovery." This point was negatived and the answer was sustained.

Insanity is a disease, and suicide by an insane person is a death by disease.

Eastabrook *v.* The Ins. Co., 54 Me. 224.

A policy of insurance should be construed most strongly against the insurer, and liberally in favor of the insured.

Brink & Co. *v.* The Ins. Co., 5 Rowell (Vt.), 442.

May 8, 1878. THE COURT. By the facts agreed upon at the trial, and by the verdict, it was established that James M. Boileau's death was caused by his own act, that he was insane at the time; that he intended to take his life; and that he knew that death would result from the act committed.

The suit was upon a policy of insurance on

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Mr. Boileau's life, and contained a provision that if he should "die by suicide" it should be null and void. The effect of that provision on the rights of the plaintiff, in view of the established fact of the insanity, has been the point especially in controversy. On the one hand, the ground was taken that the word suicide cannot properly be applied to a voluntary death, unless caused by an act done by a person of sound mind, and capable of measuring his moral responsibility for his conduct. On the part of the defendants, it was contended that the word is synonymous with death by one's own hand, simply signifying the killing of one's own self, and whether he is sane or insane when he kills himself depends on his knowledge or ignorance of the consequences of the act.

The jury were instructed that the clause of forfeiture in the policy would not bar a recovery if they should find Mr. Boileau to have been insane, and that insanity would be made out if they should find that his anxieties and sufferings had "so entirely overpowered his judgment as to render him unable to distinguish between right and wrong."

Undoubtedly the weight of authority, or rather the preponderance of decisions, in England and this country, has been in support of the legal theory of the counsel for the defendants. But it is believed that the class of cases to which The Mutual Life Insurance Company of New York *v.* Terry (15 Wallace, 580) belongs furnish the safer and better rule. The clause of the policy relied on was not a covenant for the performance of a duty under a mutual contract. It was scarcely a condition even. It was a provision for the absolute forfeiture of the rights of the insured on the happening of the specified contingency. Premiums were paid from the 14th of February, 1872, until the death occurred. To serve the purposes of the defendants, it is requisite that the existence of conditions under which the clause of forfeiture was to have operation, shall be clearly, strictly, and technically made out. He who receives an instrument, and parts with his money on the faith of it, should have a construction put upon it in his favor, because the words of the instrument are not his, but those of the other party. (Mayer *v.* Isaac, 6 M. & W. 612.)

This principle applies to a condition in a policy of insurance, which, being the language of the company, must, if there be any ambiguity in it, be taken most strongly against them. Notman *v.* Anchor Ass. Co. (4 C. B., N. S., 481). Generally, in legal acceptation and in popular use, the word suicide is employed to characterize the crime of self-murder. It is called "self-murder" in terms in Webster, and is defined to be "the act of designedly destroying one's own life, committed by a person of years of discretion and of sound mind." Self-destruction, under insane impulses so strong as to be beyond the control and restraint of the will, is a result produced by disease, for which the victim of it is no more morally responsible than he would be for any other of the maladies of which men die. The disease, when it manifests itself in that form of melancholia which creates a prevailing propensity to suicide, consists in the unfounded and morbid fancies of the sufferer regarding his means of subsistence or his position in life, or in distorted conceptions of his relations to society or his family, of his rights or duties, or of dangers threatening his person, property, or reputation. "When the melancholic hallucination has fully taken possession of the mind," says Abercrombie, "it becomes the sole object of attention, without the power of varying the impression, or of directing the thoughts to any facts or considerations calculated to remove or palliate it. The evil seems overwhelming and irremediable, admitting neither of consolation nor hope. For the process of mind calculated to diminish such an impression, or even to produce the hope of a palliation of the evil, is precisely that exercise of mind which in this singular condition is lost or suspended, namely, the power of changing the subject of thought, of transferring the attention to other facts or considerations, and of comparing the mental condition with these and with the actual state of things; under such a conviction of overwhelming and hopeless misery, the feeling naturally arises of life being a burden, and this is succeeded by a determination to quit it. When such an association has once been formed, it also fixes itself upon the mind, and fails to be corrected by those considerations which ought to remove it." (Wh. & Stillé's Med. Jur. § 206.) When the disease attains a stage at which the mental power to judge of the moral nature of the act is entirely gone, self-destruction does not become suicide in the sense of self-murder. Such an act has never involved criminal responsibility and punishment, and it should not be followed, except under express stipulation, by a forfeiture of contract rights. The rule adopted by WILLARD, J., in Breasted *v.* Farmers' Loan Co. (2 Am. L. Reg. 358), was a safe and just one: "It must occur to every prudent man, seeking to make provision for his family by an insurance on his life, that insanity is one of the diseases that may terminate his being. It is said the defendants did not insure the continuance of the intestate's reason. Nor did they, in terms, insure him against smallpox or scarlet fever; but had he died of either disease, there is no doubt that the defendants would have been liable. They insured the continuance of his life. What difference can it make to them or to him whether

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it is terminated by the ordinary course of disease, in his bed, or in a fit of delirium he ends it himself? In each case the death is occasioned by a means within the meaning of the policy, if the exception contemplates, as I think it does, the destruction of life by a rational agent responsible for his act."

But it has been urged that the steps taken by Mr. Boileau to destroy his life were consciously intelligent, and that he knew what the consequence of taking them would be. There is no doubt that he had such knowledge. His very purpose was to kill himself. Such a degree of intelligence may well coexist with faculties so distorted and a mind so shattered by long-continued suffering as to inspire a morbid impulse the nature of which the weakened judgment cannot measure, and the execution of which the uncertain and feeble will cannot restrain. Almost every insane man knows that food will satisfy hunger and that water will quench thirst. He is able to realize that fire will burn him, that blood will follow the blow of a knife, and that he will feel pain if his flesh is torn; and he acts consciously throughout his life on such knowledge. It survives often among the instincts of the man after the intellect is wrecked. But the effect of a partial mental aberration is concentrated upon the faculties involved in the disease.

In McElroy's Case (6 W. & S. 451) Judge HUSTON said, that all treatises on insanity, and most reports of trials relating to insane persons, show that a total loss of reason and memory is unknown to Courts and physicians, unless in cases of delirium from disease or absolute frenzy; and yet commissions of lunacy are constantly found and deeds and wills avoided for insanity. In the opinion the Judge quoted the remark of Lord HALE, that "some persons that have a competent use of reason in respect to some subjects, are under a particular dementia in respect to some particular discourses, subjects, or applications."

He quoted also from the argument of Mr. Erskine in defence of Hatfield the statement which was adopted in the judgment that "in all cases which have filled Westminster Hall with the most complicated considerations, the lunatics and other insane persons who have been the subjects of them have not only had the most perfect knowledge and recollection of all the relations they stood in towards others, and of the acts and circumstances of their lives, but have in general been remarkable for subtlety and acuteness. Defects in their reasonings have seldom been traceable. The disease consisted in the delusive sources of thought; all their deductions within the scope of the malady being founded on the *immovable assumption* of matters as realities, either without any foundation whatever, or so distorted and disfigured by fancy as to be nearly the same thing as their creation." In every respect this cause was determined accurately in the Court below. The charge was subject to no valid objection, and the judgment was properly entered for the plaintiff on the point reserved.

Judgment affirmed.

Opinion by WOODWARD, J.

Jan. '78, 242. March 15, 1878.

Lehigh Valley Coal Co. v. Jones.

Negligence—Master and servant—Mining operations—Responsibility of master for injuries to a servant by an accident caused by negligence of a fellow servant—Who are fellow servants.

In order to bring a case within the rule that a master is not responsible for an injury happening to a servant through the negligence of a fellow servant, it is not necessary that the injured and the negligent servants should be engaged in the same particular work, it is sufficient if the general scope of their employment be the same.

A "driver boss" was killed in a coal mine by an explosion caused by the negligence (if any neglect there was) of the "mining boss," who had given an order to reduce the supply of fresh air:

Held, that the two were fellow servants within the meaning of the rule, and that the owner of the mine was not responsible.

To prove contributory negligence, testimony is admissible to show that the deceased, at the time of his death, was in a position which he had been warned, and himself had warned others, to avoid as dangerous.

Mullan *v.* Steamship Co., 28 Sm. 25, 1 WEEKLY NOTES, 218, explained.

Error to the Common Pleas of Luzerne County.

Case, by Gilbert Jones against the Lehigh Valley Coal Company, for negligently causing the death of the plaintiff's son. Plea, "not guilty."

Upon the trial, before STANTON, J., the following facts appeared: The defendants are the owners of a coal mine. On February 12, 1876, mining being temporarily suspended, a party of men, among whom was deceased, were employed in making certain repairs. The mine was supplied with all the machinery necessary for proper ventilation, and more than that required by the Act of Assembly of March 3, 1870 (Purd. Dig. 1069). The method employed was by "sucking or drawing the air from some distant inlet called the 'down-cast' through the mine, and thence up through what is called the 'up-cast,' which is near the shaft." In order to conduct these currents of air, and to shut off those parts of the mine which have been worked and are not in use, doors are erected at intervals, and the several openings (from one gangway or chamber to another) are kept closed.

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On the day of the accident, about thirty men were employed at the foot of the shaft near the current of air. Complaint was made by the men to the mine boss Reese, that it was impossible to work by reason of the immense volume of air passing them. The fan was then going at sixty revolutions per minute. It was slowed (by Reese's order) to about thirty-five. The testimony showed that this was amply sufficient, and would produce much more air than the Act required. As a measure of precaution, however, Reese warned the men not to go near the doors of the closed gangways, and this warning was repeated by Jones to his inferiors. An explosion took place, after which Jones's body was found inside one of the closed gangways, his body burned, giving rise to the suspicion that the gas had become ignited from his own lamp.

The testimony of the general superintendent of the company showed that Mason, "the outside foreman," had charge of the coal when it was brought to the surface, and of the engine and machinery. Davis was the "fire boss," whose duties were to ascertain each day whether there was gas in the mine. Reese, a "mining boss," had charge of the ventilation, etc. Thomas Harris was likewise a mining boss.

The deceased was a driver boss. His duty was to keep the miners supplied with cars, etc. When last seen alive he was talking with Harris. When found, his body was lying in one of the closed gangways alongside of some empty cars.

The defendants offered to prove by Thomas Stevens that the deceased told him, a day or two before the accident, "not to go off from the main gangways, or through any door." Objected to. Objection sustained. Exception. (Twelfth assignment of error.)

The plaintiff's counsel requested the Court to charge: First. If the jury believe that A. Reese had entire charge of the mining and ventilation of this shaft, and that A. G. Mason had entire charge of the machinery and engines, and that by the orders of both Reese and Mason the revolution of the fan was slowed to an unsafe degree, and that the deceased lost his life in consequence while in the ordinary discharge of his duty, then the verdict should be for the plaintiff. *Affirmed.*

Second. If the jury believe that the accident in question occurred to the deceased while in the ordinary discharge of his duty, through the negligence and want of due care on the part of the defendant, who had control of the mining and ventilation of the shaft and colliery, then the verdict should be for the plaintiff. *Answer.* To this we say your verdict should be for the plaintiff if you find that there was not contributory negligence on the part of Alexander Jones.

Defendants requested the Court to charge that under the evidence the verdict must be for the defendants. *Refused.* (Eleventh assignment of error.)

In the general charge the Judge said: "[When a company or an individual gives over to an agent all or any part of his business to perform, and leaves the exclusive control of it and all the discretion pertaining thereto in the hands of said agent, anything that results from the negligent performance of such duties, the company is to be held answerable for. Taking in this case, Col. Mason, Mr. Reese, Mr. Davis, the gentleman who was killed, and Thomas Harris, they were the company's agents in this case, and for any act of negligence on their part in the line of duty assigned to them, the company is to be held responsible by you.]" (Fourth assignment.)

"According to the testimony on the part of the plaintiff, he (deceased) was a careful, industrious, and diligent young man. [According to that testimony he was very much afraid of explosions of gas.] About two o'clock of the afternoon of that day, according to this evidence, an explosion of gas occurred in that mine, and he was killed thereby. [Now if you find that he was simply performing his duty there, that he was then in the line of his duty, and that this explosion occurred on account of the negligence of the defendants, then Gilbert Jones is entitled to damages for the life, or rather for whatever he has lost, by the death of his son.]" (Sixth assignment.)

Verdict and judgment for plaintiff for $3600. Defendants took this writ, assigning as error, *inter alia*, the exceptions to evidence above noted, and the portions of the charge within brackets

Henry M. Hoyt (*J. Vaughan Darling* and *Samuel Dickson* with him), for plaintiff in error

The portion of the charge covered by the fourth assignment is not a fair presentation of the law. It cannot be sustained even by Mullan *v.* Steamship Co. (28 Sm. 25), which is the strongest case that can be found. All that was held in that case was, that under the evidence it was for the jury to say whether the superintendent had been clothed with such unlimited authority as to make him fully the representative of the company. Here the jury was charged that several of our employés *were* so clothed, and no question therefore was left to the jury at all. Jones, Reese, and Mason were but fellow workers.

Gallagher *v.* Piper, 16 C. B. (N. S) 669.
Feltham *v.* England, L. R. 2 Q. B. 33.
Searle *v.* Lindsay, 11 C. B. (N. S.) 429.
Caldwell *v.* Brown, 3 Sm. 453.
Frazier *v.* R. R. Co., 2 Wr. 104.
Weger *v.* Penna. R. R., 5 Sm. 460.

The Court erred in declining to affirm our point; there was no evidence of negligence either of the company or of its employés.

Rice and *Famaline*, for defendant in error.

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Many of the authorities cited by the plaintiff in error as bearing on the fourth assignment of error, are irrelevant. We do not dispute the doctrine of non-liability for the acts or negligence of a fellow servant. We deem the remarks of the Court in reference to Colonel Mason, Thomas Harris, and Edward Davis as unessential, and as not having tended to influence the jury in their deliberations upon the verdict. It was nowhere claimed that Davis or Harris were the parties causing the injury. Even with this statement from the Court, if the jury found, agreeably to our points, that A. Reese had entire charge of the mining and ventilation, and that the accident resulted from the negligence of the agent or agents of the defendants, the verdict must be sustained; for there can be no doubt as to Reese's functions, nor that his deliberate act caused the injury.

May 6, 1878. THE COURT. This suit was brought by the defendant in error to recover damages for the death of his son, Alexander Jones. He was killed by an explosion of gas in the colliery of the plaintiff in error, known as the "Exeter shaft," and while in the employ of the company. It is claimed that the explosion was caused by an insufficient supply of fresh air.

This mine was ventilated by the method usually practised in the coal fields of Wyoming. It is by drawing the air through an inlet called a "down cast" into the mine, and having passed it through the mine, then up and out by what is called the "up cast," which is near the shaft. The movement of the air is effected by means of a "suction fan." It creates a vacancy, and that vacancy is filled by the natural pressure of the atmosphere, thereby creating a continuous current. A current of fresh air is thus drawn in and thrown out, and the gas passes out with it. The fan is a wheel of about twenty feet in diameter, having paddles thereon of about six feet in width. Its effectiveness depends on the rapidity of its revolution. The quantity of fresh air necessary to be passed through the mines depends on the number of men employed therein. The 7th section of the Act of 3d March, 1870 (Purd. Dig. 1069, p. 7) declares that in every mine or colliery an adequate amount of ventilation shall be provided "of not less than fifty-five cubic feet per second of pure air, or thirty-three hundred feet per minute for every fifty men at work in such mine, and as much more as circumstances may require." The defendant in error proved by James Bryden that the fan in use at the time of this accident was of sufficient capacity, when driven, to thoroughly ventilate the mine, and that from thirty-five to forty revolutions a minute would secure perfect ventilation. Also that at about forty revolutions a minute the cubic contents of the ventilation would be about sixty thousand feet per minute. At the time of the accident there were only twenty-nine or thirty men at work in the mines. Hence the ventilation at forty revolutions per minute would be thirty times greater than the statute required. No witness testified that the fan was either defective in construction or insufficient in capacity to properly ventilate the mine. The complaint was that the revolution of the fan was so lessened that it did not remove the noxious gases, and the explosion therefore resulted.

It appears that some days prior to the explosion all general work in the mine had been stopped. Most of the three hundred persons or thereabouts who had been at work were discharged. Some thirty only were retained. They were engaged in making some improvements and repairs in the mine, which could not well be done when it was in full operation. Alexander Jones was one of these men. They were at work near the foot of the shaft, and so near the current of air as to be annoyed thereby. They complained to Mr. Reese, the "mine boss," that this large volume of air made it difficult for them to work. At their request the fan was "slowed down." The natural effect of this would be to check the removal of the carburetted hydrogen, and therefore to permit more of it to remain in the mine. Jones's body was found in a side chamber inside of a door shutting off that gangway from the one in which the men were at work, and a few hundred feet from them. Whether any duty called him into that gangway does not clearly appear. The marks of burning found on his person would indicate that his lamp caused the explosion, but the jury has found that he was not guilty of any contributory negligence. The main question now presented for our consideration is, whether there was any evidence of negligence for which the plaintiff in error is liable? It is claimed that the negligence, if any, was that of Jones's fellow servants, for which the company is not liable.

It is well settled in England and in Pennsylvania and pretty generally in this country, that a servant who is injured by the negligence or misconduct of a fellow-servant cannot maintain an action against the master for such injury. If, however, there be fault in the selection of the other servant, or in retaining him in his place after he was proved incompetent, or in employing unsafe machinery, the master may be liable. So if the master has placed the entire charge of the business in the hands of an agent, exercising no authority and no superintendence of his own therein, he may be liable for the negligence of such an agent to a subordinate employé. This rule of liability for the negligence of a general agent applies whether the master be an individ-

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ual or a corporation. Owing to the fact that the business of corporations is transacted by means of agents, they would escape the just measure of liability unless this rule applied to them. In this respect, both as to liability and for protection, they stand on the same footing with individuals.

The question arises, who are fellow-servants in contemplation of law? To constitute such they need not at the time be engaged in the same particular work. It is sufficient if they are in the employment of the same master, engaged in the same common work, and performing duties and services for the same general purposes. The rule is the same, although the one injured may be an inferior in grade, and is subject to the control and direction of the superior whose act caused the injury, provided they are both co-operating to effect the same common object. The true reason upon which I think this rule rests is, that one who enters the service of another takes on himself all the ordinary risks of the employment in which he engages, and that the negligent acts of his fellow-workmen in the general course of his employment are within those ordinary risks. Omitting numerous cases which sustain the principle we have stated, we will content ourselves with citing Wilson *v.* Merry (English Law Rep. 1 H. L. Scotch Ca. 326); Hall *v.* Johnson (34 L. J. Rep. Exch. 222); Morgan *v.* The Vale of Neath Railway Co. (35 L. J. Q. B. 23); Howell *v.* Landore Siemons Steel Co. (L. R. 10 Q. B. 62); Albro *v.* Canal Co. (6 Cush. 75); Gilsshannon *v.* Stony Brook R. R. Co. (10 Id. 228); Gilman *v.* Eastern Railroad Co. (10 Allen, 239); Russell *v.* Hudson R. R. Co. (17 N. Y. 134); Boldt *v.* N. Y. Central R. R. Co. (18 Id. 432); Wright *v.* Same (25 Id. 562); Fort *v.* R. R. (2 Dillon, 259); Chicago and A. R. R. *v.* Murphy (53 Ill. 336); Wonder *v.* B. & O. R. R. Co. (32 Md. 411); Ryan *v.* Cumberland Valley R. R. Co. (11 Harris, 384); Frazier *v.* Penna. R. R. Co. (2 Wright, 104); Caldwell *v.* Brown (3 P. F. Smith, 453); Weger *v.* Penna R. R. Co. (5 Id. 460); Ardesco Oil Co. *v.* Gilson (13 Id. 146); Patterson *v.* Pitts. & Connellsville R. R. Co. (26 Id. 389); Mullan *v.* Phila. & South. Mail Steamship Co. (28 Id. 25).

In the part of the charge covered by the fourth assignment, the learned Judge said to the jury, "that Colonel Mason, Mr. Reese, Mr. Davis, and Thomas Harris were the company's agents in this case, and for any act of negligence on their part in the line of duty assigned to them the company is to be held responsible by you." The question then is, did the evidence show that these persons, or either of them, sustained such relation towards the plaintiff in error as to make it liable for their misconduct?

The company had one general superintendent over all these men. He was one of the witnesses called and sworn in behalf of the defendant in error. He testified that he was superintendent of all its collieries in the neighborhood; that he had the general control of the management of all these collieries; that Colonel Mason was the "outside foreman" and Mr. Reese the "inside foreman" of the Exeter shaft. That the duties of Colonel Mason were to take charge of the coal when it came out; that he had charge of the breakers, engines, all outside men; but was not superintendent of the inside work. It appears that Mr. Reese, called by the general superintendent "inside foreman," was also known as the "mining boss." He had the entire control of the inside operations in regard to workingmen employed and the ventilation, subject to orders from the general superintendent. The 8th section of the Act of 3d March, *supra*, requires the employment of a mining boss, who shall keep a careful watch over the ventilating apparatus and all things connected with and appertaining to the safety of the men at work in the mine. Presumably these duties were assumed by him. Harris was an assistant under him, and to a considerable extent performed the duties of a mining boss. Mr. Davis was the "fire boss." His duties were to go down the shaft every morning before the men went to work, and to ascertain whether there was any gas, and report to the men before they went down. Lines was the engineer in charge of the fan and pump engine. He had control of the revolutions of the fan, under instructions from Colonel Mason and Reese, and by their orders he "slowed down" the fan a few days prior to the explosion. Alexander Jones was the "driver boss." His business was to get cars for those needing them, and to see that the drivers properly discharged their duties in moving the coal.

Thus it is shown that the foremen and bosses and their assistants, including the engineers, miners, and drivers, whether at work inside or outside of the mine, were all engaged in the same common work, and performing duties and services to effect the same general object. That purpose and the object was to take the coal from its natural bed, lift it to the surface, and prepare it for market. It is true each had his allotted work to perform, yet nevertheless they were all fellow-servants or fellow-workmen seeking to reach the one common object and accomplish the one common purpose. Some of the employés were superior in the grade of their employment to Alexander Jones; others were inferior. Whether superior or inferior, they, as well as he, were all under one common superintendent. In his hands and in his alone was the entire charge of the business placed by the company. His negligence might be the negligence of the com-

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pany. In this case no negligence is imputed to him either in the selection or retention of unworthy employés, nor in using unsafe machinery.

It therefore follows that the learned Judge erred in charging that the company was liable for the negligence of certain of its foremen and bosses, which resulted in the death of another boss. The latter took on himself that risk as a part of the ordinary risk of his employment when he became engaged in the same common service with them. Under the most careful management mining is attended with danger, and persons engaging therein must be presumed to knowingly incur the ordinary risks incident thereto. Nor do we think the liability of the company for the act of its mining boss is changed by the fact that he is appointed pursuant to a statute, where it has a general superintendent over him who has power to direct and control him. We discover no sound reason for any distinction. In either case the company must appoint a competent and suitable person, and provide suitable and safe machinery. He is to "carefully watch" and "to see" for the purpose of protecting from danger all men at work in the mines, says the statute. This, however, does not displace or supersede his superior to whom he may be required to report. Howell *v.* Landore Siemens Steel Co., *supra*. The conclusion we have reached is not in conflict with the law of Mullan *v.* Phila. & Southern Mail Steamship Co. (28 Sm. 25). The facts show that to be a close case. It is very near the dividing line; yet we thought the evidence sufficient to go to the jury under proper instructions. As stated in the opinion of our brother WOODWARD, there was some evidence tending to establish that the chief stevedore, whose negligence was alleged to have caused the injury, was clothed with the ultimate power and authority of the steamship company. It was further said, the jury should ascertain to what extent the plaintiff and the chief stevedore were engaged in a common employment; yet it was expressly said, "it is not designed in any way to impair or affect the rule settled in the cases on which the Court below relied." Hence that case was not intended to overrule, nor did it profess to, any of the numerous decisions which have so clearly settled the law against the right of an employé to maintain an action against his master for the negligence of his fellow-workman. We think the learned Judge erred in excluding the evidence covered by the twelfth assignment. It bore directly on the question of Jones's negligence in entering the gangway in which his body was found. The point submitted by the plaintiff in error should have been affirmed. The fourth, sixth, eleventh, and twelfth assignments are sustained. We cannot say there is any substantial error in the other assignments.

Judgment reversed.

Opinion by MERCUR, J.

Jan. '78. March 20, 1878.

The Township of East Union v. Ryan.

Negotiable instruments—What are not—Warrants on township treasurer—Demand—Special jurisdiction.

Warrants upon a township treasurer issued to a contractor or bearer by Commissioners appointed to view and open a State road, are not negotiable instruments, entitling the holder to bring suit upon them in his own name.

When such warrants are to be paid out of a special tax, a demand on the township treasurer is necessary before a suit can be maintained on the warrants.

Where an Act of Assembly appointed Commissioners to view and open a State road, and prescribed that they should take an official oath; that they should let contracts to the lowest and best bidder, and should examine and approve the work before issuing warrants in payment thereof:

Held, that the plaintiff, in an action on the warrants, must prove a strict compliance by the Commissioners with all the requirements of the Act.

Error to the Common Pleas of Schuylkill County.

Assumpsit, by Patrick Ryan against the township of East Union to recover the amount of two warrants drawn on the township treasurer.

The narr. averred that the Commissioners appointed by Act of 7 April, 1873 to view and open a State road at the expense of the various townships through which the same should pass, did view and locate the road through the township of East Union, and did let the construction thereof to one Andrew Comrey, who duly complied with his contract; and that the said Commissioners, as required by the Act, did issue their warrants to the township treasurer in favor of said Comrey, who, for a valuable consideration, assigned them to the plaintiff. Plea, non assumpsit.

On the trial, before WALKER, J., the plaintiff put in evidence the Act of 7 April, 1873,* and

* The material provisions of the Act of 7 April, 1873 (P. L. 541), are as follows:—

SECTION 1 appoints William H. Barlow, John R. Porter, and Philip Huntzinger Commissioners, to view, lay out, and open a road from a given point in Schuylkill County to another point in Luzerne County.

SECTION 2 requires the Commissioners, after taking and subscribing an oath or affirmation to perform the duties enjoined upon them by the Act with fidelity and impartiality, to carefully view the ground on which said road shall pass, and lay out and mark the same, or the route agreed upon by them for the road, and authorizes them to employ a surveyor, etc.

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called Andrew Comrey, who testified that he was the contractor for the building of the road through East Union township, and that the warrants or orders in suit were issued by the Commissioners to him, and were by him endorsed to the plaintiff. He was not positive that his contract with the Commissioners was in writing, but thought that it was.

The plaintiff, for the purpose of establishing his claim, then offered the two warrants, as follows:—

No. 67. Mahanoy City, June 1, 1874.

To Henry Miller, Treasurer of the Township of East Union, in the County of Schuylkill, State of Pennsylvania.

Pay to Andrew Comrey, or bearer, Two hundred dollars, and charge to the account of State Road in the Counties of Schuylkill and Luzerne, authorized by Act of Assembly, approved April 7, 1873.

$200. WILLIAM H. BARLOW,
JNO. R. PORTER,
PHILIP HUNTZINGER,
Commissioners.

No. 68. Mahanoy City, June 1, 1874.

To Henry Miller, Treasurer of the Township of East Union, in the County of Schuylkill, State of Pennsylvania.

Pay to Andrew Comrey, or bearer, Five hundred dollars, and charge to the account of State Road in the Counties of Schuylkill and Luzerne, authorized by Act of Assembly, approved April 7, 1873.

$500. WILLIAM H. BARLOW,
JNO. R. PORTER,
PHILIP HUNTZINGER,
Commissioners.

SECTION 3 enacts that the Commissioners shall deposit a draft of the location of the road in the office of the Court of Quarter Sessions of the several counties through which the road shall pass; that within thirty days after the filing of the draft they shall give public notice that upon a certain day and place they will receive proposals for the opening and making either the whole or certain portions of the road; that on the day appointed they shall open the proposals and award the contract to the lowest and best bidder; said contractors to file with the Commissioners, within five days after the award of contract, bonds for the faithful performance of their duties under their contracts and specifications.

SECTION 4. The said Commissioners are hereby authorized and empowered to draw warrants in favor of the contractor or contractors, on the treasurers of the several townships through which said road shall pass, for such sum as may be necessary to build or construct so much of said road, as the relative length in such township may be to the entire length thereof, and the several townships through which said road shall pass are hereby authorized and empowered to levy and collect a special tax, not exceeding two mills in any one year, on the assessed valuation of such township; said tax shall be levied and collected at the same time and in like manner as other county and township rates and levies are made and collected; said tax so collected shall be applied only to the payment of the warrants hereinbefore mentioned.

SECTION 5. The said Commissioners are hereby authorized and required to examine said road as the work progresses, and draw warrants in payment thereof in proportion to the amount of work performed, and no warrant shall be drawn until the work shall be approved by said Commissioners; should any contractor or contractors fail to do their work in a good and workmanlike manner, then, and in that case, the said Commissioners are hereby authorized to re-let such work at the expense of the original contractor or contractors.

The defendant objected (1): Because the warrants were issued to Andrew Comrey, who was not the plaintiff in the action. (2) Because the conditions precedent to the right to issue warrants under the Act of 7 April, 1873, not having been shown, the evidence proposed was incompetent to establish the plaintiff's claim. (3) Because, if the warrants were properly issued, the Act provided for their payment out of a special fund, and the remedy, if any, was by mandamus, and not by suit. The Court admitted the evidence; exception.

The plaintiff testified that he worked for Comrey on the road in East Union township, and received the warrants in payment.

The defendant, offering no evidence, moved for a non-suit, which the Court declined to enter, and directed a verdict in favor of the plaintiff for the amount of the warrants without interest. Verdict and judgment for plaintiff accordingly ($700). The defendant took this writ, assigning for error the admission of the warrants in evidence.

The following statement was made in the paper book of the defendant in error: "The question raised upon the admission of the orders in evidence, that the suit was not brought in the name of the payee in the orders, was obviated in the Court below by a motion to amend the whole record, by adding the name of Andrew Comrey for the use of Patrick Ryan as plaintiff. By some mistake of the reporter, this was not entered on his notes as a part of the record."

Lin Bartholomew and *E. O. Parry*, for the plaintiff in error.

The Act of 7 April, 1873, is plainly a statute derogatory to private property, and as such must be construed strictly. (Dwarris on Stat. 750.) Where a special jurisdiction is given to any body of men, it must be strictly pursued. (Wistar *v.* Kammerer, 2 Yeates, 204.) There was no control over the Commissioners as to the price of making the road. They might draw warrants on the township treasurer for any sum, which must be paid out of the special fund provided in the Act. But the Act required them to examine the road as the work progressed, and draw warrants in payment thereof in proportion to the amount of work performed, and no warrant was to issue until they had approved the work. This is an essential prerequisite to the right to draw warrants, and the plaintiff ought to have shown the examination and approval of the Commissioners before his warrants could be considered of any validity

The officers and tax payers of the township are entitled to the decision of the Commissioners that the work is properly done (Kennedy *v.* Board of Health, 2 Barr, 366); but if they be not entitled to that decision, then the Act of 1873 is unconstitutional.

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Philadelphia *v.* Scott, 31 Sm. 80; 2 WEEKLY NOTES, 714.

The suit should have been upon the original claim, not upon the warrants, and a demand must be made before a suit can be maintained.

Allison *v.* Juniata Co., 14 Wright, 351.
Luzerne Co. *v.* Day, 11 Harris, 143.

If an instrument loses its negotiable character by being made payable out of a particular fund, it does not *per se* import consideration. And consideration must be proved, unless it be stated on its face that it was given for value received, or some equivalent, or there are expressions in it inconsistent with any other theory

1 Daniels on Negot. Instr.

The warrants were to be paid out of a special fund, and it cannot be inferred that it was the Legislature's intention that this tax should be levied and collected until some basis had been furnished by the Commissioners.

James Ryon and *John W. Ryon*, contra.

If the suit were erroneously brought in the name of the equitable plaintiff, the record could be amended in this Court, and the Court will consider such amendment made.

Shryock *v.* Bashore, 3 WEEKLY NOTES, 360.

The warrants were an acknowledgment of indebtedness; they were issued by the proper officers. It was not necessary to prove a consideration.

Dyer *v.* Covington Township, 7 Harris, 200.
Pitt Township *v.* Leech, 2 Jones, 33.
City of Phila. *v.* Burgin, 14 Wr. 539.

The warrants were evidence of indebtedness.

Thompson *v.* Commonwealth, 31 Sm. 314; 3 WEEKLY NOTES, 196.

The plaintiff was bound to show only the Commissioners' appointment, and that they acted under it.

Neale *v.* The Overseers, 5 Watts, 538.

They were public officers, and the presumption is that they performed their duty.

The question of demand before suit was not raised in the Court below, and does not arise in this Court on any assignment of error. The orders, however, are not of that class which requires a demand before suit brought.

Commonwealth *v.* Pittsburgh, 10 Casey, 512.

They are payable by special tax, and the only purpose of obtaining this judgment is that we can compel the township by mandamus to levy the tax. A mandamus will not lie until after judgment.

Hester's Case, 2 W. & S. 416.

The case of Luzerne County *v.* Day ruled only that if the County Commissioners refused a warrant, an action would lie. But that case is shaken by

Allegheny Co. *v.* Shaw, 10 Casey, 301

May 6, 1878. THE COURT. It was a fatal objection to the admissibility of the warrants of the State Road Commissioners, that they were drawn in favor of Andrew Comrey, while Patrick Ryan was the plaintiff in the action. It is true they were made payable to Comrey "or bearer," but that did not give them any of the qualities of commercial paper. In Reeside *v.* Knox (2 Wharton, 233), it was decided that a draft by a mail contractor, payable to his own order, on the Postmaster-General, was not a negotiable bill of exchange, so as to entitle a holder to sue in his own name. It was said in the opinion of the Court that an indispensable element in the constitution of negotiable instruments is, an absolute and entire freedom from contingency of payment depending on the happening of an event, or the solvency of a fund. Where a defendant had been convicted of the larceny of a county order, the judgment was reversed because the instrument was not within the terms of the Act of the 5th of April, 1790, making it a felony to steal obligations, or bonds, bills obligatory, bills of exchange, promissory notes for the payment of money, lottery tickets, paper bills of credit, or certificates granted by or under the authority of this Commonwealth, or of all or any of the United States of America. (Warner *v.* The Commonwealth, 1 Barr, 154.) Orders drawn by supervisors or a township treasurer, "payable out of moneys arising from road taxes," are not bills of exchange, nor contracts of any kind, and in a suit on them interest is not recoverable. (Dyer *v.* Covington Township, 7 Harris, 200.) The holder of a county warrant or order cannot recover interest after demand and non-payment for want of funds. Such a warrant is not a bill, note, check, or contract, nor is it a satisfaction of the original indebtedness. (Allison *v.* Junaita County, 14 Wright, 351.) In that case an opinion was strongly intimated by Judge Thompson that an action would not lie on such a paper, but there was nothing to call for a decision of that question.

In The First National Bank of Northumberland *v.* The Rush School District (2 WEEKLY NOTES, 471), the plaintiffs gave in evidence an order signed by the president and secretary of the school board, on the treasurer of the school district, in favor of Abel Marcy, and proved Marcy's endorsement. A non-suit was ordered by the Common Pleas, and the judgment was affirmed.

While the point was not distinctly made at the trial, it sufficiently appears that the verdict was obtained without any proof whatever of demand on the township treasurer. It is not necessary for the purposes of this cause to attempt an analysis of the cases in which the rule of Luzerne County *v.* Day (11 Harris, 143) has been followed, overlooked, or disregarded. The Commissioners of this State road were appointed by a special Act of Assembly. Forming no part of the

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pervading governmental system of the Commonwealth, responsible to no existing constituency, and controlled by none of the restraints or limitations, and subject to none of the penalties by which the faithful performance of the duties of ordinary municipal officers are secured, these gentlemen were clothed by the Legislature of 1873 with power to appropriate private property for the uses of a highway, to enter into contracts for opening and making it, to take bonds from contractors, to decide finally and without appeal on the character of the work done, and to draw warrants on the treasurers of the townships through which the road should be laid for their respective proportions of the costs of construction. No supervision or control over the work, no participation in it even, was allowed to the township authorities. They were to have no part in settling prices or selecting contractors—no inspection of the road by them during its progress or at its completion was authorized—they had no power to inquire whether the entire expense were equitably apportioned or not—no provision for auditing accounts was made—no limit of expenditure was fixed—and no notice even of the number of warrants to be drawn on the treasurer of any township, or of the amounts to be drawn for, was prescribed. The townships were simply to pay. Done well or ill, the cost of the work, as adjusted by the Commissioners, was provided to be met by a special tax in addition to the current burdens of the municipalities. Under such a statute, before they should become liable to be harassed by a lawsuit, it would seem just that the township officers should be afforded the opportunity at least of ascertaining the weight of the load they were called upon to bear. The construction of this highway was to be paid for out of a designated fund, to consist of a tax of two mills on the assessed valuation of the property of each township.

The treasurer had no authority to appropriate to the payment of the warrants of the Commissioners any moneys outside of the fund to be thus raised. Some reasonable notice by the holders of those warrants, conveyed by a demand of payment or in some other form, was requisite in order to fasten a liability upon the township officers. An action for the recovery of the amount of any warrant could only be maintained against them after such notice, and after the lapse of such a period of time as would enable them to collect this tax, "at the same time," in the language of the Act, "and in like manner as other county and township rates and levies are made and collected." These warrants could only be payable after such presentation as would give opportunity to provide the fund exclusively indicated for their liquidation. On other grounds this judgment is unsustainable. The evidence consisted of the Act of Assembly of the 7th of April, 1873, of the two warrants, of the testimony of Andrew Comrey that he was the contractor for the East Union portion of the road, and that he had endorsed the two warrants in suit, which he identified; and of the testimony of Patrick Ryan, the plaintiff, that he was the owner of the warrants, that he had worked for Comrey on the State road, and had taken the warrants in payment, and that Barlow, Porter, and Huntzinger were the Commissioners in charge of the road. The statute required the Commissioners to make oath or affirmation, before entering on their duties, that they would discharge them with fidelity and impartiality. Compliance with this direction was not even alleged in the declaration. The work was to be done under contracts. No contract was shown, and it was not proved that the road was built.

The fifth section contained this provision: "The said Commissioners are hereby authorized and required to examine said road as the work progresses, and draw warrants in payment thereof in proportion to the amount of work performed, and no warrant shall be drawn until the work shall be approved by said Commissioners."

It has been argued that their examination and approval are necessarily to be implied from the fact that they signed the warrants. But they formed for the purposes of this highway not only a new board of administrative officers, but a new tribunal with judicial attributes. A jurisdiction was conferred on them that was in derogation of the common law and in conflict with the general statutes regulating individual and municipal rights. The Act was as novel as it was special. It placed the property of entire communities under the discretionary authority of the Commissioners, without security or responsibility for its exercise. Rights asserted under the powers they wielded ought to be affirmatively made out, and their action should be held subject to strict scrutiny. Before the holder of the warrants can recover a verdict, he must show that the prescribed statutory steps have been duly taken, and the prescribed statutory duties literally fulfilled. The whole current of authority has pursued one direction in holding proceedings under enactments like this to rigorous account. A statute which gives a new remedy by summary proceedings, or other deviation from the ancient constitution, ought not to receive a liberal construction. (Pool *v.* Neal, 2 Sid. 63.) A statute creating a new jurisdiction ought to be construed strictly. (10 Rep. 75.) Private Acts of Parliament conferring new and extraordinary powers of a special nature upon particular persons, affecting the property of individuals, or giving exemption from a general burden attaching by law upon all parties, should receive a strict interpretation. (Rex

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v. Croke, 1 Cowp. 26.) In that case, which arose under an Act for making a road from Blackfriars' Bridge across St. George's Field, Lord Mansfield held the corporation of the city of London, in exercising the power given them, to rigid compliance with the terms of the Act in the minutest details. Marshall's Lessee *v.* Ford (1 Yeates, 195) was an ejectment by a purchaser at a sheriff's sale under a mortgage to the trustees of the loan office, and a precept from one of the trustees. The question was as to the necessity for the production in evidence of the precept and a certified copy of the mortgage as well as the sheriff's deed. The Court said:—

"The summary remedy given under the loan office Acts requires a minute and strict investigation. The mortgage is *instar judicii*, and must, with the precept, be produced as the basis on which the sale rests." "It has been truly said that where the law gives a special jurisdiction to any body of men, it must be strictly pursued. Courts of justice are bound to watch their conduct narrowly, and investigate it minutely." (Wistar's Lessee *v.* Kammerer, 2 Yeates, 100.) Watt's Lessee *v.* Gilmore (2 Yeates, 330) was one of a flood of cases illustrating the exact fidelity with which every act, every document, and every advertisement connected with a sale of land for taxes before the passage of the Act of 1815, was required to be reproduced. In all actions in which a bankruptcy comes in question, unless otherwise provided by statute, it is necessary to go through all the steps before entered into by the Commissioners. (Pleasants *v.* Meng, 1 Dallas, 405.) And in almost every instance of local, limited, and exceptional jurisdiction, the same rule applies. In order to sustain this action it must appear that the directions of the Act have been pursued. It does not follow that the Commissioners were sworn because the law prescribed an oath. The provision that they should examine and approve the work was an injunction on them to investigate, deliberate, and judge.

The fact that the warrants were signed and delivered cannot be taken to imply that they performed that duty, or that a contract was ever made, or that the road has ever been constructed. All that was shown on the trial was, that the Act of Assembly had been passed, and that the Commissioners named in it had issued their warrants on the treasurer of the township of East Union in favor of Andrew Comrey for seven hundred dollars. Compared with what was proved, the margin that was taken for granted was too large.

Judgment reversed, and *venire facias de novo* awarded.

Opinion by WOODWARD, J.

Jan. '78, 114. March 13, 1878.

Wright v. Barber.

Constitutional law—Art. VIII. § 7—Constitution, construction of—Act of April 6, 1868, regulating elections in Luzerne and Wyoming Counties still in force—Act of January 30, 1874.

Art. VIII. § 7 of the Constitution, which provides that all laws regulating the holding of elections shall be uniform throughout the State, does not, in the absence of further legislation on the exact subject, repeal the special Act of April 6, 1868, establishing in Luzerne and Wyoming Counties the "single ticket" system of voting instead of the "flag ticket" system which prevails throughout the rest of the State.

Certiorari to the Quarter Sessions of Luzerne County.

On December 6, 1876, G. R. Wright and thirty others filed a petition setting forth that they were citizens and qualified electors of Luzerne County, and voted at the election for prothonotary and other officers held November 7, 1876; that it had been returned that at the said election A. P. Barber received 16,631 votes, and S. W. Trimmer 15,719 votes for the office of prothonotary; that Barber was therefore returned as elected; and that this election and return were false, fraudulent, and untrue.

The petition, then, in alleging more particularly the grounds of contest, set forth, *inter alia*, (3) that each person who voted for Barber delivered to the persons holding the elections at the respective polls, printed or written tickets on a separate piece of paper folded, only containing the name of A. P. Barber for prothonotary, and that each of the votes cast, returned, and counted for the said Barber was so cast, deposited, counted, and returned on a separate piece of paper, and that this separate ticket or piece of paper did not embrace the names of all county officers voted for at said election, and was not labelled "County;" that the said election was wholly illegal and void, because, under the new Constitution, all laws regulating the holding of elections shall be uniform throughout the State, and if a uniformity existed in the laws regulating the holding of this election for prothonotary, tickets cast, counted, and returned for Barber, would embrace the names of all the county officers voted for, and be labelled "County;" and that therefore all of the votes so cast for Barber should be wholly disregarded, the votes not counted, and the election declared illegal and set aside. This petition was verified, as required by law, by six of the petitioners.

On June 4, 1877, Barber filed his answer, alleging, *inter alia*, that the mode of casting, receiving, computing, and counting votes pur-

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sued at this election was in full conformity with the Constitution and laws of the Commonwealth.

On June 23 the petitioners moved the Court to declare S. W. Trimmer duly elected to the office of prothonotary of Luzerne County, and make such further orders as might be necessary to enforce this decree.

On June 30 the Court dismissed the petition, HARDING, J., delivering the opinion. The petitioners thereupon took this writ of certiorari, assigning for error this action of the Court.

John Lynch (with him *C. L. Lamberton* and *J. T. Lenahan*), for the appellants.

At the time of the adoption of the new Constitution, the Act of March 30, 1866 (P. L. 1866, 92), which directs the use of a separate ticket for each class of officials, Judiciary, State, County, etc., the "flag ticket" system was in force throughout all the State except Luzerne and Wyoming Counties. In those counties, under the special Act of April 6, 1868 (P. L. 1868, 729), the "single ticket" system prevailed, in which a separate ticket is used for each individual voted for. The new Constitution, Art. VIII. § 7, provides that all laws regulating the holding of elections shall be uniform throughout the State. The Legislature, in carrying out their duty to enforce this provision of the Constitution by appropriate legislation, enacted the general Act of January 30, 1874 (P. L. 1874, 31), which, by implication, repealed all prior special acts on the subject, among them the Act of 1868, and made the "flag system" the only method of voting throughout the State.

Johnson's Estate, 9 C. 511.
Bartlet *v.* King, 12 Mass. 545.
King *v.* Cator, 4 Burr, 2026.
King *v.* Davis, 1 Leach's Cases, 306.
Nusser *v.* Commonwealth, 1 C. 126.
Dwarris on Statutes (Ed. 1871), 189.
1 Kent's Comm. 463.
Gwinner *v.* R. R. Co., 5 S. 126.
Commonwealth *v.* Baxter, 11 C. 263.

A. M. Palmer (with him *E. S. Osborne* and *E. H. Chase*), contra.

However it may be the duty of the Legislature, under the new Constitution, to repeal the Act of 1868, they have not done so. The Act of 1874 contains no provision as to the kind of ticket to be used, nor is the use of the single ticket system in any way inconsistent therewith.

Dyer *v.* Covington, 28 Penna. 186.
Street *v.* Commonwealth, 6 W. & S. 209.
Cohen *v.* Commonwealth, 6 Barr, 111.
Shenn *v.* Commonwealth, 3 Grant, 205.
Egypt Street, 2 Id. 455.
Commonwealth *v.* Gregory, 2 Par. 241.

Moreover, even if this mode of voting is irregular, the election of Barber could not be overturned, for no election, no matter how irregularly and unlawfully conducted, can be set aside, where the true result, untainted by fraud, can be ascertained.

Boileau's Case, 2 Parsons, 503.
Skerrett's Case, Id. 509.
Thompson *v.* Ewing, 1 Brewster, 107.
Weaver *v.* Given, Id. 140.
Batturs *v.* Megary, Id. 162.
Wheelock's Case, 82 Penna. 297.

March 25, 1878. THE COURT. The single ticket system of voting existing at the time of the adoption of the Constitution of 1873, still prevails in Luzerne County. The Act of 1874 not having provided a different mode of voting, as to the tickets to be used, from that prescribed by the Act of 1868 for the counties of Luzerne and Wyoming. The Act of 1868 is continued in force by the second section of the schedule to the new constitution. Indeed, the Act of 1874, in its language, seems rather to recognize than to contradict the single ticket system. We discover nothing in it to repeal any then existing lawful mode of voting, as to the kind of tickets to be used.

Decree and order of the Court of Quarter Sessions affirmed.

PER CURIAM.

Jan. '78, 29. March 13, 1878.

Sturges's Appeal.

Execution—Lien of fieri facias—Expiration of.

The lien of a *fieri facias* expires on its return without a levy.

A. issued a *fi. fa.* on a judgment against B., but before the sheriff had levied on B.'s property, the Court granted a rule to stay the *fi. fa.*, "all proceedings to be stayed" during its pendency.

Held, that the failure of the Court to order a levy, although an act of negligence and a hardship on A., did not preserve the lien of the *fi. fa.* after its return without levy, nor give A. any claim to the proceeds of the sale of B.'s property under a subsequent execution.

Appeal from the Common Pleas of Luzerne County.

This was an appeal from a decree confirming the report of the Auditor appointed to distribute a fund arising from a sheriff's sale of the personal property of E. R. Mills.

The following facts appeared from the record: On May 12, 1876, J. P. W. Riley issued a *fi. fa.*, returnable June 5, on a judgment for $1000 which he held against E. R. Mills. On May 15 the Court granted a rule to show cause why this *fi. fa.* should not be stayed at the plaintiff's cost. This rule was made returnable the following September; in the mean time all proceedings on the *fi. fa.* were to be stayed, and the "sheriff to be secured in his levy *if made*." The sheriff's return to the *fi. fa.* was "returned, stayed by order of Court." In September the rule to show cause was discharged.

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On May 31, A. C. Nettleton issued a *fi. fa.* returnable September 12, on a judgment against Mills and one John Stone for $776.53. On July 11, Mills's personal property was sold under this writ for $761.88. At the sale public notice was given that the proceeds would be claimed upon the Riley writ and all parties in interest then agreed that the money should remain in the hands of the sheriff to abide the order of the Court.

M. J. Wilson, the auditor appointed to distribute the fund, awarded the balance remaining after the payment of costs, to Nettleton, on the ground that the lien of the Riley writ expired more than a month before the sale, on its return without a levy.

To this report of the Auditor, Riley filed exceptions. These were dismissed and the report confirmed by the Court, HANDLEY, J., delivering the opinion. From this decree E. B. Sturges, to whom Riley had assigned his judgment, appealed, assigning for error, *inter alia*, (1) the Court's decision that the lien of the Riley *fi. fa.* expired on its return by the sheriff without a levy, and (2) the consequent appropriation of the money in payment of the Nettleton writ.

A. J. Hand, for appellant.

A levy under the Riley *fi. fa.* was prevented only by the granting of the rule to show cause. During the pendency of this rule, no levy could be made without a special order of the Court. This order it was most clearly their duty to make and it would be most inequitable if their failure to do so could impair the appellant's lien.

Irons *v.* McQuewan, 3 C. 196.
Batdorff *v.* Focht, 8 Wr. 195.
Bain *v.* Lyle, 12 Sm. 60.
1 Troubat & Haly, 903, note.

G. R. Bedford (with him *W. H. Gearhart*), contra.

The lien of a *fi. fa.* is lost by its return without a levy.

Commonwealth *v.* Magee, 8 Barr, 248.
Finn *v.* Commonwealth, 6 Id. 462.
Lantz *v.* Worthington, 4 Id. 155.

The application of this well-settled rule works no hardship in this case, for it was owing to the appellant's own laches that a levy was not made. Three days intervened between the issuing of the *fi. fa.* and the granting of the rule to show cause. Moreover at any time before the return day of the *fi. fa.* the appellant could have applied to the Court for a special order to make a levy in order to preserve his lien.

April 1, 1878. THE COURT. The power of the Court to stay the writ has not been questioned. In the execution of such power the duty of the Court to direct a levy to be made and preserve the lien, during pendency of the rule, is well settled. Without special order, that the lien of the writ will continue until the return day may be conceded. The lien of a levy will continue, pending the rule, though no order be made. (Batdorff *v.* Focht, 8 Wr. 195.)

In the absence of a levy, that the lien of a *fieri facias* continues after the return day is unheard of in the jurisprudence of this State.

Among principles not gainsaid are these: A levy may be made by virtue of a writ of *fieri facias* at any time before and on its return day, but not afterwards. By levy on personalty the officer acquires a special property in the goods seized, which he may sell before or after the return day in satisfaction of his writ. Except for the purpose of detention and sale of property previously levied upon, an execution after its return day is dead. An officer making levy and sale after his writ has expired is a trespasser, and the purchaser acquires no title. (Freeman on Ex., § 106.) The research of counsel has discovered no case where the lien of a *fieri facias* without levy did not end with the writ. How it could be otherwise is difficult to imagine. The officer can do nothing with a defunct writ but return it. No process has been devised whereby goods, which had once been subject to the lien of an execution, expired and returned, may be seized and sold in satisfaction of the lost lien. The effect of an order of court, staying an execution until after the return day, was well settled by BELL, J. in Commonwealth *v.* Magee (8 Barr, 240). "Its functions were thus suspended until, by lapse of time, its vitality was extinguished. Beyond the return day, its operation and vigor could only have been preserved by an actual levy; . . . . but a levy being wanting it had no hold on the goods after the return day. Consequently the second execution was the only effective one in the hands of the sheriff at the time of the sale of the goods. The proceeds were therefore properly applied in satisfaction of it." If this be a dictum and unnecessary to the decision of that case, it is an accurate expression of the law applicable here.

The plaintiff had a right to execution of his judgment. For apparent cause before execution issued, the Court could have granted a rule and stayed execution. Pending the rule the defendant's goods might have been seized by another creditor and the plaintiff's judgment become worthless. In such case no power, legal or equitable, exists to give him the proceeds of the goods. He issued execution, and, for apparent cause shown to the Court, a rule was granted and proceedings on the writ stayed. The writ was returned unexecuted. Afterwards the defendant's goods were sold on another execution.

The plaintiff has no better title to the proceeds than if he had been prevented from issuing execution.

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Such consequences should induce Judges to observe the oft-repeated admonition, on staying execution, to direct levy to be made, when not done, and preserve liens.

The serious result of the mistake in staying the writ and suffering it to die without a levy has led the injured party to demand the money on the ground that the Court will redress the wrong done by their own act. This is urged the more because the Court, when distributing a fund in their possession, will always overlook technicalities and do equity. A hardship must be distinguished from a right. If the appellant has no right to the fund no equity power can give it to him. The lien on the property which expired before the sheriff's sale, gave no right to its proceeds. That the Court in the exercise of their judicial functions, struck down the lien is a hardship, and now to give the money to the sufferer, who thereby lost his right, would be another wrong. A court of equity may not take the money of A. to redress their own wrong done to B. With no lien upon the property at the time of sale the appellant has no right to the fund, and, without right, has no footing in equity.

PER CURIAM. Decree affirmed and appeal dismissed at the cost of the appellant.

Opinion of the Court by TRUNKEY, J.

See Suydam *v.* Elliott, *ante*, 317.]

May, '77. May 6, 1878.

Malone et al. v. Haman et al.

Practice—Delay after commencing suit—Laches—Abandonment—Presumption of.

In the absence of a rule of Court making delay in the prosecution of a suit an abandonment *ipso facto*, a plaintiff may file his declaration and proceed to trial seventeen years after the institution of the suit, it having been within the power of either party to speed the case, under the ordinary rules of pleading and trial.

In such a case, it is not error to charge the jury that the age of the suit has nothing to do with the merits or demerits of the case, and that they should not permit that fact to prejudice them against either the plaintiff or defendant.

Error to the Common Pleas of Lancaster County.

Assumpsit, by Haman & McCrum against Malone, Painter, & Gonder to recover a balance due for ballasting five sections on the Northwestern Railroad. The defendants were contractors for the construction of that portion of the railroad and the plaintiffs were sub-contractors under them.

The summons was issued on April 17, 1858, and was served on the several defendants except Painter who was brought in by an *alias* the same year. Nothing further was done until August 31, 1875, when the plaintiffs filed a narr. and obtained a rule to plead. The defendants moved to strike off the rule to plead on the ground of the plaintiff's laches, but the Court denied the motion. The defendants pleaded non assumpserunt, payment with leave, and accord and satisfaction.

On the trial, before PATTERSON, J., the plaintiffs proved the performance of the work under the contract. The defendants claimed and produced some evidence tending to show that they had long ago paid the balance sued for. The Court instructed the jury that the issue raised a question of fact for their determination, and charged *inter alia* as follows: "The age of this suit has nothing to do with the merits or demerits of the case before you. You should not permit that fact to prejudice you against either the plaintiffs or defendants, for after a suit is brought and entered on the record of the Court, either party, the plaintiff or defendant, can prosecute it to a termination, and cannot be prevented from so doing by the other party to the suit."

Verdict and judgment for plaintiffs for $2785.01. The defendants took this writ, assigning for error, *inter alia*, the refusal to strike off the rule to plead, and the portion of the charge above quoted.

Thos. E. Franklin and *Geo. M. Kline*, for the plaintiff in error.

No imparlances or continuances were entered but the suit remained on the docket undisturbed for seventeen years and four months. The rule in the English Courts is that a plaintiff is deemed out of Court unless he declares within one year, and it is not necessary that any rule should be taken or judgment of *non pros* entered.

3 Chitty's Gen. Practice, 443-450.

We have no express rule in the Common Pleas of Lancaster County, but seventeen years is an unreasonable time, and the suit must then be considered abandoned. A plaintiff should not be permitted to abuse the machinery of the Court to vamp up an abandoned claim after the death, or removal of witnesses, when recollection has failed, and receipts are lost or destroyed.

The charge of the Court withdrew from the jury any consideration of the great length of time which the plaintiffs suffered to elapse before pursuing their claim. The jury had a right to take this into consideration in connection with the other facts of the case. The delay was quite sufficient to warrant the presumption that the plaintiffs were afraid to press the suit. It is not generally the interest of a defendant to bring a case to trial when the plaintiff neglects to proceed.

There are hundreds of records in this State of suits commenced and not prosecuted which both plaintiffs and defendants consider abandoned. The defendant often has not the power, if he has the desire to force a plaintiff, who may be absent or even dead, to proceed.

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H. M. North and *J. Hay Brown*, contra, argued that the first assignment of error related to a matter within the discretion of the Court below, and that the second assignment was ruled by Hemphill *v.* McClemans (12 Harris, 370).

May 13, 1878. THE COURT. We discover no ground to reverse this judgment. The delay in bringing on the action to trial did not affect it.

In this country no rule of court has been adopted to make the delay an abandonment *ipso facto*. It was in the power of either party to speed the case under the ordinary rules of pleading and trial. The Court did not take away the delay, by any instruction, as an element in the evidence. This was not the meaning of the Court contained in the seventh assignment of error. What the Court then said was evidently to prevent the jury from being carried off by a mere prejudice, a suspicion that there was something wrong because of the age of the suit.

PER CURIAM. Judgment affirmed.

SHARSWOOD, J., absent.

Common Pleas—Law.

C. P. No. 1. Feb. 23, 1878.

Atkinson v. Schuyler et ux.

Mechanics and material men—Married women—What constitutes a contractor — Agency — Where a married woman owning land permits another to erect a house thereon, she will be held to have constituted such person her agent to contract therefor, and the house will be subject to liens for labor and materials furnished in erecting it—Practice—Amendment of record to enable party to sue out writ of error—When amendment not permitted.

Rule to open judgment.

Sci. fa. sur mechanic's lien. The claim was filed against D. H. Schuyler and Emma his wife, owners, and one Maxwell, contractor, for materials furnished in the erection of a house on land belonging to the wife. Judgment was obtained January 26, 1878, for want of an affidavit of defence.

On January 28, 1878, the present rule was taken by the wife, upon the filing of an affidavit setting forth that the failure to previously file a defence was in consequence of an oversight made by the clerk of defendant's attorney, the case having escaped his notice. The affidavit of defence, and a supplemental one afterwards filed, set forth: That deponent was a married woman; that the lot of ground described in the claim was purchased by her in her own name; that neither she nor her husband had ever contracted for the erection of any building on said lot, nor authorized any one to contract therefor; that her mother-in-law, Mrs. Schuyler, said she was going to build a house on this land of deponent's, and pay for it, and present it as a gift to deponent; and deponent was informed that in pursuance of that intention the said Mrs. Schuyler made a contract with one Maxwell (the contractor named in the lien) for the erection of the building; that Maxwell, after partially fulfilling his contract, had failed; that he had already been paid more than was due to him under his contract; and that neither deponent nor her husband had anything to do with the making or execution of said contract.

Roberts (*Graham* with him), for the rule.

Defendant is responsible only upon the theory that she gave Mrs. Schuyler implied authority to erect the building. But, if this be true, then, as to material men, Mrs. Schuyler held the position of a contractor, Maxwell that of a sub-contractor; and the claimants, having furnished material upon his order, have no right of lien.

Prichard, contra.

No contract relation existed between defendant and Mrs. Schuyler, but the implied authority arising from the circumstances set forth in the affidavit constituted her the agent of defendant.

Forrester *v.* Preston, 2 Pitts. Rep. 298.

The test in such a case is, whether the person erecting the house could have filed a lien. Here Mrs. Schuyler could not have filed a lien for her services, and hence she was not a contractor within the meaning of the Mechanic's Lien Acts, and the decisions thereon.

C. A. V.

March 16, 1878. THE COURT. We think that Mrs. Schuyler, defendant's mother, was not a contractor, but rather the implied agent of the owner. The owner, having stood by and allowed the house to be built, cannot now defend upon the ground that she gave no express authority. The contract made by Mrs. Schuyler under such circumstances, while it may have created no personal liability on the part of defendant, yet bound the land for the price of the material furnished in the erection of the house.

Rule discharged.

Oral opinion by PEIRCE, J.

On March 18, 1878, the defendants obtained a rule to show cause why the record should not be amended so that it might appear that a judgment

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was entered for want of a sufficient affidavit of defence.

Roberts (*Graham* with him), for rule.

The case was argued upon the affidavits of defence filed, and the judgment is substantially a judgment for want of a sufficient affidavit of defence. As the record now stands a writ of error would result in nothing; it is therefore asked to be amended so that the defendant can take the case to the Supreme Court.

Prichard, contra.

It is nearly two years since this material was furnished, and defendant has no equity to ask for further delay. This rule cannot be granted without revoking the former action of the Court discharging the rule to open judgment.

C. A. V.

April 6, 1878. THE COURT. This application is resisted, and in view of this fact we think we cannot amend the record so as to show a judgment for want of a sufficient affidavit of defence, when in fact no such judgment was entered.

Rule discharged.

Oral opinion by ALLISON, P. J.

C. P. No. 1. June 1, 1878.

Dahman v. Quinn.

Practice—Continuance—Costs—Witness fees—Taxation of.

Appeal from taxation of costs by the prothonotary.

When the case was called for trial, the plaintiff obtained a continuance upon condition that he paid the costs. On taxing the costs, the defendant claimed for thirteen witnesses. There was no proof that a subpœna had been served upon them, but the defendant stated under oath that they had been in attendance, and that the subpœna had been lost or destroyed. The prothonotary allowed the full amount for all the witnesses, and plaintiff appealed.

Wollaston, contended that there should be proof that the persons were in court as witnesses, and not as spectators willing to be called if needed; and further, that they should appear before the prothonotary in person.

Quinn, contra.

It is unnecessary for witnesses to appear in person before the prothonotary.

Brightly on Costs, 299.

Before taking an appeal the costs must be paid to the prothonotary.

Rules of Court, 42.

THE COURT. The prothonotary was satisfied that the witnesses were present awaiting the trial, and no reason is shown why we should interfere with his finding.

Appeal dismissed.

Oral opinion by BIDDLE, J.

C. P. No. 3. April 20, 1878.

Reimer v. The City of Philadelphia.

Practice—Debt on the award of a road jury—Pleading—Duplicity—Plea in abatement—Act of April 1, 1864—Failure of councils to make an appropriation.

Rule to strike off pleas.

Debt, on the report of a jury to assess damages, which awarded the plaintiff $400 for a change of grade on 28th St. from Brown St. to Pennsylvania Avenue. This report was confirmed by the Court of Quarter Sessions on March 9, 1878, and the city was by said confirmation directed to pay said damages.

The narr. averred, *inter alia*, that the grade is practically and physically as well as technically changed, and the damage actually done. Pleas: *nil debet*, *nul tiel record*, and a special plea as follows: "That *no appropriation* for the payment of the said damages hath been made by the councils of the city of Philadelphia, and that the *term of one year* hath not elapsed since the said decree of confirmation of said report and award, all of which defendant is ready to verify, wherefore it prays judgment."

Messick, for the rule.

The special plea is in abatement, and should not be joined with pleas in bar. It should be stricken off for the following reasons:—

Because the damages awarded were due to plaintiff instantly upon the confirmation of the report. Interest runs upon the award of a road jury from the *date of its confirmation*.

Dyer *v.* City, 5 Wright, 463.
Norris *v.* City, 20 Sm. 332.
City *v.* Miskey, 18 Id. 49.

As interest is the penalty for the non-payment of a debt on the day when it is due, the date from which interest can legally be calculated fixes the day on which the debt is due.

Noblit *v.* Briggs, 8 Phila. 275.

Because the special plea, being a plea in abatement, must be pleaded in advance of pleas in bar, and cannot be pleaded in conjunction with them.

Chitty, Pl. *481, *474.

Because it is a double plea, setting up the two defences of no appropriation by councils, and that suit cannot be brought before the lapse of one year after the confirmation of the report of the jury.

Chitty, *260.

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Because, as it was a dilatory plea, and not sworn to, it was bad under Rule of Court No. 29, § 100.

Because the Act of April 1, 1864 (P. L. 207), fixes the time when the award is due and demandable, in these words: "*When* said award is confirmed by the Court the street shall be *forthwith* opened, ... and said city shall pay to the respective owners of the property damaged, or their legal representatives, the damages so assessed for said opening."

By this Act, where benefits are assessed, the city can collect them at once, and hold them in her treasury, and still refuse payment to the party awarded damages, if this plea is good, while these assessments of benefits are only to reimburse the city.

The defence set up that no appropriation has been made by councils is bad, because a judgment of a court against the city is as much an appropriation of money out of the city treasury as is an appropriation by the councils of the city.

Monaghan *v.* City, 4 Casey, 207.

The plea of *nil debet* to this action of debt on a record is bad.

Chitty, *521.

The only pleas that are issuable are *nul tiel record* and payment.

J. H. Gendell, Assistant City Solicitor, contra.

This is not a plea in abatement. Such plea does not deny the right of action, but merely says the present suit is improper. We here deny all present right of action in any shape.

Duplicity, if it exist, can only be taken advantage of by demurrer.

The plea is not double. It tends to one point. No action accrues till the end of a year.

The Act of April 21, 1855, § 7 (P. L. 266), gives one year for option of councils to appropriate before suit can be brought. The Act of May 13, 1856, § 18 (P. L. 571), gives the councils power to refuse to appropriate until the assessments for benefits are contributed by the owners. See, also—

Act April 21, 1858, § 6, P. L. 386.

Act January 6, 1864, § 1, P. L. 1130.

The Act of June 13, 1836 (P. L. 555), called the General Road Law, regulates these proceedings. The Act of April 21, 1858, § 5 (P. L. 386), provides that no debt or contract shall be binding on the city, unless an appropriation sufficient to pay the same be previously made by councils. Here there was no appropriation.

The allegation of no appropriation merely negatives that which might give an action within the year. It is, at most, immaterial. Matter immaterial does not make a plea double.

The Act of 1864 only requires that the street shall be open on confirmation. It does not change the time for payment of assessment.

April 20, 1878. THE COURT. The Act of April 1, 1864 (P. L. 207), which rules the case, declares that when the award is confirmed the city shall pay the damages. The special plea set up by the city is no defence.

A confirmed report is not technically a judgment, but it is an authoritative decision by a competent tribunal, and no technical plea such as "*nil debet*," "payment with leave," etc., should be interposed.

It has been the practice for twenty years to issue a mandamus upon awards of road juries, and it is preposterous to say that every man who has issued such a mandamus has committed a fraud upon the city. We are speaking of honest claims which have no fraud about them. If it has been found that this process has been abused, that is no reason why the law should be upturned.

The thing essential is, that a proper assessment of damages shall be made; it may be necessary, technically, to institute a suit for its recovery. Under the Act of 1864 it is declared that the city shall pay the damages.

The Supreme Court have said that the damages reported and confirmed bear interest from the date of confirmation. What is this but a debt due and demandable? It is not right that technical objections should be thrown in the way of such payment. It is important that the city should not suffer by an improper award, but when an award shall be found to be proper it is equally important that the claimant shall not be delayed. The plea is urged that because councils have not done what they ought to have done, made the appropriation at once, the city should not pay. But a judgment of a court against the city for payment of money, when obtained, is as high authority for the disbursement of money as any appropriation by councils. It is clearly apparent by Act of Assembly of April 1, 1864, by which it is decreed, that when the award of a road jury is confirmed by a court, the city of Philadelphia shall pay the damages awarded to the owner, that the time when the damages are payable and demandable is as soon as the report of the jury is confirmed by a Court of Quarter Sessions, and it is the duty of the city to pay them.

All that we now can do, however, is to order the special plea to be stricken off, and the rule to be made absolute, on the ground that it is a plea in abatement. If this were a demurrer the plea would be bad, being double. It contains two matters of defence: 1st. No appropriation; 2d. Suit premature.

Oral opinion by LUDLOW, P. J.

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Orphans' Court.

Jan. 21, 1878.

Eckert's Estate.

Partition—Descent—Equitable conversion—Act of April 18, 1853.

Sur exceptions to auditor's report.

Before the auditor the following facts appeared: Dr. George N. Eckert died on the 28th day of June, 1865, intestate, seized of valuable real estate. He left a widow and two minor children, H. Trevor Eckert and Charles M. Eckert. H. Trevor Eckert, having attained his majority, died on the 16th day of September, 1870, leaving a will by which he devised and bequeathed one-half of his estate to his mother and the remaining half to his brother Charles M. Eckert, who afterwards died in his minority.

Before the death of H. Trevor Eckert, proceedings in partition between the co-tenants of George N. Eckert and his personal representatives had resulted in the shares of George N. Eckert being taken by his co-tenants at the appraisement. After Trevor Eckert's death, but during the lifetime of Charles M. Eckert, the remaining real estate of the intestate was sold at private sale under the "Price Act."

On March 6, 1872, the administrators of Dr. Eckert filed their account, which was referred to an auditor, who reported a distribution of one-third to the widow, one-third to the guardian of Charles M. Eckert, and one-third to the administrator *c. t. a.* of H. Trevor Eckert. On March 28, 1872, the original guardian of Charles M. Eckert filed his account, which was also referred to an auditor, and the fund directed to be paid to the present guardians. Subsequently the administrator *c. t. a.* of H. Trevor Eckert filed an account; this was also referred to an auditor, who distributed one-half of the fund to the widow, and the remaining moiety, less collateral taxes, etc., to the present guardians of Charles M. Eckert. The account of the Philadelphia Trust, Safe Deposit and Insurance Co., guardians of Charles M. Eckert, being filed, by agreement of the parties was referred to Jos. A. Clay, Esq., as auditor.

The auditor held that the sales subsequent to the death of H. Trevor Eckert were made under the "Price Act" and reported *inter alia;* that so much of the balance for distribution as consists of the proceeds of land sold at private sale under the "Price Act" passes to the heirs of the intestate as land (Act of 18 April, 1853, sec. 9; Act of 13 April, 1854, sec. 2); that so much as has arisen from the partition of the original share of the minor in land of which his father was seized in his lifetime, also vests in the heirs of the father, and not in the mother as next of kin of the minor (Leigh & Dalzell on Conver. p. 2; Foster's App., 24 P. F. Sm. 391; Comm. *v.* Pool, 6 Watts, 32, 33; Pennell's App., 8 Har. 515; Comm. *v.* Pool is affirmed in Wright *v.* Vickers, 2 WEEKLY NOTES, 497, 500); that the proceeds of land which came to the minor by devise from his brother, and sold after the death of H. Trevor Eckert, also go to the heir and not to the next of kin not of the blood of the ancestor, G. N. Eckert (Roberts's App., 3 Wr. 417; Clepper *v.* Livergood, 5 Watts, 113; Kinney *v.* Glasgow, 3 P. F. Sm. 141); that the proceeds of land derived from the intestate, and sold during the lifetime of H. Trevor Eckert, passing by his will to Charles M. Eckert, are to go to the mother as next of kin to the minor, although not of the blood of the ancestor, because they have been so mingled with other funds of H. Trevor Eckert, and have so passed to the minor as to be incapable of a separate distinction.

Exceptions were filed on behalf of the administrators.

John G. Johnson, for exceptants.

Charles M. Eckert is in by purchase; the descent from George N. Eckert having been broken by the devise from H. Trevor Eckert, the mother being of the blood of Trevor Eckert, takes the property devised to Charles M. Eckert as his heir.

Reading *v.* Royston, 1 Salk. 242
Kinney *v.* Glasgow, 3 Sm. 143.
Powell on Devises, *427, *428.
Act of 18 April, 1833, § 9, Purd. Dig.

The proceeds of sales made in the lifetime of Charles M. Eckert, under partition proceedings, pass as personalty to his next of kin. This is shown by the following authorities:—

(*a*) In the absence of any special provision, the effect of a sale of minor's real estate is to convert it out and out.

Grider *v.* McClay, 11 S. & R. 230.
Snowhill *v.* Snowhill, 2 Green's Ch. (N. J.) 20.
Ashburton *v.* Ashburton, 6 Vesey, 6.

(*b*) After the decease of a minor the money realized from his realty sold in partition proceedings shall pass as personalty.

Grider *v.* McClay, *supra.*
McCune's Appeal, 15 Sm. 450.

(*c*) The analogies to other cases demand a distribution of these proceeds of partition sales as money.

Grider *v.* McClay, *supra.*
Clepper *v.* Livergood, 5 Watts, 113.
Sayers's Appeal, 29 Sm. 428.
Hay's Appeal, 2 Ib. 449.
Biggert *v.* Biggert, 7 Watts, 563.
Dyer *v.* Cornell, 4 Barr, 359.
Spangler's Appeal, 12 Harris, 424.
Pennell's Appeal, 8 Ib. 515.

(*d*) The distribution in the hands of the guar-

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dian is a second transmission; the land of a person under disability, when sold by order of Court, passes in the first transmission as realty, in the second as personalty.

Commonwealth *v.* Pool, 6 Watts, 32.

(*e*) There is no distinction between sales under partition and sales for maintenance.

The sales were not of necessity under the "Price Act," no statement to that effect appearing; they may have been under the Act of 1851, or any other enabling Act.

S. Henry Norris, contra.

The auditor found certain sales to be under the "Price Act," and his finding binds the Court.

This fund thus passes to the heirs as realty, and the widow not being of the blood of the first taker, cannot inherit.

Holmes's Appeal, 3 Sm. 342.
Act of 8th April, 1833, Purd. Dig.
Roberts's Appeal, 3 Wright, 420.
McWilliams *v.* Ross, 10 Ib. 370.

But, even if the land had not been sold under the Price Act, the proceeds would have still retained the character of real estate. The widow's interest in partition is real estate

Tilghman's Est., 5 Whart. 65.
Leigh and Dalzell on Conver., 5 Law Lib'y, 182.
2 Kent. Com. 230.
2 Story's Equity, 793 (note).
Clepper *v.* Livergood, *supra*.
Foster's Appeal, 24 Sm. 398.
Miller *v.* Leidig, 3 W. & S. 458.
Gourley *v.* Kinley, 16 Sm. 271.
Kennedy *v.* Nedrow, 1 Dal. 418.
Burson's Appeal, 10 Har. 167.
Gorney *v.* Hendricks, 3 Johnson (N. Y.), 217.

The land devised to Chas. M. Eckert was a descent to him, not a purchase; the proceeds retain the quality of real estate.

Kinney *v.* Glasgow, *supra*.

This is the first descent, the distribution after the death of the present claimants will be the second descent.

McCune's Appeal, 15 P. F. Sm. 450.
Hay's Appeal, 2 P. F. Sm. 449.

Grider *v.* McClay (*supra*) does not apply, having been overruled by Commonwealth *v.* Pool (*supra*), and also having been decided under the Acts passed prior to 1824; Dyer *v.* Cornell (*supra*) does not apply; McCune's Appeal (*supra*) appears to have been delivered under a misapprehension that it was second descent, when in fact it was first descent. In Sayers's Appeal the question of the blood of the ancestor appears to have been overlooked.

May 4, 1878. THE COURT (after stating the facts). Two questions are raised by the exceptions: What interest does Mrs. Emily T. Eckert take in the estate of her son, Charles M. Eckert? This includes the question as to the nature of that estate, whether real or personal.

(1) It seems clear that as to any part of her son's estate which may be held to be realty, the mother is restricted to her portion for life, and cannot take as heir. The reason for this is found in the 9th section of the Act of April 8, 1833, under which, in order to take, the mother must be of the blood of the ancestor from whom the estate was derived. The Act is in these words: "That no person who is not of the blood of the ancestors or other relations from whom any real estate descended, or by whom it was given or devised to the intestate, shall in any of the cases before mentioned take any estate of inheritance therein, but such real estate, subject to such life estate as may be in existence by virtue of this Act, shall pass to and vest in such other persons as would be entitled by this Act, if the persons not of the blood of such ancestor or other relation had never existed, or were dead at the decease of the intestate."

The Act seems to intend that the entirety and not parts only shall be subject to the rule of blood, *i. e.*, that the whole subject of the devise or descent shall pass in the line of the ancestor from whom it came. In other words, that as to any realty which Charles M. Eckert took directly from his father the mother is precluded from taking as heir, because she is not of the blood of the father from whom it descended; and that as to any realty of the father which descended to H. Trevor Eckert, and was taken by Charles M. Eckert, as devisee of his brother, she is also ineligible as heir, because she is not of the blood of the first taker. A reference to two or three cases will make this apparent.

Bevan *v.* Taylor (7 S. & R. 397), overruling Walker *v.* Smith (3 Y. 480), arose under the Act of 1794, which, as to this point, was identical in principle with the Act of 1833. It was there held that it was the manifest and declared intention of the Legislature to preserve the line of descent in the blood of the ancestor from whom the estate came, forever. That under the Acts of 1794 and 1797, it was the intention of the Legislature, in every grade of descent, to exclude from the inheritance all who were not of the blood of the ancestor from whom the estate came, and to preserve it in the line in which it came; in other words, that the ancestor is the *commune vinculum*, whether the estate ascends or descends.

In Clepper *v.* Livergood (5 Watts, 113) the minor took by descent from his mother, and from his sister, who received her estate by descent from the mother. It was held that the father of the minor, not being of the blood of the mother, could not take, the whole having come *ex parte materna*.

The feeling which gave rise to the Act is hinted at by ROGERS, J., in Maffit *v.* Clark (6 W. & S. 258), where a claim was attempted to be set up

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in the mother as heir to a daughter, who took partly directly and partly through a deceased sister, real estate from the father. "It has not yet been decided that a child taking purely by descent can be considered as a first purchaser or perquisitor, and we do not decide it. . . . I shall not enter into the propriety or correctness of the feeling which inclines in favor of that stock of ancestors whose labor or industry acquired any property in preference to another stock, who in no way contributed to its acquisition. The law seems to have settled the matter, and I feel neither inclination nor authority to change it."

In Hartman's Case (4 R. 39) it was held that one who takes gratuitously by devise is not to be viewed as the *propositus* in determining the future descent of the land. To make him so, he must be a purchaser for value in the popular sense of the term, or at least derive the estate by gift from some one other than an ancestor. This case settles that in case of gift by devise from a father to a child, the devisee, although at common law deemed a purchaser, and as such the head of a new line of descent, is not so esteemed under our statute, but we must go back to him who actually acquired the estate, and brought it into the family, in determining who is entitled to succeed to the inheritance. (Baker *v.* Chalfant, 5 Wh. 480; Kinney *v.* Glasgow, 3 P. F. Sm. 143; Waln's Appeal, 4 Barr, 506, and Roberts's Appeal, 3 Wright, 417, are other cases in point.)

(2) As to the nature of Charles M. Eckert's estate. The proceeds of the sales in partition passed into the hands of his guardian as realty. But how long did the fund retain this character? As LEWIS, J. says in Pennell's Appeal (8 Har. 515), "it cannot retain its original character forever." And in Dyer *v.* Cornell (4 Barr, 359), COULTER, J. says: "Even admitting that the money in this case bore the impress of real estate, and the inheritable qualities peculiar to lands and houses, for how many generations or descents shall it wear that complexion? It must cease as it mingles with other moneys of the distributee, otherwise uncertainty, confusion, and litigation will indelibly mark its character." To this argument drawn from necessity, Chief Justice TILGHMAN has added a broader reason. In Grider *v.* McClay (11 S. & R. 224), he says: "No feudal tenures having ever existed in Pennsylvania, her Legislature has never shown an anxiety to preserve land for the benefit of the heir. On the contrary, it has always been her policy to consider land as a kind of property which should be subservient to the principles of justice. It always has been turned into money where the claims of creditors or the convenience of families required it. Even the right of devise has yielded to the superior right of the creditor."

The cases on this point are divided into two classes: cases of sales for payment of debts, or maintenance, etc., and cases of sales in partition. In the first class of cases the surplus proceeds are realty in the first taker, but they lose in his hands that character, and become personalty on the next transmission.

This was the doctrine in Grider *v.* McClay (11 S. & R. 224), Dyer *v.* Cornell (4 Barr, 359), Pennell's Estate (8 Har. 515), Foster's Appeal (24 P. F. Smith, 391), Sayers's Appeal (29 P. F. Smith, 428), Large's Appeal (4 P. F. Smith, 383).

But a distinction seems to have been taken between these two classes of cases. In Commonwealth *v.* Pool (6 Watts, 32), it was put thus by GIBSON, Chief Justice: "That there is a conversion at all, is a defect that is endured because it cannot be avoided, but it is tolerated no further than is necessary to accomplish the end it was intended to serve, the money being land for everything else. Equitable conversion is dependent on the particular object to be attained by it, insomuch that if the property be more than sufficient for it the surplus passes, at the next transmission, as if it had not been converted at all. A sale for partition, therefore, works a conversion of the form without a transmutation of the essence; and this distinguishes it from a sale for payment of debts, of which the transmutation is the primary and entire intent.

"So far was this distinction carried by us in Grider *v.* McClay that even a surplus after payment of debts was held to belong to the administrator and not the heir; in which I thought established analogies were transcended. In every judicial sale for payment of debts, however, the money raised for the object is in a course of administration, and no process lies against it to enforce or continue a lien on it; but money raised incidentally by process of partition is land in another form, and attended with inheritable qualities."

This distinction, although drawn by a very great authority, has not been recognized in later cases, and will not bear a searching analysis. Whatever be the purpose of the sale, the final proceeds, that is, the proceeds which remain after the purposes of the sale have been fulfilled, is realty. That the fund remains in solution longer in the one case than the other, does not in the least alter the character of the *residuum*, which is all that concerns us in this inquiry. That is always real estate, whether it results from a sale in partition or from a sale for payment of debts or maintenance. A later and eminent authority has said (Foster's Appeal, 24 P. S. Sm. 391): "When the purpose of conversion is attained conversion ends, or more accurately, re-conversion takes place. . . . If land, re-

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maining in specie after the partnership is dissolved and wound up, and all the purposes of its conversion answered, is still personal estate, how long is it to remain so? The answer is, the moment the partnership is wound up, either by decree, judgment or agreement, and it is determined that it no longer forms a part of the partnership stock, and is not required for its purposes."

All the reasoning of Judge GIBSON as to the effect of conversion in partition, in the case just quoted, applies with equal force to conversion effected by sales for other purposes. He says: the conversion "is tolerated no further than is necessary to accomplish the end it was intended to serve, the money being land for everything else." Is not this literally true of sales of land for payment of debts. And it is not correct to say, without qualification, that "the money raised for the payment of debts is in a course of administration, and no process lies against it to enforce or continue a lien on it," because the surplus of the fund is land in another form, and attended with inheritable qualities and subject to lien. This very authority admits that the surplus arising from sales for payment of debts, and the proceeds of a sale in partition pass to the first takers as real estate. Having clothed the money with that character in both cases, upon a principle equally applicable to both, the attempt to withdraw that character at an earlier stage in the one case than in the other, is to introduce just that "uncertainty, confusion, and litigation," which the judges have so feelingly denounced.

The history of the decisions will show the gradual obliteration of this attempted distinction. In Clepper *v.* Livergood (5 W. 113), the share of the proceeds allotted in partition to the minor came into his hands as realty, and on his death descended as realty. This case came under the 5th section of the Act of 1794, which prescribed the same canon of descent for both real and personal estate. Hence whether the money in that case was held to have been converted or not, the father, inasmuch as it came *ex parte materna*, was equally precluded from taking it absolutely.

In Commonwealth *v.* Pool (6 W. 32), the daughter of the intestate was awarded $1114.90 as her share in partition of her father's estate. It was held that this money in her hands, so far partook of the character of real estate, that it was not liable for a debt of decedent which had been barred by the Act of 1797, in favor of the heirs, although the debt was a subsisting debt against personal estate.

In Spangler's Appeal (12 Har. 424) the original owner of the land died; partition was then made, and parts 1 and 3 of his estate, appraised and taken by his two sons, who gave recognizances to the widow and children for their shares. Then Anna, a daughter, died, leaving a husband and child. Two remaining parts were sold after her death. Held that Anna took the money in her life as realty, but it went to her husband on her death as personalty; that the other two parts came to the son as realty, and that the father took a life estate in it. (Walker *v.* DeHaven, 14 Wr. 101.)

In Hay's Appeal (2 P. F. Sm. 449), on the death of the decedent, the daughter took her share in the proceeds of his estate, sold under proceedings in partition. She afterwards died, leaving a husband and three children. Two of her children soon afterwards died intestate. It was held that the wife's share was realty, but that at her death it descended as personalty to her children, subject to the life estate of her husband. But that the shares of the deceased children therein, given by the act, became personalty at their death, and passed to the father as their heir. This decision was under the Act of March 29, 1831, § 48, which provides that the money awarded in partition to a married woman shall be awarded to her husband as if it were real estate. STRONG J. said: "The effect of this provision is not to prevent a conversion of a wife's real estate into personalty by an Orphans' Court sale, but to restrict the husband's interest in the proceeds of such sales, and to determine to whom the purchase-money shall belong, subject to the husband's life interest. . . . Two of the children having died in the lifetime of their father, in their minority and without issue, their shares descended to their father. For it descended as personalty, which it actually was. The provision in the Act of Assembly extended no further than to regulate the first descent, and prevent the fund from passing directly from the wife to the husband. After it had vested in the heirs it was no longer real estate for any purpose, and on their subsequent death it went to their personal representatives, and through them to their father. Such is the rule asserted in Pennell's Appeal, (8 Har. 515), and in Dyer *v.* Cornell (4 Barr, 359)."

In McCune's Appeal (15 P. F. Sm. 450), John McCune died, leaving a widow, children, and Anna, a granddaughter, the daughter of a deceased child. Under proceedings in partition, her share of the estate was paid to her guardian. Anna died, a minor, unmarried. Thompson, Chief Justice, said: "The guardian of the intestate recovered the share of his ward in her grandfather's estate, through proceedings in partition of that estate. The first descent to her was in the character in which the share existed, viz., as land, although converted into money. After a time she died, and the question now is, to whom does the unexpended balance of Anna's share pass? This is easily answered. It being the

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second descent, the money undoubtedly passed as money and not land. (Hay's Appeal, 2 P. F. Sm. 449.)"

The rule laid down by these authorities seems of easy application to the case in point. The share of the partnership real estate of Dr. Eckert, which came to H. Trevor Eckert in his lifetime, came to him as realty; Charles M. Eckert took one-half of this share on the second descent, and it passed from him to his mother as personalty. So the share of the proceeds of the land of Dr. Eckert, sold after H. Trevor's death, which was awarded to the executors of H. Trevor, came to them as realty, and passed under the devise to Charles M. as realty; but on his death it went to his mother as personalty.

The share in partition of the partnership real estate which was awarded to the guardian of Charles M. Eckert, came to him as land, and on the death of the minor, following the rule in McCune's Appeal, it passed to his mother in a second transmission as personalty.

The descent of the proceeds of the real estate sold under the Price Act is governed by the 7th section of that act, to wit: "That no purchase or sale by authority of this act shall change the course of descent or the transmission of any property changed in its nature by virtue thereof, as respects persons who are not of competent ability to dispose of it."

Charles M. Eckert took this portion as realty, and he was precluded by his non-age from working any change in its character. Under this section of the act it was transmitted at his death as real estate.

The 5th exception to the auditor's report is sustained, and the report is recommitted to the auditor for correction, in accordance with the terms of this decision.

Opinion by ASHMAN, J.

[*Note.*—The case has been since settled by mutual consent of the parties in interest, in accordance with the opinion of the Court.]

May 22, 1878.

Dyre's Estate.

Costs—When payable out of estate of decedent—Liability for—Examiner's fee part of costs—Practice.

Sur petition for order on the administrator to pay examiner's fee, and answer.

The petition of James F. Lynd set forth that letters of administration on the estate of Charles Dyre, deceased, were granted to John Hanna, Esq., on January 18th, 1875; that on March 9th, 1875, an alleged will was presented to the Register of Wills, and by him refused probate; that in an appeal from the action of the register the petitioner was appointed examiner; that all the counsel representing the various interests in the estate fixed the fee of the examiner at $500, and drew up and signed an agreement that the administrator should pay that amount to him; that upon presenting this agreement to the administrator, with the request that he should pay the fee, he refused to do so, and the petitioner therefore prays the Court for an order on him to pay.

The Court awarded a citation to the administrator to show cause why he should not pay the examiner's fee, and an answer was filed, setting forth that the examiner was appointed to take testimony in an appeal by one Joseph Peters, the executor named in the alleged will which was refused admission to probate; that the appointment of examiner was made upon a rule granted in favor of the alleged executor's right to claim letters testamentary; that the estate of decedent is not a party to these proceedings, and therefore cannot be held liable for the payment of this fee; that the agreement referred to in the petition is not such a writing or order as to bind the administrator for the payment of the said sum of money; that some of the parties named in the alleged will as devisees and legatees have not signed the order or agreement, and that it is imperfect in this respect.

Ashhurst, for the petitioner.

The Orphans' Court is a Court of Chancery, with full equity powers. It has discretion to order who shall pay costs, and often pays them out of decedents' estates.

Shollenberger's Appeal, 9 Harris, 337.
Stokely's Estate, 7 Harris, 484.
2 Daniell's Ch. Pl. 1457.

"Costs" includes fees of officers, and are to be paid in advance. The examiner is an officer of the Court.

Penna. R. R. Co. *v.* Keiffer, 10 Harris, 356.

An examiner will be allowed his fee out of an estate after taking testimony in a contest between a devisee and executor.

Soley's Estate, 3 WEEKLY NOTES, 80.

Counsel of respective parties to a litigation have authority to bind them as to costs.

Marvine *v.* Drexel, 1 WEEKLY NOTES, 323.
Mooney *v.* Carlin, Id. 92.
Sherman *v.* Brenner, Id. 193.

C. A. V.

June 1, 1878. THE COURT granted the prayer of the petition.

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May 22, 1878.

Charlton's Estate.

Administrators—Liability of, for funds distributed before filing of bill of review—Notice—Practice—Act of Oct. 13, 1840.

Sur exceptions to Master's report.

From the Master's report the following facts appeared. The account of Thomas Stewart, the administrator of Mary Ann Charlton, was filed Feb. 5, 1876, and confirmed *nisi* the following April, and the balance awarded to Mary Ann Conrad, decedent's daughter. On April 27th, a petition was filed by William H. Charlton, the alleged husband of the decedent, praying for a rehearing, and the adjudication was accordingly opened. On October 31st, a supplemental adjudication was filed disallowing Charlton's claim, but exceptions to the adjudication were sustained by the Court (3 WEEKLY NOTES, 305), allowing him to participate as the husband of the decedent in the distribution of the estate. From this decree the administrator, having previously paid the entire balance in his hand to Mary Ann Conrad, appealed, and the Supreme Court reversed the decree and remitted the record to this Court for a further hearing. (Stewart's Appeal, Charlton's Estate, 5 WEEKLY NOTES, 136.) An Examiner and Master was subsequently appointed to take testimony to find the amount, if any, distributed by the administrator prior to the notice of filing the exceptions of William H. Charlton, and the Master found that, after that time the administrator refused to make further payments, and was consequently protected by the Act of Oct. 13, 1840 (Purd. Dig., 1109, Pl. 49). To this finding exceptions were filed.

H. F. Hepburn, for the exceptant.

Pierce Archer Jr., contra.

June 1, 1878. THE COURT. The exceptions to the adjudication having been considered by the Supreme Court in the light of a bill of review (Stewart's Appeal, 5 WEEKLY NOTES, 137), testimony has been taken to ascertain the amount, if any, distributed by the administrator prior to notice of the filing of the exceptions. From the report of the Master and Examiner, it appears that the administrator paid to the daughter of decedent, in the aggregate, the sum of $1850 before the filing of his account, and after that time refused to make further payments until it had been audited and confirmed.

On April 24th, 1876, the adjudication awarding $2351.56 to the daughter, as sole heir and distributee, was confirmed absolutely. And, on May 6th, 1876, upon the petition of Mary Ann Conrad, the distributee, setting forth that she had been paid by the administrator $1850, on account of the amount awarded to her, he was ordered to pay the balance due before May 13th, 1876. The administrator complied with the order of the Court, and, on May 9, 1876, paid said Mary Ann Conrad $488.16. She thereupon executed and delivered to him a formal release from all claims and demands, and received from the administrator the notes and due bills she had given him from time to time as evidence of the partial payments to her.

Neither the administrator nor his counsel had notice of the filing of the exceptions of April 27th, 1876, until after the entire balance of the estate in his hands had been actually paid to the distributee in accordance with the decree of the Court. But it was argued that the payments made prior to the order directing the administrator to pay the balance of $488.16 to Mary Ann Conrad, were "voluntary," unauthorized by the Court, and should not be considered as having been distributed, within the meaning of the Act of April 13th, 1840. But we are unable to adopt this view. Immediately upon the confirmation of the adjudication, the distributee became entitled to demand of the administrator the amount of the award, and without any further order of the Court. And it cannot be doubted that the administrator had full authority to make a partial distribution, prior to the confirmation of his account, nevertheless, at his own risk. (Act of February 24, 1834, Purdon, 448, pl. 210.)

If no debt or other demand against the decedent was presented at the audit and allowed by the Court, he would be entitled to credit for the amount so distributed, as against the share of each legatee or distributee. This is of frequent occurrence in the settlement of estates. In this instance, the "balance found due," in the language of the Act of 1840, was ascertained by the Court before final distribution, and this was "actually paid and discharged by" the administrator, before notice of the exceptions to the decree.

This being the case, the exceptions should have been dismissed, for the reason as stated by SHARSWOOD, J., in Stewart's Appeal (*supra*), "both the express provision of the Act of 1840, and the plain dictates of justice and equity, require that the appellant should be protected."

The exceptions are dismissed, and decree entered in accordance with this opinion.

Opinion by HANNA, P. J.

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WEEKLY NOTES OF CASES.

VOL. V.] *THURSDAY, JUNE 27, 1878.* [No. 22.

Supreme Court.

Jan. '76. March 25, 1878.

Baldwin's Appeal.

Execution — Attachment-execution — Lien of — Distribution where several writs of attachment-execution are served on the same day.

When several writs of attachment-execution have gone into the sheriff's hands, and have also been served on the same day, no preference can be given, but distribution of the fund in the hands of the garnishee must be made to all *pro rata*.

Per GORDON, J. The intent of § 40 of the Act of June 16, 1836, requiring the sheriff, upon receiving a writ of *fieri facias*, to endorse thereon the month, year, and hour of the day of such reecipt, is not to furnish *data* for distribution, but to prevent injury to honest purchasers.

Long's Appeal (11 H. 297) and Yelverton *v.* Burton (2 C. 355) followed, and the rules therein laid down applied to the writ of attachment-execution.

Appeal from the Common Pleas of Delaware County.

This was an appeal from a decree sustaining exceptions to the report of the auditor appointed to distribute funds attached in the hands of a garnishee by judgment creditors of Samuel C. Bonsall, under the following circumstances: On April 23d, 1875, Richard L. Jones having two judgments, the one of $264.96, the other of $729.16, against Bonsall, under two writs of attachment-execution attached six shares of stock in the "Upper Darby Building and Loan Association." These writs were placed in the hands of the sheriff at 3.25 P. M. and 3.30 P. M. respectively upon the same day. B. C. Baldwin, having a judgment of $2177.59 against Bonsall, also issued a writ of attachment-execution to attach the same stock, which writ was placed in the hands of the sheriff at 5.45 P. M. of the same day. To these writs the sheriff returned that he served them all on the garnishee on the 24th of April, 1875; the first two at 12.30 P. M., and the last one at 12.35 P. M. Interrogatories having been filed in each case, the garnishee answered in each case, admitting the sum of $633.18 in its hands subject to the attachments.

The auditor (G. E. Darlington) reported that the debts in the several attachments should all participate *pro rata* in the fund for distribution.

The Court below sustained exceptions to this report, and awarded the fund to R. L. Jones on his two attachments; whereupon Baldwin took this appeal, assigning as error the decree of the Court.

H. C. Howard, for the appellant.

The foreign attachment law is the parent of the attachment-execution, and after service of the writ under the latter, we are obliged to look to the former for all subsequent steps in the process.

Sheetz *v.* Hobensack, 8 H. 412.

There is no priority as to payment between several writs of foreign attachment served or levied on the same day.

Long's Appeal, 11 H. 297.
Yelverton *v.* Burton, 2 C. 355.

An attachment-execution is not a writ of execution like a *fi. fa.* The lien of the former relates from service; the latter is binding from the moment when left with the sheriff. There is a broad distinction between the two.

Gemmill *v.* Butler, 4 Barr, 232.
Swanger *v.* Snyder, 14 Wright, 218.
Bancord *v.* Parker, 15 Sm. 336.

It being clear that the attachment is a lien only from the time of service, to give priority to one writ served on the fractional part of a day before another writ, would be attended with serious difficulties, and in many cases would defeat the very preference to the vigilant intended to be secured by such a rule.

E. Levis (with whom was *J. J. Lewis*), for the appellee.

An attachment under the Act of 1836 is a process to enforce judgment, and is in substance, if not in form, an execution.

Wray *v.* Tammany, 1 H. 394.
Hall *v.* Holmes, 4 B. 250.
Newlin *v.* Scott, 2 C. 103.
Kase *v.* Kase, 10 Id. 131.
Lewis *v.* Lewis, 11 Wr. 127.
Strouss *v.* Becker, 8 Id. 206.
Franklin *v.* Rush, 1 Phila. R. 571.

The provision requiring the sheriff to endorse thereon the day of the month, the year, and the hour of the day when the writ of execution comes to his hands, is general, and applies, by the express words of the statute, to writs of *fieri facias* and to *other writs of execution*.

Executions issued the same day, and delivered to the sheriff at different periods of the day, must be paid out of the proceeds, in the order as to time in which they come to his hands.

Ulrich *v.* Dreyer, 2 W. 303.
Shafner *v.* Gilmore, 3 W. & S. 438.

May 6, 1878. THE COURT. At common law a *fieri facias* had relation to its *teste*, and bound the defendant's goods from that time; so that, if he sold them afterwards, they might still be taken in execution. (Rob. Dig. 320.)

As this often worked great injustice to *bona*

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fide purchasers, the Act of Car. II., ch. 3, provided, among other things, that a *fieri facias, or other writ of execution*, should bind the property or goods of the person against whom it is issued only from the time such writ should be delivered to the officer by whom it was to be executed, and he was required to endorse, upon the back thereof, the day of the month and year when he received the same. (Id. 310.) Our Act of June 16, 1836, is in effect a transcript of the above, and embraces the same intent, to wit, the limitation of the lien of the writ of *fieri facias*, as it stood at common law, to the time of its receipt by the executive officer. The two statutes differ only in this: that, by the former, the day and year only, when the writ came to hand, were to be endorsed, thus leaving the lien to cover the whole of the day on which the writ was received, whilst the latter requires the endorsement of the hour also, and so limits the lien to the fraction of a day.

The intent of both acts is, however, the same; not to furnish *data* for distribution, but to prevent injury to honest purchasers. As was said in Long's Ap. (11 Har. 297), the practice of paying writs of *fieri facias* out of the proceeds of the defendant's personal property, in the order to which they are delivered to the sheriff, rests upon *usage* sanctioned by the Act, and not on principle. It is, then, obvious that the Act just recited can have no bearing upon the writ called "attachment-execution," since it is not such an execution as does now, or ever did, bind the defendant's goods from its *teste*, or even from the time it came into the sheriff's hands, but only from the time of service upon the garnishee, or levy upon the goods themselves. The execution of such a writ, from its very nature, never could work detriment to good faith purchasers, and, therefore, from it they never needed protection. It follows that, if we adopt the *usage* above mentioned, we must do so without the sanction of the Act. This, however, will not do, for the statute which creates this writ interposes and directs us to look for rules and analogies in the laws governing foreign attachments. The process to levy an execution upon stock is declared to be in the *nature* of *an attachment*, and "*from and after the service of such writ*, all stock belonging to the defendant in the corporation upon which service shall be so made, and all debts and deposits of money, and all other effects belonging or due to the defendant by the person or corporation upon which service shall be so made, shall remain *attached* in the hands of such corporation or person *in the manner heretofore practised and allowed in the case of foreign attachment.*"

Whilst, therefore, this process may be regarded as an execution in that it is intended to carry into effect the final judgment of the Court, and not merely to compel appearance; yet it is wanting in some of the important features of such a writ, and in this notably: that it is not in itself final, but requires execution for its enforcement. We think, therefore, that this process is nearest of kin to the foreign attachment, and that the rules governing that writ must also govern this one. Having arrived at this conclusion, we do not hesitate to adopt the rule settled by Long's Ap. (11 Har. 297) and Yelverton *v.* Burton (2 Casey, 355), that is to say, the several writs of attachment having gone into the sheriff's hands, and having also been served on the same day, no preference can be given to either, but distribution must be made to them *pro rata*.

The decree of the Court below is reversed, the report of the auditor is reinstated, and distribution ordered accordingly. It is further ordered that the costs be paid by the appellee.

Opinion by GORDON, J. AGNEW, C. J., absent.

Oct. & Nov. '77, 3. Oct. 19, 1877.

Guthrie v. Kerr.

Right of party to sue upon a contract made with and for another—Privity of contract—Decedent's estate—Jurisdiction—Common Pleas cannot order the probate of wills.

The rule that when one person having money belonging to another, and having agreed with that other to pay it to a third, an action will lie by the person beneficially interested, does not extend to cases where the contract is for the benefit of the contracting party, and the third person is a stranger to the contract and the consideration.

Where a contract to pay money leaves the promisor liable to an action by the promisee or his personal representatives, an action cannot be maintained by a third person beneficially interested in the subject-matter of the contract.

A Judge of the Court of Common Pleas has no power to order the admission of a will to probate.

Common law proceedings by a legatee against a debtor of the decedent's estate cannot be maintained.

Per WOODWARD, J. "The attempt to marshal and distribute the assets of a decedent's estate through common law forms is always awkard, cumbrous, and unsafe."

Blymire *v.* Boistle, 6 W. 182, followed.

Error to the Common Pleas of Clarion County.

Debt, by Rebecca Kerr against James W. Guthrie. The narr. recited the agreements and will hereinafter set forth. Pleas *nil debet*, payment with leave, etc. The facts were as follows:—

The plaintiff and defendant were brother and sister, the children of Alexander Guthrie. On May 16th, 1840, Alexander Guthrie conveyed all his property, real and personal (with certain

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specified exceptions), to his son James W. Guthrie, the defendant, the latter agreeing to pay $5750 to support his father in a suitable manner, and to pay, if required, an additional sum of $500. On January 26th, 1844, the following supplemental agreement, ratifying and explaining the former one, was entered into:—

(After reciting the original agreement.) It is understood between the parties that all the estate of Alex. Guthrie, Sr., of whatever kind, whether real, mixed, or personal, as well as all debts due and owing to the said Alex. Guthrie, Sr., of whatever nature and kind, ... was, by the said article of agreement, and is hereby transferred to the said Jas. W. Guthrie, with the exception of the household and kitchen furniture, and all the horned cattle now in possession of the said Alex. Guthrie, Sr., or his daughter Rebecca, or his son Isaiah; and it is further understood between the parties to the said agreement, and they do understand the covenant and agreements on the part of the said J. W. Guthrie to be kept and performed as follows, viz., the amount of the consideration in the said agreement to be paid by the said J. W. Guthrie is $6250, which said sum is not to bear interest until the expiration of one year after the death of the said Alex. Guthrie, Sr.; and it is further understood between the parties that any money, or its equivalent, that the said Jas. W. Guthrie may heretofore have paid, or may hereafter pay, to any of my children, for which he will produce their receipts, are to be taken as a credit on the agreement hereinbefore recited, provided said payments shall not exceed the amount given and bequeathed to them respectively by my last will and testament, and the said J. W. Guthrie is not to charge interest on any moneys he has paid to or advanced for any of the heirs or legatees mentioned in my will, unless such payments shall exceed the amount of the said legacies, then interest to be charged for the excess; and it is further understood by the said agreement, and it is hereby agreed, that the said Jas. W. Guthrie will, in a decent, comfortable, and respectable manner, support and maintain his said father, Alexander Guthrie, during his lifetime.

In witness whereof, we have hereunto set our hands and seals this 26th of January, 1844.

ALEXANDER GUTHRIE, SEN. [SEAL.]
J. W. GUTHRIE. [SEAL.]

Attest:
JAMES CAMPBELL,
THOS. SUTTON.

A receipt of $200 on the same day was indorsed thereon and signed by Alexander.

It did not appear that at the time of making this agreement, Alexander Guthrie had made any will; but at a former trial of the cause there was offered in evidence a paper, purporting to be a will, bearing date January 5th, 1846, and proved by the subscribing witnesses on March 25th, 1852, the jurat being duly administered and attested by the register. Upon the same day a renunciation of the rights of executorship was filed by the executors named. The paper was never registered, nor did it appear that it remained in the custody of the register. The defendant having objected to its admission in evidence, the Court made a verbal order upon the register to record the same, withdrew a juror, and continued the cause.

At the subsequent trial, the same paper was again offered in evidence, having endorsed thereon:—

"Filed February 2d, 1876, and ordered to be recorded by the Court.

O. E. NAIL, Register."

The offer was objected to by defendant. Objection overruled. Exception. (First assignment of error.)

The will devised and bequeathed to testator's daughters, Jane Fleming and Margaret Corbett, $800, to his son William $850, and to his daughter Rebecca (the plaintiff) $2300 and the residue of his estate, and $400 to his executors to be distributed to specified charities.

It further provided, *inter alia*, as follows:—

It is further my will and desire that any money, or its equivalent, that my son James W. may heretofore have paid or expended for the use and benefit of my children hereinbefore named, or that he may hereafter pay or expend for their benefit, for which he shall produce their receipts to my executors, shall be taken and received by them as payments to be applied on the agreement between myself and him, of the date of January 26th, A. D. 1844, and shall also be considered and taken by them as payments, or part payments, of the specific sums hereinbefore bequeathed, provided the said receipts shall set forth and specify that they are to be applied as payments on the legacies aforesaid; and provided that the payments made by him to my other children shall in no case exceed the sums to them respectively bequeathed.

And it is further my will and desire, that my son James W. shall not be required to pay any of the legacies aforesaid, nor interest thereon, until the expiration of one year after my decease, neither shall he be entitled to receive any interest for any money heretofore paid, or which he may hereafter pay, to any of my said children on the legacies hereinbefore bequeathed until the time aforesaid.

. . . . And it is further my will and desire, that any receipts that my son James W. now holds against me, or that he may hereafter obtain (unless drawn and expressly stated to be payments on the said article of agreement between my son James W. and myself), are not to be received or taken as payments on the same, they having been given for money advanced to me for my support and maintenance, which, by the terms of said article, he is bound to furnish me in addition to the other considerations therein expressed, and also to pay all debts that may exist at the time of my decease, which shall have been contracted for my support and maintenance as aforesaid.

The defendant offered in evidence the following paper:—

I agree that whatever amount J. W. Guthrie has paid, or may pay hereafter to or for William Guthrie, Peggy Corbett, Jane Fleming, Rebecca Guthrie, or Isaiah Guthrie, shall be a credit on his contract made with me on the 16th day of May last. [First agreement.] Witness my hand, this 16th day of October, A. D. one thousand eight hundred and forty.

ALEXANDER GUTHRIE.

Witness present.

Objected to. Objection sustained. Exception. (Second assignment of error.)

Receipts to the amount of $2575.86 were admitted, leaving the entire balance due upon the agreement $3734.14.

Defendant's counsel requested the Court

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(JENKS, P. J.) to charge that "under the pleadings and evidence the plaintiffs cannot recover." Which was answered as follows: "We reserve the question raised by this point."

In the general charge, his Honor said, *inter alia:* "The consideration mentioned in the article is $6250, to be paid by J. W. Guthrie. $200 of this was paid when the article was signed, leaving the sum of $6050. This sum, less the debts and expenses of administration, would constitute the fund out of which the legacies were to be paid, pro rata. Whether the money referred to in these receipts and orders was paid, and what part thereof was paid, and whether it was paid outside of the maintenance and support of Alexander Guthrie, and what part thereof, are questions to be determined by the jury."

Verdict for plaintiff $3759.82, subject to the question reserved.

The Court subsequently entered judgment for plaintiff. Defendant took this writ, assigning as error (1st and 2d) the admission and rejection of testimony as above, and (5th) the entry of judgment for plaintiff upon the point reserved.

B. J. Reid (with whom were *Wilson* and *Jenks*), for plaintiff in error.

(1) There was no contractual relation between the plaintiff and the defendant: the form of action was therefore wrong.

Beach *v.* Morris, 12 S. & R. 16.
Robertson *v.* Reed, 11 Wr. 115.

The only case where the promisor is liable to an action by a third person is, where he was not liable to the promisee at the time the contract was made.

Blymire *v.* Boistle, 6 W. 182.

The Court of Common Pleas has no jurisdiction to marshal the assets of a decedent's estate.

Whiteside *v.* Whiteside, 8 H. 474.
Dundas's Est., 29 Sm. 479.

It was evidently the testator's wish and intention that the debt of James should be paid to his personal representatives, and not to the legatees, he expressly provides for receipts to be given by his executors.

(2) The will of Alexander Guthrie was never proved. It cannot be pretended that it was so before the case was first called for trial; and, beside the fact that the Common Pleas Judge had no power to order the probate, the register certifies that he exercised no judicial discretion upon it.

Shinn *v.* Holmes, 1 C. 142.
Logan *v.* Watts, 5 S. & R. 214.
Holliday *v.* Ward, 7 H. 489.

Wm. L. Corbett, for defendant in error.

The requirements of the Act of Assembly (April 8, 1833) relating to the probate of wills, were fully complied with by the taking of the oath of the subscribing witnesses and the affixing of the jurat and attestation by the register in 1852.

Holliday *v.* Ward, 7 H. 489.
Thompson *v.* Thompson, 9 B. 235.
Lory *v.* Kennedy, 1 W. & S. 339.

The will was therefore properly admitted in evidence.

There was no error in the entry of judgment on the reserved point in favor of the defendant. By the article of agreement of 1844, Rebecca Kerr is made the party to whom the money is payable. The executors would not have been the proper parties.

Zimmerman *v.* Zimmerman, 11 Wr. 378.
Hoover *v.* Hoover, 5 B. 354.

Upon the general doctrine of sustaining an action by a third person beneficially interested, the Court was not in error.

Long *v.* Long, 1 W. 265.

Jenks, in reply.

The most complete review of the authorities upon the question of the right of a stranger to a contract to maintain an action in his own name against the promisor is found in Torrens *v.* Campbell (24 Sm. 470), and the general result announced by the Court would seem to be that such an action cannot be maintained unless there be some trust in favor of the plaintiff. Now a trust, if any there were, in the present case would be barred by lapse of time.

The extreme hardship of holding the plaintiff in error liable to an action by the several legatees is apparent. The jury have fixed the amount due the plaintiff below according to some artificial standard in their own minds at a sum far above her *pro rata* share; if now each legatee may bring an action, the result will be an exceedingly inequitable distribution of the assets of the estate.

January 7, 1878. THE COURT. Articles of agreement between Alexander Guthrie, senior, and James W. Guthrie, the defendant below, were executed on the 26th of January, 1844, in which the terms of a former agreement made between the same parties on the 16th of May, 1840, were recited, explained, and construed. Alexander Guthrie, senior, transferred to the defendant, who was his son, all his real and personal estate, except certain household furniture and cattle then in the possession of himself, his daughter Rebecca, and his son Isaiah. In the first agreement, the consideration was stated to be $5750 and the further sum of $500 if that should be required by the father to be paid. The revised agreement fixed the consideration at the sum of $6250, which was not to bear interest until after the expiration of one year from the father's death. This was followed by the following stipulations. "And it is further understood between the parties that any money, or its equivalent, that the said James W. Guthrie may heretofore have paid, or may hereafter pay to any of my children for which he will produce their

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receipts, shall be taken as a credit on the agreement hereinbefore recited, provided said payments shall not exceed the amount given and bequeathed to them respectively by my last will and testament. . . . . And it is hereby agreed that the said James W. Guthrie will, in a decent, comfortable, and respectable manner, support and maintain his said father, Alexander Guthrie, during his lifetime."

On the trial, a paper purporting to be the last will of Alexander Guthrie, senior, was offered and admitted in evidence. It was dated on the 5th of January, 1846. The subscribing witnesses on the 25th of March, 1852, testified to its execution, and their affidavit was endorsed upon it by the register. The same day the persons named in it as executors filed a renunciation of their right to letters testamentary. The paper was then taken from the office, and was first produced afterwards in Court by the plaintiff on the 2d of February, 1876. Continuing the cause which was then on trial, a verbal order to the register to file and record the alleged will was made by the Court.

The view which is entertained of the rights of these parties will make a final disposition of this litigation, and any extended inquiry into the question raised by the exception to the admission of this paper would be superfluous, but it may be said that there is a grave doubt whether any act was done either by the register of 1852, or by the register of 1876, that amounted to a probate of this will. If it had been expressly declared to be proved—if without that it had been recorded—if letters testamentary or letters of administration *cum testamento annexo* had been issued—or, perhaps, if it had been simply filed, an adjudication by the officer would be presumed. Here nothing was done in 1852 except to administer and endorse the oath of the subscribing witnesses. The paper was taken from the office, while the 17th section of the Act of the 15th of March, 1852, expressly declares that all wills after probate shall remain in the register's office, "except when required to be had before some higher tribunal, by certiorari or otherwise, and if removed for such cause, shall be returned in due course to the office to which they belong." In 1876, twenty-four years later, the filing and recording were directed by a Judge of the Common Pleas. This was the exercise of a judicial discretion which the law directs to be exercised in the admission of a will to probate.

In the instrument executed by him, Mr. Guthrie bequeathed to his daughter Rebecca, the plaintiff below, twenty-three hundred dollars, the horned cattle in his possession, and his household and kitchen furniture. Legacies of eight hundred dollars each were given to two of his daughters, and one of eight hundred and fifty to his son William Guthrie. Eight hundred dollars were bequeathed to his executors, four hundred of which were directed to be divided amongst certain specified religious institutions. Any balance that should remain after payment of the legacies, was given to his daughter Rebecca. Asserting a personal right to recover from the defendant under the terms of the agreement of the 26th of January, 1844, and the provision of the alleged will of her father, the plaintiff brought this suit for her legacy of twenty-three hundred dollars on the 15th of July, 1872. In the charge of the Court the following instructions were given to the jury: "The consideration mentioned in the article is $6250, to be paid by J. W. Guthrie; $200 of this was paid when the article was signed, leaving $6050. This sum, less the debts and expenses of administration, would constitute the fund out of which the legacies were to be paid *pro rata*. Whether the money referred to in these receipts and orders was paid, and whether it was paid outside of the maintenance and support of Alexander Guthrie, and what part thereof, are questions to be determined by the jury." The verdict was for the plaintiff for $3759.82.

It is to be observed that neither the name of the plaintiff nor the name of any beneficiary was mentioned in the original and recited agreement of 1840, or in the revised agreement of 1844. By the former the balance of the consideration was provided to be paid as Alexander Guthrie, senior, should hereafter direct. By the latter it was indicated rather than expressed that it should be paid to legatees in his last will and testament. The instrument given in evidence as a will was executed two years after the second agreement was entered into, and the interests of the beneficiaries were then for the first time created and defined. Without a will the plaintiff could not move one step, and this paper is the very foundation of her title to the fund in controversy. Putting aside the general question whether a legatee can maintain an action against the debtors of a testator on an express contract between them, that a debtor should pay a particular legacy, it is necessary to ascertain what, under the will she sets up, she was entitled to receive, and upon and through whom she was given the right to make a claim. The bequests to the testator's children were followed by the following clause: "It is further my will and desire that any money, or its equivalent, that my son James W. may heretofore have paid or expended for the use and benefit of my children hereintofore named, or that he may hereafter pay or expend for their benefit, for which he shall produce their receipts *to my executors*, shall be taken and received *by them* as payments to be applied on the agreement between myself and him of the date of January 26, 1844, and shall be considered and

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taken by them as payments of the specific sum therein bequeathed, provided that the said receipt shall set forth and specify that they are to be applied as payments on the legacies aforesaid, and provided that the payments made by him to my other children shall in no case exceed the sum to them respectively bequeathed." It was the manifest intention of Mr. Guthrie, in the testamentary disposition of his estate, to provide that it should be administered by his personal representatives. The bequest of a possible residue to his daughter Rebecca creates a necessary implication of such an intention. And his purpose could only be carried into effect through the instrumentalities of the Register's office and the Orphans' Court.

At the time of Mr. Guthrie's death the situation of the fund for the payment of legacies was such as to require the adjustment of questions with which a jury in the trial of a common law action are unfit to deal. It was said by BLACK, C. J., in Holliday *v.* Ward (7 Harris, 491), that "juries are less competent to state an account requiring long calculations than for any other duty that could be assigned them." After the receipt by Mr. Guthrie of $200 at the date of the revised agreement, $6050 of the consideration remained unpaid. The pecuniary legacies bequeathed amounted to $5550. But the receipts admitted in evidence proved the payment of $2515.86 by the defendant to his father in his lifetime. Allowance was claimed for other sums, but they were rejected and are of no present importance. Of the fund to meet $5550 of legacies, there remained in the defendant's hands only $3714.14. In this sum all the legatees were interested, and in the disposition of it all had the right to be heard. An attempt was made by the jury to apportion the plaintiff's share to her, and possibly approximate accuracy was reached. Her proportion of the $3714.14 was something like $1450, and the jury seem to have fixed less than $1600 as the principal sum on which interest was cast to produce the verdict. Still the attempt to marshal and distribute the assets of a dead man's estate through common law forms is always awkward, cumbrous, and unsafe. And the employment of these forms in the settlement of an estate like this was equally novel and inappropriate. Each of the other legatees could have a separate action if the action of one could be maintained. The same question would arise in each trial, and the jury in each case would erect an equitable standard of adjustment and apportionment of themselves. The defendant would be harassed by oppressive litigation, and at the same time be deprived of the safeguards against haste and prejudice which the patient, careful, and deliberate investigation of the Orphans' Court would throw around him.

Under the particular facts presented here, no review is required of the cases in which the right of a third person to sue in his own name on a promise made for his benefit by one to the other of two contracting parties has been involved. While they are all not readily reconcilable, the distinction stated by Mr. Justice SERGEANT in Blymire *v.* Boistle (6 Watts, 182) has generally been kept in view. The rule laid down in that case was that if one pay money to another for the use of a third person, or having money belonging to another, agree with that other to pay it to a third, an action lies by the person beneficially interested. But where the contract is for the benefit of the contracting party, and the third person is a stranger to the contract and consideration, the action must be by the promisee. In the one instance the promisor becomes the custodian and trustee of a fund actually belonging to the beneficiary. In the other he undertakes to pay some sum or do some act in consideration of a benefit conferred on himself. The first branch of the rule was stated, by Mr. Justice MERCUR in Torrens *v.* Campbell (24 P. F. S. 470), to be, that when the promisor receives money, or personal property to be converted into money, in trust for a third party, the action may be sustained in the name of the latter. And the reason given for the distinction may be gathered from the opinion in Blymire *v.* Boistle. Where the fund actually belongs to the beneficiary, he ought to have the right to release the demand or recover it by action. But where the contract leaves the promisor subject to a suit by the promisee, if he were also subject to a suit by the third party, he would be liable to two actions at the same time for the same debt. Here some covenants of the defendant in the article of agreement could have been enforced by an action in the name of Alexander Guthrie in his lifetime, and a suit for his breach of any or all of them could have been maintained by his personal representatives. It would be a harsh rule of law that would throw on the defendant the additional burthen of a suit by each of the legatees.

There is nothing in the revised statutes settling the powers of the different Courts to warrant this proceeding. Under guards provided for the protection of the personal representatives and the estates of testators, the Common Pleas and Orphans' Courts have concurrent jurisdiction to enforce the payment of legacies not charged on land. Under the forty-seventh section of the Act of the 24th of February, 1834, such payment may be directed by the Orphans' Court on the application of a legatee or any other person interested, the applicant executing the requisite refunding bond. This was the proceeding in Dundas's Estate (23 P. F. S. 474). But by the fiftieth section of the same Act, a legacy may be

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recovered in an action of debt, detinue, account render, or on the case; but it must be brought against the executors, and before execution can issue, the same security must be given that is required by the forty-first section from distributees. The right to an action of debt for a legacy was declared to be clear in Gillilland *v.* Bredin (13 P. F. S. 393). But a common law proceeding by a legatee against the debtor of a testator's estate is justified neither by statute nor precedent nor principle.

Various other questions were raised on the trial below and in the argument here, but no practical good would come from their discussion.

Judgment reversed.

Opinion by WOODWARD, J. SHARSWOOD, J., absent.

[See Kountz *v.* Holthouse, next case.]

Oct. & Nov. '77, 179. Oct. 11 1877.

Kountz et al. v. Holthouse.

Partnership—Liability of incoming partner to creditor of old firm—Contracts—When a stranger to the consideration can sue thereon.

As a general rule, an action on a contract must be brought in the name of the party thereto having the legal interest therein.

A stranger may, however, maintain an action in his own name upon a contract made expressly for his benefit, where his release would be a sufficient discharge to the promisor.

But a stranger cannot sue upon a contract which, although for his benefit, leaves the promisor liable to an action by the other contracting party.

Where A. contracts to pay B.'s debts, such promise is primarily for the benefit of B., and he has a right of action against A. to secure that protection. B.'s creditors cannot in such case sue A. on the contract; otherwise A. would be subjected to separate actions by different parties at the same time for the same debt.

An incoming partner purchased the interest of an outgoing partner and agreed with him to take his place in, and, together with the remaining partner, pay the debts of, the old firm:

Held, That the incoming partner did not thereby become liable to a suit by a creditor of the old firm.

Error to Common Pleas No. 2, of Allegheny County.

Assumpsit by A. W. Holthouse against Wm. J. Kountz and Bartley T. Campbell, partners, doing business as B. T. Campbell.

At the trial, before EWING, P. J., the following facts appeared:—

Bartley T. Campbell and George W. Young were associated as partners under the firm name of B. T. Campbell, and while so associated became indebted to the plaintiff. Subsequently, Young sold his interest in the firm to Wm. J. Kountz, who agreed with him in writing, substantially, to take his, Young's, place in, and, together with Campbell, the remaining partner, pay the debts of, the old firm. This contract was not produced at the trial, but it was not claimed that the plaintiff was a party to it or even that he had any knowledge of it at the time it was made.

Kountz and Campbell continued business under the same firm name, and became further indebted to the plaintiff, who brought this suit for the whole of his bill. The defendant, Kountz, asked the Court to charge, in effect (1, 2, 3, 4), that he was liable only for what was furnished after he became a partner. In answer to this the Court charged that "if the jury find that after a part of plaintiff's bill was incurred, and while the bill was running, Young sold and delivered his interest in the 'Evening Mail' to Kountz, and, as a part of the price, Kountz, by consent of the other partner, Campbell, agreed to take Young's place in the firm and to be responsible for and pay the debts of the firm in place of Young, and the business was thereafter carried on under this agreement by Campbell and Kountz without further change, and the balance of the bill was thereafter incurred for the paper, the defendants would be liable for the unpaid portions of the bill;" to all of which the defendant, Kountz, excepted.

Verdict and judgment for plaintiff for the whole of his claim. Whereupon the defendant, Kountz, took this writ, assigning for error, *inter alia*, the answer of the Court above quoted.

S. H. Geyer, for plaintiff in error.

The contract was for the benefit of Young alone, and hence Holthouse, being a stranger to it and to the consideration, cannot maintain this action against Kountz for what was furnished before he became a partner.

Blymire *v.* Boistle, 6 Watts, 182.

John Barton, contra, cited Story on Partnership, sections 152 and 153; and contended that the new firm had made itself liable for the whole of plaintiff's bill.

Jan. 7, 1878. THE COURT. Campbell and Young were associated as partners in the publication of the "Evening Mail" under the name of B. T. Campbell. While thus engaged they became indebted to the defendant in error. Young, by agreement in writing, the precise terms of which are not shown to us, sold his interest in the firm and in its property to Kountz; the latter assuming and agreeing to pay Young's indebtedness. Campbell and Kountz continued the publication of the paper, and made other purchases of the defendant in error. He now seeks to recover of Campbell and Kountz the debt due to him from Campbell and Young. Can he do it?

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He was a stranger to the contract between Young and Kountz, and to the consideration. He did not agree to release Young, nor to accept Kountz as his debtor. He in no wise participated in the transaction, and had no knowledge of it. The decisions bearing on the liability of Kountz to the defendant in error under such a contract are not in entire harmony; but their difference is more apparent than real. The apparent conflict arises from attempting to apply one rule of law to different statements of facts. The general rule is that an action on a contract, whether express or implied, must be brought in the name of the party in whom the legal interest in such contract was vested. (1 Chit. Plead. 2.) Yet many cases are to be found in which the right of a third person to sue has been sustained, on a promise made to another. Hence, if one pay money to another for the use of a third person, or having money belonging to another, agree with that other to pay it to a third, an action lies by the person beneficially interested. This right of action is not restricted to cases of money only, but extends to an agreement to deliver over any valuable thing; so that such third person is the only party in interest. But when a debt already exists, a promise by a third person to pay such debt, being for the benefit of the original debtor, and to protect him against it, he must necessarily have a right of action against his promisor to secure that protection. If the third person also became liable to the original creditor, he would be subject to two separate actions at the same time and for the same debt. This would manifestly be unjust. (Blymire *v.* Boistle, 6 Watts, 182.)

There is nothing in the case before us indicating that the property sold to Kountz was to be delivered over to the defendant in error; nor that it was to be converted into money and the proceeds be paid to him; nor is there any fair inference, as in Townsend *v.* Long (27 P. F. Smith, 143), that the avails and proceeds of the property and business should pay and discharge the debt due to the defendant in error. In the case of Townsend *v.* Long, the late cases are cited and the true distinctions pointed out. A reference to them will show that to enable the third person to sustain the action, money or property must have been placed in the hands of the defendant for his use, or he must have become a party to the new agreement.

It was urged that an incoming partner may become liable for debts contracted by the firm previous to his entering it. Undoubtedly he may so become liable by agreement; but the presumption of law is against any such liability, and requires proof to remove it. Hence it is important to ascertain whether there has subsequently been, with the consent of all parties, any change or extinguishment of the original contract. Where it is proved that upon the accession of a new partner, a new promise has been made by the entire new firm, in respect to the payment of the old debt, with the consent of the old partners as well as of the creditor, it will amount to a novation of the debt, and the new firm will be liable. (Story on Part., § 153.)

Here there is not only an entire absence of evidence that the arrangement was made with the assent of the defendant in error, but it fails to show that Kountz's agreement to pay was made with the consent or knowledge of Campbell. There is no evidence showing that Campbell and Kountz agreed to be jointly liable for the debt of the old firm; to the present action against them jointly each can answer: I did not so agree with my co-defendant. The assignments are therefore sustained.

Judgment reversed, and a *venire facias de novo* awarded.

Opinion by MERCUR, J.

[See Guthrie *v.* Kerr, last case.]

Jan. '76, 223. Jan. 23, 1878.

Harrison et al. v. Collins.

Negligence—Master and servant—Independent employment—Public highway—Liability of owner of property adjacent to, for nuisance on.

An owner of a sugar-refinery, who employs a master rigger to place in his building certain heavy machinery, is not liable to one who is injured by the negligence of such master rigger. If the employer does not interfere in the direction or control of the work, an agreement for the payment of the rigger by the day instead of at a fixed sum for the job does not alter the case.

The owner of property is not responsible for the unauthorized act of one employed to do certain work about the premises, in removing the cover of a coal-hole upon the adjacent sidewalk, unless the hole is left open for such a length of time that the fact of its opening is, or reasonably ought to have become, known to the owner of the property.

Error to the Common Pleas No. 4, of Philadelphia County.

Case, by John A. Collins, by his next friend, etc., against Harrison, Havemeyer & Co., to recover damages for an injury caused by falling into a coal-hole in the defendants' pavement, and left open through their alleged negligence. The defendants pleaded the general issue, under which, upon the trial, they denied the alleged injury, and set up that the coal-hole had been opened without their permission by one Connor, a rigger, employed by them to move machinery, and exercising an independent employment. The following facts appeared:—

The defendants owned a sugar refinery on

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Swanson Street. In May, 1875, they purchased two large coolers, weighing respectively 9 and 7 tons. These were brought by railroad to a point on Swanson Street where the track stopped, and were there left on the cars. The defendants then employed John Connor, a master rigger, to take the coolers from the cars and place them in the buildings at a distance of about 88 feet from the termination of the track. Accordingly Connor, with the aid of three assistant riggers employed and paid by him, having lifted the coolers from the cars, began to move the smaller cooler with ropes and rollers up Swanson Street, and occasionally, when more force was needed at the ropes, he called in, with the permission of the defendants, some of their factory hands, who, while thus working, were under his direction and control. In order to get a purchase for his tackle, Connor, without the knowledge of the defendants, directed his men to open a coal-hole in the sidewalk on Swanson Street, in front of the refinery, and to put in a piece of timber around which the ropes could pass. Having, by this means, drawn the cooler to within 6 feet of the hole, and it becoming necessary to have a new purchase, he ordered his men to take out the tackle and carry it around the corner of Bainbridge Street. The hole was thus left open from two to five minutes, during which time the plaintiff, a boy thirteen years old, fell in, receiving, as he alleged, severe injuries to his eye.

The facts relating to Connor's employment were undisputed. He received $4 per day for his own services, and the same sum for each of his men, of which he paid each $3.50. He was also paid for the use of his tackle, and the entire job of moving the cooler was done under his direction.

The coal-hole into which the plaintiff fell was constructed in compliance with the city ordinances, and when not in use was closed with an iron cover, weighing about 60 pounds, and so contrived that it could be lifted only with a hook.

The Court below (ELCOCK, J.) charged the jury as follows: "I do not think it becomes important in this case to determine whether that was an independent employment within the legal definition or not, whereby the responsibility was shifted from the defendants to Connor, because Connor's undertaking was simply to move and hoist this machinery, and he would be in any event only liable within the scope of his employment. If Connor, in his employment, for the mere purpose of convenience, or an easy way of obtaining a purchase for his rigging, used the hole or opening referred to by express or implied permission of the defendants, then for the time being he became their agent, because the care and control of the hole was not necessarily incident to his employment.

"If he used it without their permission then he became a wrong-doer, and defendants, not protecting such a species of property as this hole from such acts, would be guilty of negligence, and liable for any injury occurring during the time. But, gentlemen, whether the defendants impliedly gave permission, or whether Connor was a trespasser during the time he was using the hole or the opening, the instant that he ceased to use it its control reverted to the defendants, and from that instant they were bound to protect it, there being no undertaking on the part of Connor to see to its subsequent care or management. He who, being the owner of property, seeks to shift the responsibility for its care or management, must show that he has parted with the power or authority over it, or the superior control upon which it falls."

Verdict for the plaintiff for $3000. A rule for a new trial was subsequently discharged, THAYER, P. J., dissenting (reported 2 WEEKLY NOTES, 353), and judgment was entered on the verdict. The defendants then took this writ, assigning for error the charge of the Court.

George Junkin and *G. W. Biddle*, for the plaintiffs in error.

The uncontradicted evidence showed that the rigger's employment was an independent one. He was engaged to do a specific work, and he did it, giving his own directions, and judging of the means by which he should accomplish it. There was no interference by the defendants, who simply contracted for a result.

Pack *v.* Mayor, 8 N. Y. 222.
Kelly *v.* Mayor, 11 Id. 432.
Shearman & Red. on Neg. 74.

That he was paid by the day does not alter the case.

Corbin *v.* America Mills, 27 Conn. 274.
Forsyth *v.* Hoopes, 11 Allen, 419.

The employment then being of this nature, the defendants are not liable.

Hilliard *v.* Richardson, 3 Gray, 349.
Blake *v.* Ferris, 1 Selden, 48.
Painter *v.* Mayor of Pittsburgh, 10 Wr. 221.
Allen *v.* Willard, 7 Sm. 374.
Hunt *v.* Railroad Co., 1 Id. 475.
Overton *v.* Freeman, 8 E. L. and Eq. R. 479.

The laborers of the defendants, who assisted at the ropes, were the servants of the rigger, *pro hac vice*.

The defendants could not surmise that the rigger would open the inlet. No express permission was given, and there was no evidence from which an implied permission could be inferred.

The jury were told, that, if the cover was lifted by Connor without the defendants' permission, then he was a trespasser; but that it was the defendants' duty to guard the inlet from such acts. That is, a coal-hole must be so constructed that it will be physically impossible for a wrong-doer to open it.

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This is a new doctrine. These inlets are allowed and are regulated by city ordinances. Their very nature requires that they shall be open at times; otherwise their value is lost. This particular inlet was amply protected from the acts of trespassers.

There was error in charging the jury that, if the hole was left open for any time after its use was ended by Connor, the defendants were liable, and this, whether the rigger was a trespasser or not.

The owner of property must have a reasonable time to undo the acts of a wrong-doer. Nothing was left to the jury on this point. They were instructed that not closing the hole instantly constituted negligence in law. The defendants had no notice even that the hole was open.

Pierce Archer (*Cassidy* with him), contra.

The coal-hole was not properly guarded, and it was used in an unlawful manner. The defendants are therefore liable.

Pickard *v.* Smith, 100 E. C. L. R. 470.
Whility *v.* Pepper, 36 Law Times Reports, 588.

These cases rule that for an unlawful use of the highway all the parties are liable, no matter what their relation to each other might be.

But Connor's employment was not independent, and the doctrine at any rate applies only where the purpose is lawful.

Homan *v.* Stanley, 16 Sm. 464.
Baird *v.* Pettit, 20 Id. 477.
Reed *v.* Allegheny, 2 WEEKLY NOTES, 189.
West Chester *v.* Apple, 11 Casey, 284.

May 6, 1878. THE COURT. This was an action by the defendant in error to recover damages for injuries which he sustained by falling into a coal-hole of the plaintiffs in error. They were sugar-refiners, occupying buildings on Swanson Street, in the city of Philadelphia. They purchased two large iron coolers to use in their business. The coolers were brought by rail to within about 100 feet of their works. They then employed John Connor, a rigger, to take the coolers from the cars and place them in their buildings. He was to be paid $4 per day for his own services, and for each of his three assistant riggers. On each of these three men he made a profit of 50 cents per day. He was to furnish the ropes, hoisting apparatus, and all the necessary machinery incident to his occupation. Yet for the use of these he appears to have received an additional sum.

The distance to move the coolers being so little, he moved them with skids and rollers, over the sidewalk. While so moving them he uncovered the coal-hole, and left it open, by reason of which the defendant was injured. The question presented is whether the plaintiffs in error are liable for the injury thus sustained.

As a general principle pervades all the assignments, they will be considered together. The learned Judge thought it unimportant whether Connor was merely the servant or agent of the plaintiffs, or whether his employment was an independent one. That if he used the hole by either the express or implied permission of his employers they were liable, or if he used it without their permission, and as a trespasser, and left it open "for any time" after so using it, they were liable. In this we think there was error. If Connor was their mere agent or servant, they would be liable for his negligent manner of performing the work. Yet if his employment was an independent one, they are not so liable. This distinction has been recognized in numerous cases. Among others may be cited Painter *v.* The Mayor, etc. of Pittsburgh (10 Wright, 213); Hunt *v.* Penna. Railroad Co. (1 Sm. 475); Allen *v.* Willard (7 Id. 374).

It is well settled in England and in this country that persons not personally interfering or giving directions respecting the manner of the work, but contracting with a third person to do it, are not responsible for a wrongful or negligent act in the performance of the contract, if the act agreed to be done is legal. (Gray & Wife *v.* Hubble & Pullen, Law Journal Rep., vol. 32, part 8, N. S.; Hilliard *v.* Richardson, 3 Gray, 349; Blake *v.* Ferris, 1 Selden, 48; Painter *v.* The Mayor, etc., *supra*.) The fact that the contractor is paid by the day does not necessarily destroy the independent character of an employment. (Forsyth *v.* Hooper, 11 Allen, 419; Corbin *v.* America Mills, 27 Conn. 274.) If one renders service in the course of an occupation representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished, it is an independent employment. (Shearman & Redfield on Neg., sec. 74; Pack *v.* The Mayor, etc., of New York, 4 Selden, 222; Barry *v.* The City of St. Louis, 17 Missouri, 121.)

In the present case the evidence was most ample to submit to the jury to find that Connor's employment was an independent one. It does not appear that the plaintiffs in error reserved any right to advise or direct as to the manner in which the coolers should be moved, nor that they assumed or exercised any such authority during the progress of the work. It is not pretended that the moving was an unlawful work. As to Connor it was a distinct employment in the line of his occupation. His employers stipulated for the result only. He alone superintended and directed the manner in which his assistant riggers should work. He had the exclusive control and direction of the plaintiffs' men who assisted him. He testifies that he did the job according to his own views. Under his directions the coal-hole was opened. It is not shown that the plaintiffs in error, or any one act-

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ing under their directions, were present or had knowledge that it was opened. It is not claimed to have been opened by their express authority. How could their permission be implied? We see no necessary connection between the work to be done and the use of this coal-hole in performing it. If the jury should think there was no reasonable presumption that Connor would use the hole in such a manner as to uncover it, the plaintiffs in error were guilty of no negligence in not stationing a man there to prevent its being opened.

The coal-hole appears to have been in all respects constructed and protected according to the city ordinance. Its cover was of solid cast iron, weighing about 60 pounds. At the bottom it was securely fastened. Certain it is that the coal-hole was not made nor maintained for any such use as it was subjected to by Connor. If, then, it should be found that his employment was an independent one, and that he had no implied permission to use it in the manner in which he did use it, or if Connor was a trespasser while so using it, the plaintiff would not be liable for an injury sustained by the defendant, on the instant that Connor ceased to use it. While it is true, as the learned Judge said, "the instant that he ceased to use it, its use reverted to the plaintiffs in error;" yet it does not follow that "from that instant they were bound to protect it." This is imposing too harsh terms on them.

If they had no expectation that the hole would be uncovered or thus used, and no knowledge that it was, they should not be held liable until such reasonable time had elapsed, under all the circumstances, that a careful and prudent man ought to have discovered its dangerous condition. If, after such reasonable time had elapsed, they failed to make the hole secure, they cannot be relieved from the consequences of their own negligence, by showing the previous trespass of Connor. It therefore follows that the assignments, except the last, are substantially sustained.

Judgment reversed, and a *venire facias de novo* awarded.

Opinion by MERCUR, J.

May, 1877, 207. May, 1877.

Stoever's Appeal. Van Hoff's Estate.

Will—Construction of—Intention of testator—To be derived from whole instrument—Legacy charged on land—Trust for minors.

V. devised his real estate to his daughter, charging it with a certain sum "to remain as a lien on it and the interest only to be paid at five per cent." to his granddaughters.

In a subsequent clause (the 6th) he bequeathed one-half of his personal and mixed property to his granddaughters, and directed that it should be put at interest by his executor, until they reached the age of twenty-one.

The next section (the 7th) provided that "all the moneys coming from my estate to my granddaughters shall be and remain" in the hands of S. as trustee, and that they and their legal issue shall have the use and income thereof. On a petition filed by the grandchildren praying payment to them of the *corpus* of their share of their grandfather's estate:

Held, that the will plainly contemplated payment to the grandchildren, as they reached twenty-one, and that the trust created in the 7th section was only intended to last until the children (or their issue) reached that age.

Held, further, that the provision in item 6, as to payment at twenty-one was intended to apply also to the sums charged on testator's real estate.

Appeal by Charles F. Stoever and Louisa S. his wife, from a decree of the Orphans' Court of Cumberland County, requiring Louisa S. Stoever to pay over certain sums of money to the three daughters of Augustus Van Hoff, deceased.

The petition of Catharine E. Van Hoff and two others, averred that they were the daughters of Augustus Van Hoff, deceased, and were also granddaughters of the Rev. John H. Van Hoff, deceased, under whose will they claimed the payment to them of certain moneys then in the hands of their trustee and Louisa S. Stoever. That the Rev. John H. Van Hoff died in 1861, leaving a will, the material portions of which are as follows:—

Item 2. I give and bequeath my farm . . . and my mountain land to my daughter Louisa S., intermarried with C. F. Stoever, and her heirs and assigns forever, for which I charge her nine thousand two hundred dollars. The one-half I give and bequeath to my daughter Louisa S., as aforementioned, and the other half I give and bequeath to the three children of my son, Augustus, deceased, share and share alike; and I order that this money shall remain in the farm as a lien, and my daughter Louisa S., shall only pay the interest annually, at five per cent. after our demise.

Item 3. I give and bequeath my house and lots in the borough of Mechanicsburg I now live in to my only daughter, Louisa S., intermarried with C. F. Stoever, her heirs and assigns forever, who shall pay $1200 to the three daughters of my son Augustus, deceased, share and share alike. This money shall remain invested as a lien in the house, and my said daughter, Louisa S., is only to pay the interest for the same, at the rate of five per cent. annually after our demise.

Item 6. After my demise, I order and direct my executor shall have the remainder of my personal and mixed property appraised by two impartial men, and shall convert into cash or equal to it. To be divided, after all expenses deducted of settling up my estate into two equal shares. I give and bequeath one share to my daughter, Louisa S., and her heirs forever. The other share to the three daughters of my son, Augustus, deceased, share and share alike. This money to be put out on interest with good security, by my executor, until they arrive at the age of twenty-one years, for their use. If any of these daughters demise before that age, without legal issues of her own body, her or their share shall be reverted and equally divided to the remaining sisters, for their use and benefit as directed in my will and testament.

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Item 7. I order and direct that all the moneys coming from my estate to the three daughters of my son Augustus, deceased, shall be and remain in the hands of my son-in-law, C. F. Stoever, whom I appoint and constitute as trustee. That the said daughters have the use and income of their moneys, and their legal issues of their own bodies. If any of the daughters demise without legal issues of their own bodies, her share shall be reverted and invested as directed, for the use of the surviving sisters or their legal issues, until they come to the full age of twenty-one years old, and should their issues not get twenty-one years old, the principal, with interest, shall be reverted to my legal heirs or her heirs.

Item 8. I make this provision, and order and direct that the said trustee or his successor, as one of the daughters is married, and should the others be married, and their husbands do well and industrious, and would be in the opinion of the said trustee or his successor more advantageous, to give to each of them their portion coming from my estate, he can do so, by each one satisfying Louisa S. to unincumber her property and indemnify the said trustee to lead out the intention of my last will and testament.

The petition prayed for a rule upon J. T. Zug (who had been appointed trustee in the place of C. F. Stoever), and upon Charles F. Stoever and Louisa S. his wife, to show cause why the trustee should not pay over the funds in his hands to the petitioner, and why Louisa S. Stoever should not pay to them the several sums charged upon the real estate devised to her. A supplemental petition averred that the petitioners were all of full age. The rule having been granted, Stoever and wife presented an answer in which they denied the right of the petitioners under the will to require the payment of the principal sums. The Court below (JUNKIN, P. J.) entered a decree in favor of the petitioners, saying: "On the whole case, in view of all the provisions of this will, the intention is clear, that payment to testator's granddaughters of one-half of his estate was to be made as they severally arrived at twenty-one, and that the trustee should receive and manage the fund until then; that Louisa was to pay five per cent. until that event, after which the principal became due, thus making all due together."

Stoever and wife took this appeal, assigning for error the said decree.

W. H. Miller, for the appellants.

The Court erred in interpreting the 6th and 7th clauses together; they refer to entirely different funds. The 6th clause refers to personal and mixed property and the testator's direction is that this fund shall be paid to his grandchildren as they reach twenty-one. But the 7th clause refers to an entirely different fund, viz., the income from his real estate. In items 2 and 3 he directs that certain moneys shall "remain as a lien" in the real estate devised to his daughter, and that she "shall only pay the interest," and then in item 7 he directs that such interest shall be and remain in the hands of C. F. Stoever. The 8th clause supports this interpretation, for it gives the trustee a discretion to pay over one-third to each granddaughter, if she marries and her husband does well. If he were obliged to pay it to them as they reach maturity, this clause would not have appeared.

John Hays, contra.

The 2d and 3d clauses relate to real estate, the 6th and 7th to personal and mixed property. By the 2d and 3d clauses certain sums are bequeathed to his granddaughters charged on real estate. No time is fixed for payment, and therefore they would be payable one year from testator's death, with interest at five per cent. By the 6th clause he disposes of the residue of his property, first giving it absolutely and then limiting it so that it shall be invested until they reach twenty-one, for their use. It is therefore a vested legacy, being a present gift, with payment postponed until arrival by the legatees at twenty-one years, and the interest accruing therefrom in the mean time to be for their use.

McClure's Appeal, 22 P. F. Smith, 414.

The seventh clause is intended to provide for the disposition of the property in case any of the grandchildren should die before reaching twenty-one, leaving issue; it includes all moneys as well the sums charged on his real estate as his personal and mixed property.

May 28, 1877. THE COURT. We think the decree of the Orphans' Court was correct. The trust for the three daughters of Augustus A. Long, the testator, terminated on their arrival at the age of twenty-one years. The seventh clause cannot be separated from the sixth and other clauses of the will. When taken as a whole the will plainly contemplated payment of their legacies to each, as she arrived at age, or if she died with issue before that period had arrived, that the trust should continue during the minority of the issue. Having reached the period prescribed they were entitled to receive their respective shares.

Decree affirmed, with costs to be paid by the appellants and their appeal is dismissed.

PER CURIAM.

Jan. '78. March 6, 1878.

Kline's Appeal.
Seibert's Estate.

Wills — Construction of — Residuary legatee — Orphans' Court practice — Effect of decree upon first account.

A testator by his will constituted C. a residuary legatee, and provided that her share should remain in the hands of his executors to pay the interest thereof to her, and after her death bequeathed the principal to K. By a codicil he changed this provision as follows: "I give and bequeath

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to K. the sum of five hundred dollars . . . . And what I have heretofore bequeath in my will to K. shall be null and void, and that he shall have not more, as I bequeath in my codicil, the annual interest of K. shall be paid to C. and after her death the principal to K." A second codicil bequeathed $500 to K. in addition to that mentioned in the first codicil, and continued: "And whereas in my said will and in my codicil I have given and bequeath to C. the annually interest during her natural life, which I do hereby declare that the same shall be void and no heir in my will and codicil, and shall have nothing out my estate, and be paid the same to K. as before mentioned in my will and codicil":

Held (reversing the decree of the Court below), that K. was a residuary legatee.

A decree of partial distribution of an estate is conclusive only as to the fund there distributed.

Guenther's Appeal (4 WEEKLY NOTES, 41), followed.

Appeal from the Orphans' Court of Berks County.

This was an appeal by Benjamin M. Kline from a decree confirming the report of the auditor appointed to make final distribution of George Seibert's estate. The appellant claimed to be entitled to share in the distribution as one of the residuary legatees. The facts were as follows:—

George Seibert by his will bequeathed his residuary estate to various persons, among them his sister Christiana, also called by the testator Catharine, Kline, and provided as follows:

"And it is also my will and desire, and I do hereby order and direct that the share of the said Christiana Kline shall remain in the hands of my hereafter named executors. They shall put it on interest and pay her the interest annually during her natural life, and after her death the principal sum to Benjamin Kline [the appellant, her grandson] and to his heirs and assigns; and case if he should die without any issues, his share shall be equally divided the same among the other devetees and legatees of residentuary estate above-mentioned."

The testator by a subsequent codicil altered the original will as follows:—

"I give and bequeath unto Benjamin Kline, the sum of five hundred dollars, to him and to his heirs and assigns forever. And what I have heretofore bequeath in my wil' to Catharine Grim, Sally Ginder, and Benjamin Kline sha' null and void, and that they shall not have more, as I bequeath in my codicil, the annual interest of Benjamin Kline shall be paid to Catharine [Christiana] Kline, and after her death the principal to B. Kline."

Also by a second codicil the testator provided:

"And further I give, and devise, and bequeath the sum of five hundred dollars to Benjamin Kline in addition to the first codicil mentioned to him, and his heirs and assigns forever. . . . . And whereas in my said will and in my codicil I have given and bequeath unto Christiana Kline the annually interest during her natural life, which I do hereby declare that the same shall be void and no heir in my will and codicil, and shall have nothing out my estate, and be paid the same to Benjamin Kline, as before-mentioned in my will and codicil."

The testator died in 1866. In 1868 an auditor appointed to distribute the balance shown on the first account of the executors, reported that by a proper construction of the will the appellant was not a residuary legatee, and accordingly excluded him from that distribution. To that report the appellant did not except.

In 1876 the executors having presented their final account, which was referred to a second auditor (F. R. Schell), Kline appeared and asked to share in the distribution as a residuary legatee, and also that he should receive an amount equal to his claim in the first distribution, on the ground that no absolute confirmation of the first report was shown by the records.

The auditor reported that Kline was not a residuary legatee, and that, even if he could be considered such, his right had been finally adjudicated by the first auditor whose report was conclusive of the question in all future distributions. He further reported as a fact that the report of his predecessor had been confirmed absolutely. Kline excepted, and his exception having been dismissed by the Court (SASSAMAN, J.), he took this appeal.

Daniel and *James N. Ermentrout*, for the appellant.

The auditor holds directly that where one auditor has made a decision on a will, though erroneous, in the distribution of one fund, which is not excepted to, a second auditor of a second fund in the same estate is precluded from examining the question and making a different distribution. This proposition is in conflict with the doctrine of the Court in Guenther's Appeal (4 WEEKLY NOTES, 41), and we may therefore examine the will and codicil to ascertain whether the appellant is, or is not, a residuary legatee.

It is beyond doubt that he is made a residuary legatee by the original will, the payment of his share being postponed until the death of his grandmother, Christiana Kline. It is equally certain that the first codicil destroys his residuary interest, and substitutes a specific legacy of $500; the income of which is to be paid to his grandmother in addition to the income of the original share of the residuary estate.

The construction of the second codicil must determine the appellant's right. The entire provision for Christiana is wiped out by this codicil. She is not to receive anything from the estate. The income of the share for life bequeathed to her in the will, and the interest on the $500 bequeathed to her in the first codicil, are both gone. The first codicil has extinguished the appellant's right to the principal of the share. One full share of the residuum is undisposed of as to both principal and interest. Something must be done with it, and the testator continues, "and be paid the same to Benjamin Kline as before mentioned in my will and codicil," so that the result is that the appellant is to receive the share of the residuum bequeathed to him in the will, $500

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bequeathed to him in the first codicil, and $500 bequeathed to him in the second.

Amos B. Wanner and *Samuel L. Young*, contra.

A court of competent jurisdiction from whose decree there was no appeal taken, decided that the appellant was not a residuary legatee, and that decision is conclusive of his right.

Rhoads's Appeal, 3 Wright, 186.
Schindel's Appeal, 7 Sm. 45.
McLellan's Appeal, 26 Id. 231.

But the second codicil shows that the appellant has no residuary interest. The bequest in the will to Christiana, that is, the bequest in trust of a principal sum, is entirely revoked; the bequest being revoked expressly in the codicil, the interest of all parties in the fund is necessarily destroyed. The codicil means that the legacy shall have no existence for any purpose.

May 6, 1878. THE COURT. The first question we will consider is whether the appellant took as a residuary legatee under the last will and testament of George Seibert.

By his original will of the 7th of November, 1861, the testator disposed of his whole estate. After several specific devises, he devised all his residuary estate to Christiana Kline, and divers other persons named, to be equally divided among them, share and share alike. He further proceeded to say, "It is also my will and desire, and I do hereby order and direct, that the share of the said Christiana Kline shall remain in the hands of my hereafter named executors. They shall put it on interest and pay her the interest annually during her natural life, and after her death the principal sum to Benjamin Kline, and to his heirs and assigns," with remainder over in default of issue. Christiana was a sister of the testator, and Benjamin was her grandson. By the first codicil thereto, dated the 10th of February, 1863, he devised to Benjamin Kline, his heirs and assigns, the sum of five hundred dollars, but declared that the annual interest thereon should be paid to Catharine Kline, and after her death the principal to Benjamin Kline, and he revoked the devise made to Benjamin in the original will.

Catharine and Christiana were one and the same person. Benjamin is the appellant. Thus this codicil took from him the residuary estate given by the original will on the death of his grandmother, and gave him a specific legacy of five hundred dollars; but it also gave to her during life the interest on these five hundred dollars, in addition to the interest on the residuary estate given her in the original will.

On the 21st of February, 1866, he executed a second codicil. He therein refers to the original will, and to the first codicil, each separately, and to certain of the devises given in each. By this last codicil he devised to Benjamin Kline, his heirs and assigns, the sum of five hundred dollars, in addition to the sum in the first codicil mentioned. Then, referring to the annual interest which he had devised to Christiana in the original will, and also in the former codicil, he proceeds to say: "And whereas, in my said will and in my codicil I have given and bequeathed unto Christiana Kline the annual interest during her natural life, which I do hereby declare that the same shall be void, and no heir in my will and codicil, and have nothing out my estate, and be paid the same to Benjamin Kline, as before mentioned in my will and codicil."

It is very evident that these testamentary writings were not drawn by an able lawyer or experienced scrivener: yet we think there is no great difficulty in discovering the intention of the testator. It is clearly manifest that the testator intended to revoke those portions of the original will and of the former codicil, that gave to Christiana the annual interest during her life on the funds therein specified. We think the intent in regard to the devise to Benjamin is also sufficiently clear. The testator had in his mind the residuary share mentioned in his first will, as well as the specific legacy in the codicil. He thus revoked each devise giving annual interest to Christiana. It remained to make some disposition of the residuary share thus relieved from her life interest. In his first will he had given it to Benjamin; in the codicil he had revoked it. He now desires to reinstate it. By transposing two words in the last codicil, which will do no violence to its letter or its spirit, the intention of the testator will be more clearly expressed. This we may do. (Schott's Appeal, 28 P. F. Smith, 40.) The true reading, then, is, "And the same be paid to Benjamin Kline, as before mentioned in my will and codicil." "The same" to be paid to Benjamin manifestly did not refer to the interest only, but to the principal sums which would produce the interest. It professed not to take anything from Benjamin's portion, but to add to it. Never before had he any devise free from the life charge of Christiana. Now they were discharged therefrom, and so discharged they were both to be paid to him "as before mentioned in my will and codicil." The language used is fully adequate to give each devise to him, relieved from its former charge. There is no legal impediment in the way of giving effect to this intention. It therefore follows the learned Judge erred in holding that the appellant took no share in the residuary estate.

The other question relates to the effect to be given to the decree of distribution of a portion of the estate, made in 1868. In that distribution the present appellant was represented by counsel.

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His claim as residuary legatee was presented and disallowed. It is now claimed on his behalf that the auditor's report distributing that fund was not finally confirmed. The auditor appointed to distribute the present fund found as a fact that it was absolutely confirmed by the Court. No sufficient evidence is produced to show that he erred in thus finding. We must therefore hold the decree of distribution then made to be correct as to the fund distributed; but it is not conclusive as to every question then considered.

The precise point arose and was decided in Guenther's Appeal (4 WEEKLY NOTES, 41). There, as here, the executors had filed a partial account, showing a fund in their hands. On the distribution thereof, Lina Clara Guenther claimed her mother's share under the will of the testator. The auditor allowed the claim. No exception was filed to the report, and it was confirmed. Payments in pursuance thereof were made to her for several years. On the distribution of funds subsequently acquired by the executors, the conclusiveness of the former decree of distribution was the direct question. She claimed it was conclusive of her right to share in the proceeds. The Court below held otherwise, and excluded her claim. On appeal this Court affirmed the decree, and said, "The prior decree of the Orphans' Court was conclusive only as to the funds then distributed." That, therefore, rules this case. In so far as the appellant was excluded as a residuary legatee from a share in the fund not included in the former distribution, there was error. To the extent thus indicated, the assignments are sustained; the others are without merit.

Decree reversed at the costs of the appellees, and the record is remitted to the Court below, with instructions to decree distribution conformably with this opinion.

Opinion by MERCUR, J.

Oct. & Nov. '77, 269. Nov. 10, 1877.

In re Road in Reserve Township.

Road law—Vacation or change of road—Damages.

In a proceeding to vacate or change a road there is no authority to assess damages when no change has been made.

The owners of property taken under the original proceeding stand upon the finding of damages there made, and if these be unpaid must resort to it.

Certiorari to the Quarter Sessions of Allegheny County.

Petition for the vacation or change of a certain public road in Reserve Township, Allegheny County.

The original proceeding was before the Supreme Court at No. 28 of October and November Term, 1874 (reported 30 Sm. 165). It seems that the road, although laid out and declared open, had not been actually opened for travel.

The petition averred that the road had become useless, inconvenient, and burdensome, and prayed that it might be vacated or changed.

Viewers were appointed, and subsequently reviewers, who made no change in the location of the road, but reported that Adam King was entitled to seven hundred and fifty dollars, and Frederick Oesterly to one hundred and fifty dollars damages, one-half of which should be paid by the county of Allegheny and one-half by the petitioners.

It appeared also by the report of the reviewers that they intended that their award of damages should supersede the award in the original proceeding simply, and not that it should be in addition thereto.

A rule of the Quarter Sessions required that viewers in road cases should report whether damages awarded by them should be paid by the petitioners or by the county.

The report of the reviewers having been duly confirmed, a rule was taken upon the county to show cause why it should not pay these damages. The Court (KIRKPATRICK, J.) having discharged this rule, King and Oesterly took this writ, assigning for error the action of the Court in discharging the rule.

A. M. Watson and *T. H. Baird Patterson*, for plaintiffs in error.

S. H. Geyer, for the county.

Nov. 19, 1877. THE COURT. We perceive no error in the discharge of the rule to show cause in this case. The reviewers made no report which could fix a liability on the county for damages. It was not on a review pending an original view, but was in a proceeding to view and vacate or *change*. No change was made, the road being permitted to stand on its original location, and consequently upon the original report of damages. The effect of the confirmation of this report, even if regularly made, would be, under the special law applicable to this county, that the Court was of opinion that the report ought not to be confirmed, unless the petitioners should pay one-half of the damages. But there being no change of route, and no authority therefore to assess new damages, the owners of property taken under the original proceeding stood upon the former finding of their damages, and if unpaid must resort to it.

PER CURIAM. Proceedings affirmed.

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Common Pleas—Law.

C. P. No. 1. Feb. 9, 1878.

Strauch v. Royal Land Co. of Virginia.

Affidavit of defence law—Instrument within—Executory agreement—Suit brought thereon before expiration of term mentioned therein—Assessment of damages—Whether the judgment can contain amount accruing after suit brought but before judgment—Practice—When rule to strike off judgment improper—Rule to open judgment.

Rule to strike off judgment.

Assumpsit on a written instrument. The summons issued September 29, 1877, returnable to the first Monday of October, 1877, and judgment for want of an affidavit of defence was entered January 26, 1878. The following copy and averment were filed:—

General Office of Royal Land Co. of Virginia.
Harrisonburg, Va., February 1, 1877.

Officers:—S. D. Karns, President; Joseph J. Beal, Vice-Pres.; R. N. Pool, Gen'l Sup't; James Y. Fulton, Sec'y; P. Y. Hite, Treas.

Branch Office, Pittsburg, Pa.

To Geo. B. Strauch:—You are hereby appointed the Mining Engineer for the Royal Land Company of Virginia, and empowered to perform all the duties pertaining to that office in connection with said Company. Your engagement begins upon February 1, 1877, at $125.00 per month until the first day of March, 1877, when your salary is to be $350.00 per month thereafter. This engagement is hereby assured you for the space of one year from this date upon the above terms.

R. N. POOL,
Gen'l Sup't Royal Land Co. of Virginia.

Total amount due under the above contract is as follows:—

From February, 1877, to January 31, 1878			$3975 00
Cr.			
Mch. 28, 1877. Cash . .	$50 00		
Apr. " " " . . .	90 00		
June 4, " " " . . .	50 00		
	$190 00		
Less expenses, etc. . . .	48 30		
		$141 70	
			$3833 30

A. C. Seltzer and *Williams*, for the rule.

The instrument filed is not one upon which a judgment can be entered under the affidavit of defence law. First, the general superintendent of a corporation was not an officer who, *prima facie*, had authority to make contracts of employment such as the present on behalf of his principal; nor is there any averment to that effect. The paper is not attested by the corporate seal. Secondly, in the action here, the summons had issued returnable to the first Monday of October, 1877, which was several months before the time for the termination of the alleged contract. There is no case where judgment has been given on a written instrument when suit was brought before the termination of the period in which the services were to be rendered. The suit in such a case should be for a breach of the contract, and not in affirmation of it. Here the averment filed with the copy contained an assessment of damages, including an alleged amount due for several months subsequently to the time the action was begun. Thirdly, no judgment for want of an affidavit of defence could be rendered upon an executory contract unless it appeared on the record that the time within which the services were to be rendered had elapsed before suit brought, and without an averment that the services had been performed or prevented by the defendant's default.

Hutchinson *v.* Weir, 1 WEEKLY NOTES, 267.
McNarr *v.* Winpenny, 1 Id. 29.
Makin *v.* Ins. Co., 1 Id. 101.
Titus *v.* Bell, 4 Id. 380.
Cugan *v.* Lloyd, 2 Miles, 259.

A. Sydney Biddle (*G. R. Kaercher* with him), contra.

In order to *strike off* a judgment regularly obtained, there must be error apparent on the record; the question as to whether the damages are properly assessed is not before the Court.

The averment, "Total amount *due* under above contract is as follows, etc.," is to the same effect as if the plaintiff had expressly averred that he had performed his part of the contract, or always had been ready and willing to perform the same, and had been prevented by the defendant's default. No such averment, however, is essential.

Sutton *v.* Base Ball Club, 4 WEEKLY NOTES, 90.

The case of Titus *v.* Bell (4 WEEKLY NOTES, 380), cited on the other side, is dissimilar, there being in that case no averment whatever filed with the copy. See also—

Fertig *v.* Maley, 5 WEEKLY NOTES, 133.

The action is not prematurely brought.

Hochster *v.* De La Tour, 2 Ellis and Blackburn, 678.
Frost *v.* Knight, L. R. 7 Exchequer, 111.

By analogy to the decisions under the affidavit of defence law cited in 1 Troubat & Haly, 370, it must be held that the copy filed in cases like the present, *i. e.*, for services rendered by servant against master, can form the basis of a judgment for want of or want of a sufficient affidavit, equally well where the action is begun before the termination of the period referred to in the copy, as when brought after the time has elapsed.

In an action like this the plaintiff is entitled to a verdict for the whole contract price, being the *prima facie* measure of damages, subject to the

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defendant's right to reduce the amount by his evidence or cross-examination.

King *v.* Stearon, 8 Wright, 99.
Chamberlin *v.* Morgan, 18 Smith, 168.
Kirk *v.* Hartman, 13 Smith, 97.
Yelland's Case, L. R., 4 Equity, 350.
Ex parte Clark, L. R., 7 Equity, 558.
Ex parte Logan, L. R. 9 Equity, 149.
Thomas *v.* Howell, L. R. 18 Equity, 200.

Moreover, the point is not important, inasmuch as if the action had been tried before a jury, on the date when the judgment was given (January 26, 1878), although the original writ had issued some months previously, the plaintiff could have claimed damages to that day, and this was only four days before the termination of the year.

Gordon *v.* Brewster, 7 Wisconsin, 345.

But as the contract is divisible, the plaintiff would, in any case, be entitled to full salary for the months which had elapsed prior to suit brought, and as the *amount* of the judgment depends upon the assessment filed, any error in this, though ground for opening the judgment, would not be ground for striking it off.

C. A. V.

June 8, 1878. Rule discharged.

[After the argument in the above case, but before the decision, a motion for a rule to *open* the judgment, on other grounds, was argued, and (plaintiff's counsel not objecting) said rule was, on June 8, 1878, made absolute. For proceedings upon a rule to take depositions, under the rule to open the judgment, see next case.

Cf. Dickson *v.* Buchanan, *ante*, 192.]

C. P. No. 1. April 20, 1878.

Strauch v. Royal Land Co. of Virginia, [No. 2.]

Practice—Depositions—Rule to open judgment—Under a rule to open a judgment the plaintiff will not be subjected to expenses for taking depositions out of the county—The defendant must furnish security to pay the counsel employed in the other county a reasonable fee.

Motion to discharge rule to take depositions.

Judgment for want of an affidavit of defence had been entered, and subsequently the defendant obtained a rule to show cause why the judgment should not be opened (reported *supra*, note). In support of this rule defendant entered a rule with eight days' notice to the plaintiff to take depositions in Pittsburgh.

N. Dubois Miller (with whom was *A. Sydney Biddle*), for the motion.

A rule to open judgment is an appeal to the discretionary and equitable power of the Court. It is manifestly unjust that the plaintiff should be put to the expense of going to Pittsburgh or retaining counsel there for the purpose of assisting in divesting himself of a right acquired through his own vigilance and the defendant's default. Such expenses are not part of his judgment, and the judgment, if not opened, will not cover them. Besides, it may be that nothing can be realized on the judgment after all, and the plaintiff never be reimbursed the expense of an unsuccessful effort to divest his rights. The defendants ought to bring their witnesses here.

Act February 26, 1831, Purdon's Dig. 622, pl. 2–3.
Act June 16, 1836, Id. 233, pl. 137.

This is entirely different from taking depositions in aid of a trial where the possible chance of rejecting the deposition and cross-examining the witness at bar always exists, and different also from testimony taken under a commission with cross-interrogatories.

R. G. Williams (with whom was *A. C. Seltzer*).

We rely on the rules of Court, sections 43 and 50, and the common practice of the bar. We cannot take a commission, and we ought not to be in a worse position because our witnesses are within the State.

May 4, 1878. THE COURT. As a rule to open a judgment is discretionary with the Court, we ought to so mould the proceedings that they should not be inequitable or bear hardly upon the plaintiff, who is in no default; he is entitled to some security for his expenses.

Rule absolute, unless the defendant tender a moderate sum for counsel fees in Pittsburgh.

Oral opinion by BIDDLE, J.

C. P. No. 1. April 13, 1878.

Erlicher v. Lawson.

Affidavit of defence—Averment that defendant has paid the account, and holds plaintiff's receipt in full, is sufficient.

Rule for judgment for want of sufficient affidavit of defence.

Assumpsit on a book account. The affidavit of defence averred, *inter alia*, that defendant had paid to plaintiff the debt sued for, and holds plaintiff's receipts in full therefor.

Diehl, for the rule.

The affidavit is evasive. It does not set out the payments specifically, nor does it state in what and how the same were made.

Young *v.* Pulte, 1 WEEKLY NOTES, 38.
Cummings *et al. v.* Bleim *et al.*, Id. 432.
Betz *v.* Gilmore, Id. 145.

No intendment can be made in favor of the defendant; it is his duty distinctly to set forth the fact on which the defence must turn.

Comly *v.* Bryan, 5 Wh. 261.
Rising *v.* Patterson, Id. 316.
Dows *v.* White, 2 Miles, 140.

Nothing should be left to inference.

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Peck *et al. v.* Jones, 20 Sm. 83.
Brick *v.* Coster, 4 W. & S. 494.
Moore *v.* Somerset, 6 Id. 262.
Ogden *v.* Offerman, 2 M. 40.
Dropsie, contra.

If an affidavit sets forth a *prima facie* good defence, it should be supported.

Thompson *v.* Clark, 6 Sm. 33.

C. A. V.

April 20, 1878. THE COURT. The simple allegation that the defendant had paid the account would be too vague in an affidavit of defence, but here the defendant swears that he also holds a receipt covering each item in the account, except one named, which he returned. These receipts might not be conclusive, but they would certainly make out a *prima facie* answer to the plaintiff's claim.

Rule discharged.

Oral opinion by BIDDLE, J.

C. P. No. 3. March 20, 1878.

Kollock v. Palmer.

New trial—Parol testimony to explain a record—Entry of satisfaction on the docket of an alderman after appeal by mistake—Surprise.

Rule for a new trial.

This was an action of trover, tried before YERKES, J., for a yacht which had been purchased by plaintiff of defendant for $225, whereof $100 was paid in cash, and the balance in an order on one Miller for paper. When the order was presented Miller was insolvent, and it was therefore worthless. Plaintiff sued defendant before an alderman to recover the value of the boat, and got judgment for $100, whereupon defendant appealed to Common Pleas. When the present suit was brought, defendant pleaded former suit pending. Plaintiff then discontinued the former suit, and, through ignorance, marked the original judgment on the alderman's docket "satisfied." At the trial the plaintiff offered to show this to be an accident and error, and the Court admitted his evidence under objection. Plaintiff further testified that he did not agree that defendant should retain the boat until the order and all charges were paid.

Verdict for plaintiff for $258.75. Defendant moved for a new trial, assigning as his reasons the admission of the evidence *supra*, and surprise that plaintiff should deny his right to retain the boat until payment of the order. He filed an affidavit in support of his reason, alleging that he could produce testimony to show that the character of plaintiff for veracity was bad.

F. F. Brightly, for the rule.

It was error to permit plaintiff to explain the entry of satisfaction on the alderman's docket. The defendant was surprised that plaintiff should deny that he told defendant he could keep the boat until the order and all charges were paid. If a new trial were granted, defendant could bring evidence to prove that the character of the plaintiff for veracity is so bad that he should not be believed upon oath in any issue in which he was interested.

E. C. Shapley, contra.

Inasmuch as the entry of appeal in the former suit took away all jurisdiction from the alderman, and in the Common Pleas the proceedings were *de novo*, the entry on the alderman's docket was immaterial, and might be explained at any time.

Felton *v.* Weyman, 10 Barr, 70.
Berry *v.* Baker, 1 P. A. Br. 224.
Robinson *v.* Shrouds, 1 Ash. 168.

The reason as to surprise of defendant that plaintiff should contradict him falls within no rule under which defendant could claim a new trial.

Rule absolute.

Orphans' Court.

March 21, 1878.

Cox's Estate.

Trustees — Consignees — Factors — Mingling of funds—Moneys held in a fiduciary capacity require no earmark—As long as trust funds can be identified they will be preserved for the owners — Ancillary administration — When transfer of funds not ordered—Commissions.

Sur exceptions to auditor's report.

Upon the audit of the administrator's account the following facts appeared:—

Stephen Cox, the decedent, died August 26, 1875, having on hand a large stock of fruit on consignment and a considerable sum of money in bank, representing the proceeds of sales of produce shipped to him as consignee. The stock on hand after his death, was sold by the widow of decedent, and the proceeds turned over to the administrator. The estate of the decedent was insolvent.

The claims of the consignors were ordered to be paid in full by the auditor, and commissions at the rate of 10 per cent. allowed to the accountant. An application was made by an ancillary administrator in Maryland, to have certain of the funds paid over to him, which application was

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refused. To these rulings, *inter alia*, exceptions were filed by certain creditors.

R. P. White and *R. J. Williams*, for exceptants.

The claims of the consignors should not be paid in full, as the moneys arising from the sale of their goods could not be identified and had been converted by decedent when deposited in his own name in bank.

Merrick's Est., 8 W. & S. 402.

G. W. Wollaston, for other exceptants.

The ancillary administrator in Maryland should have charge of the accounts of the estate in Maryland, and they should not be included in this account.

John T. Spencer, for consignors.

This Court will not send funds out of its jurisdiction to Maryland. The moneys received by the decedent were received in a fiduciary capacity.

Lemacke *v.* Booth, 6 Post (47 Mo.), 385.
Meador *v.* Sharpe, 54 Geo. 125.
Treadwell *et al. v.* Holloway *et al.*, 46 Cal. 547.

Money held in a fiduciary capacity requires no earmark.

Voight *v.* Lewis, Leg. Int. 1876, p. 402.
Bank *v.* King, 7 Sm. 205.
Stair *v.* Bank, 5 Sm. 364.
Pennell *v.* Deffell, 23 Eng. L. & Eq. Rep. 460.
Burdell *v.* Willett, 2 Vern. 638.
Denston *v.* Perkins, 2 Pick. 86.
Price *v.* Ralston, 2 Dall. 60.
Chest. Mtg. Co. *v.* Dehon *et al.*, 5 Pick. 7.
Viner Admx. *v.* Cadell, 3 Esp. 88.
Howard *v.* Jemmet, 3 Burr. 1369.
Scrimshire *v.* Alderton, 2 Strange, 1182.
Godfrey *v.* Furzo, 3 P. Wms. 185.

E. Hopper, for administrator.

The 10 per cent. commission was properly allowed. There was great trouble in the management of the estate. Among other things the administrator was compelled in midwinter to take a long journey on business connected with the estate.

April 13, 1878. THE COURT (after stating the facts). Several exceptions were filed to the report of the auditor appointed to distribute the fund, of which only two require to be noticed. It was contended that the claims of the consignors should not be paid in full because the moneys arising from the sale of their goods could not be identified, and had been converted by decedent when he deposited them in his own name at bank. The case of Voight *v.* Lewis (Leg. Int. 1876, 402) disposes of this objection. It was there ruled that moneys held in a fiduciary capacity required no earmark, and on the bankruptcy of the holder did not pass as his property to his assignees. So in Farmers' and Mechanics' Bank *v.* King (7 P. F. Sm. 205), STRONG, J., says: "It is undeniable that equity will follow a fund through any number of transmutations, and preserve it for the owner as long as it can be identified." In that case a deposit of trust moneys in bank by a trustee in his individual name was held not to change the property in the trust funds. The present case is free from the possible doubt which existed in those cited, from the mingling of funds of the principal and agent, for the auditor finds as a fact that decedent's deposit in bank was composed entirely of the proceeds of sale of consigned goods.

The claim of the ancillary administrator in Maryland to any portion of the assets collected in Pennsylvania cannot be sustained. Freeman's Appeal (18 P. F. Sm. 151) decides that the administrator of the domicil cannot be called upon to transmit its assets to the ancillary administrator. The utmost which can be said on behalf of the claim is that in the exercise of a wise discretion, the Court may order such a transfer. But no reason therefor has been attempted to be shown. To the exception to the claim of the accountant to commissions at the rate of ten per cent., the answer is that the labors and responsibilities of the administrator were shown to be of a character to warrant a compensation beyond the ordinary rate of commission. The power of the Court is ample to grant this compensation either in the shape of a gross sum or of an increased percentage.

The exceptions are dismissed, and the report of the auditor is confirmed.

Opinion by ASHMAN, J.

O. C. May 22, 1878.

Lewry's Estate.

Appointment of guardians—The right of a minor when over the age of fourteen to make choice of a guardian, when such right has not been before exercised, is absolute—Minors not estopped from exercising such right by private declarations, nor by lapse of time.

Sur petition for appointment of guardian, and answer.

The petition of Anna M. and Josephine Lewry set forth that in October, 1869, Emma M. Lewry was appointed guardian of her nephew, Thomas M. Lewry, who has since attained his majority, and of her two minor nieces, the petitioners, both of whom were then under the age of fourteen; that the petitioners are now of the ages of eighteen and sixteen years respectively, and prayed the Court that they be admitted to make choice of a guardian. They selected as their guardian Thomas M. Lewry, their brother.

Emma M. Lewry, the guardian appointed when the petitioners were under the age of fourteen years, filed an answer, setting forth that the

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person proposed as guardian was about twenty-two years of age, and by reason of his youth and inexperience unfit for the position; also that the said minors, when they attained the age of fourteen, on being asked if they were satisfied with the respondent as guardian, said they were, and did not desire to make a change.

The petitioners filed a replication, averring that the said Thomas was a person of respectability and property, and a suitable person to act as guardian.

Emma M. Lewry then filed an additional answer, stating she had only accepted the position of guardian with the understanding that she would be allowed to continue as such until they attained their majority; that she had been put to great trouble, care, and expense as guardian.

G. W. Thorn, for petitioners.

The absolute right of a minor to her choice in open court, where of proper age, has been settled in

Lee's Appeal, 3 Casey, 229.
Wilson's Estate, 1 WEEKLY NOTES, 346.
Benz's Estate, Id. 486.

If a fit person be chosen, it is the duty of the Court to appoint.

Arthur's Appeal, 1 Grant, 55.

M. Arnold and *B. H. Brewster*, contra.

These minors, on arriving at fourteen years of age, said they did not want any change of guardian, but were satisfied. After this lapse of time they cannot suddenly ask to have their guardian removed. They are estopped by their consent for this long time. There is no such absolute right to be found in our statute book as this claimed by the minors, to come in and say we appoint A. B. guardian, and the Court must ratify it.

The Orphans' Court has power "when and as often as is necessary" to appoint and change guardians. There is no absolute right of the minors or duty of the Court to allow a change, unless they think it a proper case. The present guardian can only be removed for cause, and not on the mere whim or fancy of minors, after faithfully performing her duties as guardian.

Lee's Appeal, *supra*.
Colehower's Estate, 5 WEEKLY NOTES, 343.

G. W. Thorn, in reply.

There are only two grounds on which the right to choose a guardian can be disputed: that the minors, although over fourteen years, are not competent to choose (as *non compotes*); and that the guardian chosen is not a responsible or proper person.

June 1, 1878. THE COURT. The single question raised by the pleadings is, whether any discretion is vested in this Court over the choice of a guardian by a minor above the age of fourteen years, where no personal unfitness on the part of the guardian is shown.

The Act of 29th of March, 1832, § 5, gives the right of choice to the minor of the age of consent, in broad terms. Its language is: "The Orphans' Court shall have power to admit such minors, when and as often as there shall be occasion, to make choice of guardians, and to appoint guardians for such as they shall judge too young or otherwise incompetent to make choice for themselves." Under this Act the Orphans' Court has no power to appoint a guardian where the minor is above the age of fourteen years and mentally competent to choose; and LEWIS, J., so held in Arthur's Appeal (1 Gr. 55). At common law the infant at fourteen was entitled to elect his own guardian, and to oust the guardian in socage. (Litt., § 123; Kent 2, 228.) This right of the infant is recognized by the Act of August 25, 1864, § 1, which gives to the Court the power of appointing guardians where the minors are absent in the United States service, and provides that such minors may subsequently appear and choose their guardians as in the case of one attaining the age of fourteen.

An estoppel to the choice now sought to be made by these minors was attempted to be set up, in their statement made upon attaining the age of fourteen years, that they were satisfied with their present guardian. It is true that a minor over fourteen is not authorized to supersede the guardian of his own selection as often as his fancy changes. (Lee's Appeal, 3 Cas. 229.) But an infant cannot be said to acquiesce in anything, and his solemn right of choice is not exercised by any other act or in any other mode than that prescribed by the statute. (See Wilson's Estate, 1 WEEKLY NOTES, 346.) It is *idle* to claim that the loose declarations of assent, uttered in private by a minor, to the continuance in trust of his guardian, can be held to take the place of his choice made in open court, and enrolled as a matter of record. The present application must therefore be regarded as the first attempt of the minors to exercise their right of selection, and in the absence of any cause shown to the contrary, it must be respected by the Court.

In the eloquent argument of counsel for the guardian, stress was laid upon the fact that the relation which is sought to be dissolved, had engendered sympathies and affections which should not be *severed* except for invincible reasons. An invincible reason, however, exists in the shape of a positive right conferred by statute, in the face of which all consideration of sentiment must be waived. Besides, the argument loses most of its force when it is remembered that no possible stigma is cast upon the guardian by the contemplated change. In effect, the law determines the period of her trust, at the time when it confides to the ward the power of selection. And in this

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instance the highest tribute to the ability and earnestness with which the guardian has discharged the duties of her office has been paid in the choice of a successor who acknowledges that he owes his own fitness for the task to her training.

The prayer of the petition is granted, and counsel are directed to draw the proper decree.

Opinion by ASHMAN, J.

O. C. May 23, 1878.

Tasker's Estate.

Decedents' estates—Executors and administrators—Extension of time for payment of debts due to decedent—When sanctioned by the Court.

Petition for approval of consent to extension, etc.

The petition of Thomas T. Tasker, administrator of Thomas T. Tasker, Jr., set forth: that prior to his decease, T. T. Tasker, Jr., sold his interest in the Paschall Iron Works and Delaware Iron Company to his partner, S. P. M. Tasker, for $206,000; that this sale was made with the intention of reselling to a "limited" partnership; that by virtue of certain agreements the petitioner is entitled to receive the notes of said limited partnership, known as "Morris, Tasker, and Company, Limited," secured by the pledge of the stock of the Delaware Iron Company; that the "Paschall Iron Works" property is subject to three first mortgages of $98,000 each, and one second mortgage of $307,478.31; "that said 'Morris, Tasker, and Company, Limited,' who, by the said sale, became and are now the owners of the property so conveyed, are unable to meet the prior mortgages so due as aforesaid, or to pay the debt due unto the petitioner, and propose an extension upon the terms of paying the interest upon the said mortgage debts, and upon the indebtedness due the estate of Thomas T. Tasker, Jr., and also of gradually diminishing the principal of the said prior incumbrances by semi-annual instalments. And the petitioner is asked to consent to said extension, without varying the right of the holders of Thomas T. Tasker, Jr.'s bonds as against the residue of his estate, and to agree to extend the time for payment of the debt due him for ten years, receiving as collateral, bonds, secured by mortgage upon the property of the Delaware Iron Company."

That the petitioner feared the paramount mortgages would be foreclosed, and that any deficiency between the amounts due on said bonds and mortgages, and those which would be realized upon a foreclosure would be payable out of other property of Thomas T. Tasker, Jr. But if the time for payment of said indebtedness be extended, the prior mortgages will be diminished by the aforesaid semi-annual payments, thus rendering it far more likely that the security will suffice to pay said mortgagees, and thus relieve the residue of Thomas T. Tasker, Jr.'s estate. The petitioner prayed that the following order be made:—

"That Thomas T. Tasker, administrator of the estate of Thomas T. Tasker, Jr., deceased, shall be at liberty to consent to, and the Court hereby approve of, the arrangement whereby the holders of mortgages securing the bonds of Thomas T. Tasker, Jr., consent to postpone their right to sue out said mortgages without prejudice to their right to claim on the bonds of Thomas T. Tasker, Jr., after such extension, out of any assets in the hands of the administrator of Thomas T. Tasker, Jr., and that he may agree to postpone the time for the payment of any debt due him as administrator by the said firm of 'Morris, Tasker, and Company, Limited,' for ten years, provided interest is paid thereon and collateral security given by bonds equal in amount to the debt, secured by mortgage upon the property of the Delaware Iron Company of New Castle, in the State of Delaware."

McMurtrie, for the petitioner; with him—
Sutton, for heirs and guardians of minors, and
Wolfe, for Morris, Tasker, & Co.

The Court has authority to grant this petition.

Warner's Appeal, 2 Wh. 295.
Shollenberger's Appeal, 9 Harris, 340.
Lewis *v.* Lewis, 1 Harris, 83.
Bayley's Appeal, 10 Sm. 360.

May 25, 1878. THE COURT granted the prayer of the petition.

(No opinion filed.)

U. S. Circuit Court—Equity.

April 24, 25, 27, 1878.

Union Mutual Life Ins. Co. v. Kellogg.

Practice—Equity suit by insurance company against its agent—Appointment of receiver pendente lite—Writ of ne exeat, when granted—Equity pleading—Set-off.

The corporation plaintiff filed a bill in equity, to determine, *inter alia*, the ownership of, and recover, a fund held by its agent, the defendant, and which came into the

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latter's hands as the plaintiff's money. After answer filed, the plaintiff moved for a receiver of the fund:

Held, that without deciding the merits of the controversy, a receiver might be appointed before the evidence was closed, if the pleadings (coupled with defendant's admissions) showed: (1) The reception by defendant, as agent, of a fund *prima facie* belonging to plaintiff; (2) Probable peril to the fund, if left in the defendant's hands pending litigation; and, (3) A presumption that the fund was actually existing under the defendant's control when the bill was filed.

And this latter presumption will arise from a statement or admission by the defendant that he has not embezzled any portion of it, and that he can satisfy a decree for the amount, if against him.

The bill prayed an account of moneys received by the defendant for the company, and for a receiver to hold the fund *pendente lite*. The answer admitted the receipt of the money, but averred a set-off for prospective salary and commissions, which the defendant alleged he had been prevented from earning by the plaintiff having illegally terminated his contract of agency; also other smaller items of set-off. The pleadings showed that even were the smaller items admitted, but the first disallowed, there would be a balance due the plaintiff. The evidence, as far as taken, showed probable peril to the fund if left in defendant's hands:

Held, that after answer filed, but before the evidence was closed, a receiver should be appointed for such balance, without deciding the merits of the controversy, but—

Quære, whether, in equity, such prospective earnings could in such a case be the subject of a set-off against the company by its agent.

Bill in equity, filed in March, 1877, by the Union Mutual Life Insurance Co. against the defendant, its general agent for the States of Pennsylvania and Maryland, averring that by the terms of a written contract annexed to the bill, the company had a right to discharge the defendant upon thirty days' notice, which right it had duly exercised; that the defendant had received as the company's agent large sums of money for premiums, of which there remained a balance due to the company, after all deductions to which the defendant was entitled, of over $15,000. The bill also averred that the defendant had refused to account; that there was danger of his removing from the jurisdiction of the Court, and of his taking with him all his property, and that there was imminent danger of a waste of the plaintiff's money, if left in the defendant's hands.

The bill prayed for a writ of *ne exeat*, a receiver, an injunction forbidding the defendant to dispose of any of the company's moneys, and an account.

On the day that the bill was filed, after hearing counsel for the defendant, the writs of injunction and *ne exeat* as prayed for were issued, the amount of the bond in the writ of *ne exeat* being in the sum alleged in the bill to be due the plaintiff. A short order to plead answer or demur in eight days was at the same time granted.

An answer was subsequently filed, in which the defendant stated an account between himself and the company, in which he credited the latter with the amount of money claimed in the bill, and debited it with various disbursements alleged to have been duly made by him for the company, together with certain claims by him against the company, resulting in a balance in the defendant's favor of $1500.

The answer also alleged that the contract of agency was, by its terms, to last till December 1, 1878; that it had been wrongfully and unlawfully terminated by the plaintiff in January, 1877; that by the contract the defendant was entitled to salary and commissions from the actual termination of the agency to the end of the term of service contracted for (Jan. 1877, to Dec. 1878); and two items of $7000 and $5500 were, *inter alia*, claimed by way of set-off for such prospective salary and commissions.

A replication having been filed, a master was appointed to state an account, and much testimony was taken, the effect of which, however, was unimportant in the view the Court took of the case, except that coupled with the pleadings it showed the plaintiff's money to be in peril if left in the defendant's hands.

Before the testimony was closed, the plaintiff's counsel moved for a receiver.

S. B. Huey and *G. W. Biddle* (*A. Sydney Biddle* and *Daniel Magoon* with them), for the motion, argued that a motion for a receiver was like a motion for an injunction, which could be made interlocutorily. It rests in the sound discretion of the Court, and will be made where it appears *prima facie* that the defendant had money in his hands belonging to the plaintiff, and that the fund was in peril, provided it could be shown by a fair presumption that the fund was in existence when the application was made.

[CADWALADER, J. If you can show money in the defendant's hands—not money theoretically in his hands, not money he has embezzled—but money actually in his hands, we shall be desirous to act interlocutorily. We can do that.]

This is shown by the bill and answer. The defendant admits having received our money, which, to the extent of $12,500, he is not entitled to set off, or, at any rate, if he is, the fund has been shown to be in peril.

[CADWALADER, J. What is the inference from that? Is it not that he corruptly held it and used it? How does that put the money in his hands, so that we can order him to pay it before final decree, or put him in jail for not doing it? Is the inference from these facts that he still has it, or that he has improperly used it? In Askew *v.* Odenheimer* (not reported), a case in which I was counsel, the defendant in his answer denied having anything of the plaintiff's. On the mere

* U. S. C. C. for E. D. of Penna., 1845.

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question of arithmetic it was found that he had several thousand dollars, upon the admitted facts, and even in that case we could not get the money paid into court until the answer was filed; but upon the answer it was a question of partnership, —he did not divide by 2 when he ought to have done so, and the consequence was, that five thousand dollars was ordered to be paid into court. That was, however, done with great caution, and because these facts appeared in the answer. As Judge McKENNAN suggested to me just now, you appear to be applying for execution before judgment.]

We do not want this money ourselves, we merely want it paid into court. All the facts on which we rely appear in the bill and answer, and therefore the principle in Askew *v.* Odenheimer was precisely the same as here.

[CADWALADER, J. Precisely, but the facts were the reverse; a partner had cheated his co-partner, and had made an assignment to the co-partner for his indemnity; the co-partner who had been cheated put his foot on the neck of the co-partner who had cheated him and would not account. The man who had cheated him filed a bill in this Court, and the defendant stated in his answer that so much was required to indemnify him. He did not observe that half of that belonged to the partner, and upon the simple arithmetic he was ordered to pay so much into court, by his own admission upon his own answer that he had so much money of the plaintiff's in his hands. The receiver will not be appointed until the final decree, unless it appear by the answer that the defendant still holds the fund. I agree to everything you say, if you can show that there is a *fund* as contradistinguished from a *debt*.]

The case is identical with Askew *v.* Odenheimer; here the defendant in his answer expressly charges himself with a large amount of money received for the company as its agent. He sets up counter claims, which will exhaust that fund, and leave a balance in his favor of $1500. Two of the items of set-off are for matters which he cannot claim to set-off in equity at all. Therefore after deducting from the total of those items the excess of $1500 he has acknowledged, unless it is fair to infer embezzlement, a fund to that extent (viz., $11,000), of the company's money in his hands. The case of Dillon *v.* The Connecticut Life Ins. Co., Court of Appeals of Maryland, 1875, was this identical case. The items of set-off claimed there were the same as here, and the Court appointed a receiver, and this was affirmed in the judgment of the Court of Appeals.

[CADWALADER, J. Was the receiver appointed there before final decree?]

Yes, before the testimony was closed, just as here, upon bill and answer. It is not fair to infer that the defendant has committed a fraud and embezzled the money.

[McKENNAN, J. I understand you to say that by the necessary import of this account in the answer, the defendant admits that he has $12,500 in his hands, and that he says he is entitled to retain it, because he has these two claims amounting to that sum against the company. I think that is a fair inference from the document. There are two alternatives. In the first place, the defendant admits that he himself received the money, and has it in his hands, but claims to retain it because he says he has certain credits which ought to be allowed him; or else he must say that he is justly subject to the reproach of having criminally embezzled the plaintiff's money, so that I do not think that we ought to seek to get rid of his admission. If we have, by the documents furnished by the defendant himself—by his own answer—distinct admission that he had a certain amount in his hands when the bill was filed, I think we ought to lay our hands upon it. I do not think that there is any question, even of arithmetic, here as to the indisputable consequences of the admissions in the answer.]

Upon the 25th of April the counsel of the defendant presented the latter's affidavit stating that he had not concealed the $12,500 or any part of it, or embezzled it, or wasted it, or put it out of the way in any sense, to prevent the plaintiff from recovering it, if he could establish his right to recover it; that the defendant was entitled to this money, or if otherwise that he had acted in perfect good faith, that he was not insolvent, that he had means out of which the full amount claimed by the plaintiff, if a decree were finally made against him for that amount, could be paid.

[McKENNAN, J. I think the affidavit which has just been read, comes pretty close to admitting that the defendant has this money in his hands, and he denies any improper use of it.]

Shick and *B. H. Brewster*, contra, argued that there was no admission in the answer, or by the affidavit, that any of the plaintiff's money was in the defendant's hands. On the contrary, by the answer, a balance of $1500 was shown to be due to the defendant. He had a perfect right to retain that $12,500 to liquidate the damages which he had sustained by his having been wrongfully removed from the agency by the company. Much of this money had been received years before. The affidavit was in no sense an admission that he still had any of the company's money, but a mere denial of the improper use of whatever small balance, if any, was due the company, and which he still had.

The decision of McTighe *v.* Dean (22 New Jersey Equity Reports, 81) was substantially identical with this case. There the receivership was

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refused. The state of the accounts cannot possibly be determined until final hearing. The evidence is not all in, there is nothing to show that there is any specific fund in the defendant's hands.

[McKENNAN, J. The defendant's affidavit gets us over a matter of some difficulty, that both Judge CADWALADER and I had yesterday, that is whether the defendant might not have used this money. He denies that. The money that he got, belonging to the plaintiff, he says he has still in his hands.]

We do not deny that there was money of the company which came into our hands, but we claim that we have a right to hold that to meet the damages which we have suffered by their unlawful violation of their contract; but we do deny that there is any admission in the papers as to the amount we hold. This proceeding departs from all the precedents in this, that here you pick out two items from a voluminous account which no one but an expert can unravel, and hold that they admit that amount of the plaintiff's money to be in the defendant's hands.

[CADWALADER, J. I have no doubt it is a great novelty at this stage of the case, and a very important—I do not say dangerous—novelty. There was, however, another case in the Court of Common Pleas (not reported), exactly identical with that of Askew *v.* Odenheimer.]

We have a right to retain enough of the defendant's money to reimburse us for his wrongful conduct in terminating the agency.

Kirk *v.* Hartman, 13 Sm. 97.
Yelland's Case, L. R., 4 Equity, 350.
Ex parte Clark, L. R., 7 Equity, 551.
Ex parte Logan, L. R., 9 Equity, 149.
Thomas *v.* Howell, L. R., 18 Equity, 203.
East Angleon Railway *v.* Lythgoe, 10 Common Bench Rep. 734.

By the English statute unliquidated damages cannot be set off, but in this State unliquidated damages may be.

Eo die. THE COURT (McKENNAN, J.). We make the order asked for. The only difficulty that I have had about it, so far as my own views are concerned, was of a twofold character: first, whether there was an admission in the answer, in the exhibits, and in the depositions of the respondent, of any fixed determinate sum in his hands at the filing of the bill, which was received by him by virtue of his relations with the company as its agent, in the course of the business which he undertook to discharge. That difficulty was removed by the averments in the account contained in the answer, showing an admission by him of the receipt of a certain sum. He claimed to reduce that liability by two items showing that that amount—the aggregate of those two items—had not been expended. The next difficulty was as to whether this money was in such a state that it could be traced and substantially identified, in other words, whether it had been made away with by this man, and was therefore gone as a distinctive fund. That difficulty again was removed by the affidavit of the man himself. As I understand it he distinctly disclaims having made any improper use of this money so that it must be in his own hands, and can be traced there. The fact that this money was received by him as the property of the plaintiff, and belonging to the plaintiff here, is unquestionable. The answer shows that. Now that he should be permitted to retain that money as security for a claim which he sets up against the company, I cannot see should be any more readily conceded than that the money should be placed in some safe place where it can be available to be paid wherever, in the ultimate result of this litigation, it should be awarded. So that without intending to establish any precedent, except so far as future cases may accord in their features and circumstances with this case, I think that, under the circumstances of this case, we ought to make the order.

CADWALADER, J. I have no doubt that the order will meet the real justice of this case. I should have been satisfied with an order either way, either allowing or refusing the application, but upon the general reasons of the administration of justice, I should have been better satisfied, though I do not intend to dissent from the order made, with suspending this order until the final hearing. The precedent will be a dangerous and an embarrassing one. Still it does meet the justice of the case, and as the application was finally put entirely upon the pleadings, upon the bill and answer, without the affidavits or depositions that were originally exhibited, it is sufficiently within the precedent of Askew *v.* Odenheimer and the Maryland case which seems to be the only other authority, for me not to dissent from an order which I think meets the justice of the case.

(Oral opinions.)

The following order was then ordered by the Court to be entered.

And now, April 27, 1878, upon motion of complainant's counsel, and after argument by counsel, it is ordered that the sum of $11,000 be paid into the registry of the Court on or before the 28th day of May, 1878, by the defendant, Edward Kellogg, to abide the final decree of the Court in this cause.

[NOTE. The sum of $11,000 ordered to be paid into court was obtained by deducting $1500 (the balance the defendant alleged to be due him by the company on an account stated) from the aggregate of the two items of $7000 and $5500 claimed for prospective salary and commissions.]

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WEEKLY NOTES OF CASES.

VOL. V.] *THURSDAY, JULY 4, 1878.* [No. 23.

Supreme Court.

May, '78, 102. Feb. 11, 1878.

Pannell v. Commonwealth.

Crimes—Murder in the first degree—Insanity as a defence—What degree of proof necessary—Evidence—Medical experts—Value of testimony of—General reputation of insanity not admissible—Errors and appeals—What sufficient error in capital case.

Where a prisoner on trial for murder pleads insanity, the burden of proof is on him to show by satisfactory and clearly preponderating testimony that he really was insane at the time of the homicide, but it is not necessary that the proof of the insanity should be so conclusive as to rem all doubt.

In a capital case, even though the general tenor of the charge is correct, if the judge give an instruction on any material question which is likely to be misunderstood by the jury to the disadvantage of the prisoner, a new trial must be granted.

It is well settled that the knowledge and experience of medical experts are of great value in questions of insanity, and when competent medical experts have testified intelligently in a case, it is error for the Judge in his charge to say, "We question very much whether you will realize much, if any, valuable aid from them, in coming to a correct conclusion as regards the responsibility for crime by this prisoner."

Where a witness has testified in chief that, having seen the prisoner many times, he never noticed anything which induced a belief in his insanity, it is error to refuse to permit the witness to be asked in cross-examination whether he had ever seen enough of the prisoner to justify an expression of opinion upon his sanity or insanity.

Evidence of general opinion of the mental condition of the prisoner in the neighborhood in which he was born, raised, and lived for many years, is not admissible to prove insanity.

Per MERCUR, J. Since, in order to prove insanity which will relieve a prisoner from the guilt of murder, it is not necessary to show that he was a frenzied maniac, but only that he was "not of sound mind," it may be better to ask a witness, "Was the prisoner of sound or unsound mind?" than, "Did you or did you not discover anything that led you to think that he was insane?"

Error to the Oyer and Terminer of Lancaster County.

James E. Pannell was indicted for the murder of his wife, Anna C. Pannell. The plea was "not guilty." Upon the trial, before PATTERSON, J., the following facts appeared: The prisoner was born in Maryland in 1843; losing his parents in early childhood, he afterwards led an unsettled and dissipated life. In January, 1876, coming to Lancaster, he formed an acquaintance with Anna C. Hendricks at certain religious revival meetings; with her joined the Baptist Church there, and in April, 1876, married her. They went to housekeeping, and for a short time lived together in apparent peace and comfort. In May, 1876, a quarrel occurred, the prisoner at that time being employed in Philadelphia, and making weekly visits to his home in Lancaster. On July 4th and 5th the prisoner and his wife again quarrelled, when he struck her, and threatened to kill her. During his ensuing absence in Philadelphia, the deceased accepted employment as a waitress at a hotel. While so situated, on July 20th, 1876, the prisoner again returned to Lancaster, remained over night at the house of Mrs. Hendricks, his mother-in-law, and breakfasted with her. At 10 o'clock he went out for the purpose of seeing Anna, and returned at 11.30 o'clock, dined with Mrs. Hendricks, and spent the afternoon with her, conversing about the Centennial Exhibition, and other things he had seen in Philadelphia. The object of seeking his wife—it was inferred from language afterwards used by him to Mrs. Hendricks—was to effect a reconciliation. He asked Mrs. Hendricks to remain with him during the evening, as Anna was coming to the house. Anna came about half-past eight, and after some conversation about her younger brothers, said, "Mother, I have something to tell you." The prisoner, drawing up his chair, said, "I must tell *you* something; I want to talk a little business to you this evening." His wife replied, "Pannell, I feel good this evening, and I didn't come here to quarrel or make any fuss with you. I'll tell you now, as I told you to-day, I'll freely forgive you for all you have done to me, and I have made up my mind I will never live with you again." The prisoner arose, went to the window and looked out, returned, and standing close to his wife, said, "Anna, you look beautiful. Anna, we will make up to-night, or we will part forever." Simultaneously leaning forward as if to kiss her, he shot her twice, the second shot rendering her insensible, and causing death on the following morning. After the shooting the defendant attempted to escape by the balcony of the third story window, and was arrested on the second story. When arrested he expressed fear of being injured by the crowd which had collected, admitted that he had killed his wife, and with imprecations expressed satisfaction that the deed was done.

The defence relied on the prisoner's insanity. It appeared that his mother had been insane, and committed suicide by hanging. There was also testimony from members of the prisoner's family

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and those acquainted with him in early life, tending to show a diseased mind. There was also much evidence from those acquainted with the prisoner in Lancaster during the six months preceding the murder, to the effect that they never saw anything in the prisoner's conduct to induce a belief of his insanity. About an equal number of medical experts were called for the prosecution and the defence, and their contradictory testimony was very evenly balanced.

A witness called for the defence was asked, "What was and is now the reputation of the defendant in the neighborhood in which he was born, and raised, and lived, as to his mental capacity?" Objected to. Objection sustained. Exception.

A number of the Commonwealth's witnesses were asked in chief the following question: "In all the intercourse you had with the prisoner during the period of your acquaintance, with all your observations of his conduct, manner, and appearance, did you or did you not discover anything that led you to think he was insane?" Objection; admitted; exception.

A witness for the Commonwealth had testified in chief to his acquaintance and frequent association with the prisoner, and that he did not discover anything which led him to believe that he was insane. On cross-examination he was asked: "Did you or did you not, from all that you have related concerning this defendant, discover anything upon which you could base an opinion as to whether he was sane or insane?" *Answer.* "I saw nothing that would lead me to believe that he was insane." The witness was then asked: "Did you or did you not see enough in your intercourse with this defendant to warrant you in expressing your opinion as to his sanity or insanity, your attention not having been called to the fact?" Objected to; objection sustained; exception.

The Judge charged the jury, *inter alia*, as follows: "The law presumes sanity; in all criminal trials the person charged with the commission of the offence must be taken to be of sound mind until the contrary is shown; and therefore, to make insanity a good defence, it must be proven to the satisfaction of the jury. The burden of proof rests upon the defendant. . . . . [We had almost concluded to leave the question of *insanity* to you, gentlemen, with the comments of the able counsel for the Commonwealth and the counsel for the prisoner, and simply remark that it is a question of fact for you to determine from the evidence, and if made out beyond a reasonable doubt, it is a good defence and must acquit the prisoner.] . . . . [Now, whilst the medical witnesses may be paramount, and their opinions, in many instances, greatly superior to that of other witnesses in aiding a jury to come to a correct conclusion in many kindred subjects arising in criminal causes, the nature of their profession having directed their attention to the subjects; yet, in the case now trying, we question very much whether you will realize much, if any, valuable aid from them in coming to a correct conclusion as regards the responsibility for crime by this prisoner.

"You must be satisfied from the evidence, gentlemen of the jury, that this was a case of insanity, and therefore you must form your *own* opinion, and as ordinary men of the world—as men seeking truth—you may be as well qualified to form an opinion as any other on this subject matter." . . . .

After reviewing various conditions and forms of insanity, the Judge further said: ["Now whether all or any of those *conditions* existed in the prisoner at the time of the killing, is simply a question of fact, to be established, if possible, by conclusive and satisfactory evidence. The accused, acting under those conditions of mind, i assumed to have been an *in*voluntary agent or actor.] That must be proven to your satisfaction before you can acquit."

The defendant presented, *inter alia*, the following point: "If the jury believe that at the time the homicide was committed the defendant was insane, he must be acquitted. *Answer.* "This point the Court answers in the affirmative as an abstract proposition—but adds, that the jury must be satisfied, by satisfactory and conclusive proof, of the insanity of the defendant. The party alleging insanity must prove it, and the burthen of proof is upon the defence, to convince you, gentlemen, that the mind of the defendant was deranged, and so deranged as to make him irresponsible. If the jury so believe, from all the evidence in the case, then the defendant must be acquitted."

The jury found a verdict of guilty of murder in the first degree. The prisoner took this writ, assigning for error the rulings upon the evidence above given as excepted to, the portions of the charge within brackets, and the answer to the prisoner's point. There were many other assignments of error not pressed on the argument or noticed in the opinion of the Supreme Court, which are therefore omitted from this report.

S. H. Reynolds and *Wm. Aug. Atlee*, for the plaintiff in error.

The instructions as to the degree of proof of insanity required to acquit were erroneous.

Heister *v.* Laird, 1 W. & S. 245.

Meyers *v.* Commonwealth, 2 Norris, 131.

[AGNEW, C. J. Was not that condoned by other parts of the charge?]

Not so, under Green *v.* Commonwealth (2 Norris, 75). It might be were the cases analogous, but they are not.

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The medical witnesses were entitled to the fullest consideration. The force and value of their testimony was fully recognized in Pidcock *v.* Potter (18 Sm. 342).

J. W. Johnson, District Attorney, and *M. Brosius* (with whom was *J. B. Amwake*), for the Commonwealth.

It is only necessary that expert testimony should be predicated on facts fairly indicative of insanity.

Rambler *v.* Tyron, 7 S. & R. 92.
Dickinson *v.* Dickinson, 11 Sm. 404.

Such evidence was before our experts. Moreover, the question of the qualifications of experts is within the discretion of the Court trying the case.

Pidcock *v.* Potter, *supra.*
Del. & Chesapeake Steam Towboat Co. *v.* Starrs, 19 Sm. 36.
Sorg *v.* First German Congregation, 13 Id. 156.
Dole *v.* Johnson, 50 N. H. 452.
Taylor *v.* Roger Williams Ins. Co., 51 N. H. 50.

The testimony of insanity, in order to acquit, must be "satisfactory, and such as fairly flows from a preponderance of the evidence."

Commonwealth *v.* Meyers, 2 N. 141.

This may be expressed in a variety of language, and has been so expressed as strongly as was done by the Court below in this case.

Ortwein *v.* Commonwealth, 26 Sm. 421.
Brown *v.* Commonwealth, 28 Id. 123.
Lynch *v.* Commonwealth, 27 Id. 207.

In England insanity must be *clearly* proved (1 Whart. C. L. 16).

May 6, 1878. THE COURT. Forty-six errors are assigned. Many of them were not pressed on the argument, and have no special merit.

The killing of Anna C. Pannell by her husband, the plaintiff in error, is not questioned. The sole ground of defence urged to secure an acquittal, or to lessen the grade of the crime, is the unsound mind of the prisoner. We cannot say that there was not much evidence tending to prove him to be of unsound mind. If several of the witnesses were believed, the opinion of his insanity was not first entertained after the commission of this act, but existed, and was expressed, many years prior thereto. It was claimed that he had hereditary insanity. To sustain this view evidence was given that the mother of the prisoner was of unsound mind and committed suicide.

The only plea being that of insanity, and some eight or ten witnesses having testified to facts in support of that plea, it was rather an unfriendly remark of the learned Judge, when he said to the jury, near the commencement of his charge, "should it become necessary in your judgment to consider the evidence bearing upon the plea of the prisoner, and by which it is claimed he is entitled to palliation or excuse." In its effect it was equivalent to saying should it become necessary for you to consider whether he has any defence. As he had no other defence, the jury may well have considered that the Judge expressed a doubt whether they should deem the evidence of sufficient importance to consider it.

The homicide occurred some three months after the parties were united in marriage. At times he appeared to doubt the faithfulness of his wife. Sometimes he was irritable, cross, and quarrelsome. At others he was loving and kind towards her. The defence rested on hereditary taint, his own conduct and appearance for many years, and his fickle and unreasonable conduct towards his wife. It was not claimed that his insanity was of that type which is manifested in the paroxysmal or frenzied action of a maniac; but that, in a more subdued form, his mind was dethroned. This distinction was not very prominently presented in the charge, and the omission so to do may possibly have misled the jury; yet it is not so clear as to require us to say, there was positive error therein. The assignments from the 5th to the 25th inclusive, excluding the 9th, 21st, 22d, 23d and 24th, are designed to present this distinction. They cover objections to the form in which the question was put to the witnesses on the part of the Commonwealth. It was, "Did you or did you not discover anything that led you to think he was insane?" It was contended the word "insane" implied a higher degree of mental alienation than was necessary to exculpate the prisoner, and that the form of the question indicated the answer desired. In view of the fact that murder can be committed by none other than "a person of sound memory and discretion," it may be that the better form would be, "was he of sound or unsound mind?" Yet, inasmuch as the witnesses' understanding of what constituted insanity, as well as what constituted unsound mind, can be ascertained on cross-examination, we do not see that the rights of the prisoner were prejudiced by the use of the word insane; nor do we think the question was so leading as to make it objectionable.

The disallowed question covered by the 9th assignment was put under these circumstances. The witness had testified in chief to his acquaintance with the prisoner; that he had seen him many times, and conversed with him, and did not discover anything which led him to believe the prisoner was insane. It did not appear that his attention had ever been called to observe or notice whether he was insane.

So on cross-examination he was asked whether, from all he had related, he discovered anything on which he could base an opinion as to whether the prisoner was sane or insane. Avoiding any answer as to whether he discovered anything on which he could base an opinion that the prisoner

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was sane, he replied that he saw nothing which led him to believe the prisoner was insane. Then in view of the fact that the witness's attention had not been called to observe the condition of the prisoner's mind, he was asked whether he saw enough, in his intercourse with the prisoner, to warrant him in expressing an opinion as to his sanity or insanity. Substantially the question was whether he had scrutinized him with sufficient attention to form an intelligent opinion in regard to the condition of his mind. As the weight to be given to the opinion of the witness depended much on this fact, there was error in disallowing the question.

The 26th, 34th, and 36th assignments present the question to what degree or extent must the insanity of the prisoner be proved in order to acquit him? The Court was asked to charge, "if the jury believe that at the time the homicide was committed the defendant was insane, he must be acquitted." The Court answered this in the affirmative as an abstract proposition, but added "that the jury must be satisfied by satisfactory and conclusive proof of the insanity of the defendant."

That the proof of insanity must be satisfactory, and not merely doubtful to justify an acquittal, is undoubtedly correct; but we do not know any case in which it has been held that it must be conclusive. To require it to be absolutely conclusive, is asking for too high a degree of certainty. It is not necessary that the proof of insanity should be so conclusive as to remove all doubt. It may be established by satisfactory and fairly preponderating evidence. (Ortwein *v.* Commonwealth, 26 Smith, 421; Lynch *v.* Same, 27 Id. 207; Brown *v.* Same, 28 Id. 123; Meyers *v.* Same, 2 Norris, 131.) It is contended on the part of the Commonwealth that, conceding the word "conclusive" is objectionable as thus used, yet, inasmuch as the Court in several other parts of the charge said the evidence need be satisfactory only, the general effect of the charge did no injury to the prisoner. To this we answer, an examination shows the same objectionable language, substantially, used in other places. Thus in the portion of the charge covered by the 34th assignment, in commenting on the evidence tending to prove insanity, the Court said, "If made out beyond a reasonable doubt, it is a good defence and ought to acquit," thereby clearly indicating that any less degree of proof was not sufficient.

Again in the 36th assignment, after presenting the different kinds and phases of mental diseases, the Court said, "Now, whether all or any of those conditions existed in the prisoner at the time of the killing, is simply a question of fact, to be established, if possible, by conclusive and satisfactory evidence." The jury might have understood the Court to here say that it was not possible to establish insanity otherwise than by conclusive evidence. The effect of the language we have quoted is so far modified by the use of appropriate language in other portions of the charge, that in a case not capital, we might not feel required to reverse. In this case, where the life of a human being is at stake, he has a right to demand that the case shall be submitted to the jury under no doubtful instruction on a vital question. It is impossible to tell whether the jury acted on the opinion that satisfactory and preponderating evidence was sufficient to establish insanity, or whether "conclusive" evidence so strong as to establish it "beyond a reasonable doubt" was necessary. These assignments are sustained.

The language of the Court covered by the 35th assignment was certainly calculated to detract from the weight proper to be given to medical testimony. Much that was said in regard to such testimony was wholly unobjectionable, and entirely correct; but there was error in adding, "yet in the case now trying we question very much whether you will realize much, if any, valuable aid from them in coming to a correct conclusion as regards the responsibility for crime by this prisoner." Four medical witnesses had testified to the effect that the mind of the prisoner was unsound. They were all educated men, and of large experience in their practice. Two of them had resided near the father of the prisoner. They had knowledge of the mental disease of his mother, and had known the prisoner personally for several years. Their means of observing him and of forming an intelligent opinion as to the condition of his mind had been most ample. To their full observation as men, they had applied their scientific knowledge as experts, and testified to the result. The other two had testified as experts only, predicated on the assumed truthfulness of the facts testified to by others.

It is well settled that the knowledge and experience of medical experts is of great value in questions of insanity. They are like those of experts in all other branches of science and of art. Evidence had been given of the observation, experience, and skill of these medical experts, sufficient to enable them to form intelligent opinions, and they had testified to those opinions. We cannot understand on what principle the learned Judge said to the jury that in this case he questioned very much whether they would realize much, if any, valuable aid from their testimony. True, the jury were not bound to adopt the conclusions of the experts; yet they should have been instructed to give a careful consideration to the testimony of those who had made the diseases of the human mind a special study. In a former part of the charge the jury was told that

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"great respect should be paid to the opinion of that class of witnesses," followed by other remarks equally correct. Yet, when the Court came to apply the testimony to the case trying, its effect was almost destroyed. We see no especial circumstances in this case to justify taking from the evidence of these medical witnesses that consideration to which the testimony of experts is generally entitled.

As the case is to go back for another trial, it is not necessary to discuss the assignment relating to the taking of the verdict, nor to matters subsequent thereto. In so far as the other assignments are not covered by what we have said, they are not sustained.

Judgment reversed, and a *venire facias de novo* awarded.

Opinion by MERCUR, J. WOODWARD, J., absent, and TRUNKEY, J., absent Feb. 11th.

[See Commonwealth *v.* Sayre, *ante*, 424; also "Insanity as a defence in Criminal Cases," Am. Law Rev., vol. xi., No. 4, p. 661.]

Jan. '76. 189. Feb. 15, 1878.

Bauer's Appeal.

Courts—Jurisdiction over unincorporated societies—When not exercised.

While the Courts have jurisdiction to establish the rights of members of an unincorporated society they will not exercise it in cases where the tribunals of the society furnish an adequate remedy and where no right of property is involved.

Appeal from the Common Pleas No. 2, of Philadelphia County.

Bill in equity filed by Charles W. Bauer, and fifty-one other members of the Montezuma Lodge of the Order of Red Men, against John C. Seeger and seventeen others, members of the same society, to establish the right of the plaintiffs to enjoy the privileges and benefits of members of the said lodge. An answer having been filed the cause was referred to a Master, who found the facts substantially as follows:—

Prior to the 18th day of February, 1874, the plaintiffs and defendants with others, not parties to this suit, were members of an unincorporated secret society, constituted by the name and title of Montezuma Tribe No. 5, I. O. R. M. (Independent Order of Red Men) working under the jurisdiction of the Grand Tribe of the State of Pennsylvania, "the chief objects of which were to afford assistance to its sick and suffering members and to defray in whole or in part their funeral expenses." This society appears to have been organized on the 24th of November, 1851.

As is indicated by its title this association is subordinate to another known by the name of the "Grand Tribe of the State of Pennsylvania, Independent Order of Red Men," which in its turn acknowledges a superior styled "The Grand Council of the Independent Order of Red Men in the United States of North America." The Grand Council has supreme jurisdiction over the Order in the United States and all grand tribes of the States receive their legality and authority through charters or dispensations granted and issued by it, and are subject to its control. It has the power and right to enact all laws, rules, and regulations for the welfare and extension of the Order. To it are to be referred all measures for furthering the prosperity of the Grand Tribes; it receives with or without the sanction of a Grand Tribe, the appeal of a subordinate Tribe or of an individual member of a subordinate Tribe, and its decision when rendered is obligatory and final.

That under the authority of Grand Council, the Grand Tribe of Pennsylvania were authorized to levy a tax for the erection of a Red Men's hall in Philadelphia. That the Montezuma Lodge having neglected to comply with the conditions imposed in pursuance of this authority were suspended by the Grand Tribe. That subsequently a portion of the lodge (the defendants) having expressed a willingness to conform to the requirements were reinstated to membership and entered into possession of the place of meeting, books, papers, regalia, etc. That there are provisions under the Constitution and By-Laws for an appeal from the decision of the Grand Tribe to the Grand Council.

The bill prayed for an injunction to restrain the defendants from hindering, preventing, and obstructing the plaintiffs from attending and voting at the meeting of Montezuma Lodge, and inspecting its books and papers, and from receiving its benefits and from receiving and enjoying each and all the rights, liberties, and privileges of members of said lodge.

The Court after argument dismissed the bill, "without prejudice to complainants' right of appeal under the Constitution and By-Laws of the association." (Reported in the Court below, Bauer *et al.* Seeger *et al.*, 2 WEEKLY NOTES, 242.) Plaintiff took this appeal, assigning as error the action of the Court.

P. P. White, for appellants.

The Courts recognize the rights of membership of a society.

Comth. *v.* St. Patrick's Society, 2 Binn. 441.

It is no answer to say that the By-Laws of the society contain a provision for an adequate remedy, the jurisdiction of the Court cannot be thus ousted.

Gray *v.* Wilson, 4 W. 39.

D. W. Sellers, for appellees.

Courts do not interfere in cases such as this, unless there is a plain violation by the society of

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its own law. Each individual member of this Order is bound to obedience by virtue of the law of its organization and also his own oath. The principle enunciated in the following cases sustains the decree of the County Court.

Comth. *v.* Society, 8. W. & S. 247.
Society *v.* Comth., 2 Smith, 125.

February 25, 1878. THE COURT. We discover nothing in the record of this war in the Order of Red Men to require judicial interference. No matter of property invites to it, while the disputes in the Montezuma Tribe have ample means of remedy in the tribunals of their own choice, before Red Men who understand their laws and language, and can administer justice according to their own rites and rules.

Decree affirmed at the cost of the appellants, and their appeal is dismissed.

PER CURIAM. WOODWARD, J., absent.

Jan. '78, 232. March 12, 1878.

Webster's Appeal.
Goldsmith's Appeal.

Equity — Subrogation — Where allowed — One voluntarily assuming a debt not entitled to — Rights of intervening creditors.

Subrogation will not arise in favor of a stranger, but only in favor of a party who, on some sort of compulsion, discharges a demand against a common debtor

Subrogation, being founded on principles of general equity, will not be decreed where it would work injustice to the rights of others.

A. & B. were endorsers respectively of two notes drawn by C., holding, as collateral, judgments confessed by C. in their favor. When the note endorsed by A. fell due, C. went to B. (A. being absent and taking no part in the transaction) and induced him to endorse a new note to be given in payment of it, promising to procure the assignment of the judgment held by A. Other judgments were obtained against C. before this indorsement or assignment was made. Upon distribution of a fund produced by the sheriff's sale of C.'s real estate under a prior judgment:

Held, that B. having acted without any request from A. was not entitled to subrogation.

Appeal from the Common Pleas of Luzerne County.

This was an appeal confirming the report of an auditor distributing a fund arising from a sheriff's sale of real estate. The facts, as found by the auditor, were as follows:—

On October 30, 1874, Philip Banker and Robert Baur became endorsers, each upon one of two notes drawn by Jacob Adams, who, on the same day, confessed two judgments, one for $950 in favor of Baur (the amount of the note endorsed by him), to November term, 217, and another to the same term, 218, in favor of Banker, for $700 (the amount of the note endorsed by him). The judgments were held as collateral security for the endorsements.

On the 7th of December two judgments were obtained against Adams, one by P. R. Webster, the other by Goldsmith Bros.

On the 9th of December the note endorsed by Banker was about to mature. Banker was not in town, and Adams went to Baur and represented to him that he had not the means of meeting the note, and promising that if he (Baur) would endorse another note in place of it, he would procure the assignment of the judgment held by Banker to secure him. Baur accordingly endorsed a note, which was received in payment of the then outstanding note. Banker took no part in this arrangement, nor did he know of it. He did, however, on February 4, 1875, assign the judgment to Baur.

Adams's real estate was sold by the sheriff under an execution on a judgment prior to those in question, and the fund ordered into Court for distribution.

The auditor reported that Baur, having discharged the liability of Banker, was subrogated to his rights, and awarded the balance of the fund (after payment of prior incumbrances) *pro rata* to the judgments Nos. 217 and 218, Nov. term, 1874. Webster and Goldsmith Bros. filed exceptions, which after argumen were overruled by the Court (HARDING, P. J.).

The exceptants took this appeal, assigning for error the action of the Court.

S. J. Strauss (*McLean* and *Jackson* with him), for appellants.

Baur's claim, if any, upon the Banker judgment must be by subrogation. After the payment of the note to which the judgment was collateral, the judgment was dead, and could not be brought to life by an assignment.

Erb's Appeal, 2 P. & W. 296.
Troup *v.* Wood, 4 Johns. Ch. 246.
De La Vergne *v.* Evertson, 1 Paige, Ch. 181.

Now to entitle Baur to subrogation his equities must be superior to those of his opponents. But any equity that he has is subsequent in point of time. The Webster and Goldsmith judgments were obtained on December 7th, the endorsement by Baur was on December 9th.

It has never been permitted to a suosequent surety to change the liability of a former one without his knowledge or consent, and then to demand subrogation as against him, and consequently not against those who are previously interested to prevent such subrogation.

Talmage *v.* Burlingame, 9 Barr, 21.
Schnitzel's Appeal, 13 Wr. 23.

Subrogation will not arise in favor of a stranger, but only in favor of a party who, on some sort of compulsion, discharges the debt against a common debtor. These principles do not apply

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in favor of volunteers. They can obtain the right of substitution only by contract

Mosier's Appeal, 6 Sm. 76.
Hoover *v.* Epler, 2 Sm. 522.
Wallace's Estate, 9 Id. 406.
Talmage *v.* Burlingame, 9 Barr, 21.

The assignment of the Banker judgment was void as an act of ratification, because the rights of intervening creditors had attached.

Childs *v.* Digby, 12 Harris, 23.

Gustav Hahn, for appellee.

The appellants show not a single equity in their favor, but invoke the aid of technicalities only to give them a preference over the appellee.

Del. & Hudson Canal Co.'s Appeal, 2 Wr. 517.
Mosier's Appeal, 6 Sm. 76.

May 6, 1878. THE COURT. On the 30th of October, 1874, Philip Banker obtained a judgment in the Common Pleas of Luzerne against Jacob Adams for $700. He was the endorser of a note of Adams's for the same amount, which had been discounted by the Wyoming National Bank on the 7th of October, and the judgment was confessed in order to indemnify him against liability for its payment. The note matured on the 9th of December, 1874, and on that day, in the absence of Banker, at the solicitation of Adams, and upon his assurance that Banker's judgment should be assigned to him for his protection, Robert Baur endorsed a new note to Adams for $700, which was received by the bank in lieu of that which Banker had endorsed. This new note was renewed from time to time, and was finally paid by Baur. Banker assigned his judgment to Baur on the 4th of February, 1875. In the mean time, on the 7th of December, 1874, judgments against Adams were obtained by Webster and Goldsmith Brothers, the appellants. In the distribution the auditor applied the balance of the fund, after payment of earlier judgments, *pro rata* to the judgment of Banker and to the one which had been confessed to Baur, both having been entered the same day. The Court confirmed the auditor's report.

Banker had no part in the arrangement between Baur and Adams. His judgment had been obtained for a single purpose. It was to protect himself as the endorser of the note that was running in the bank. If it had been paid at maturity, all the uses of the judgment would have been served. So far as Banker was concerned, why was the note not paid when it was cancelled by the renewal? The judgment was a personal indemnity to him. It was not a collateral or cumulative security to the bank. It had no connection with the debt Adams owed, except that it had grown out of it as an independent contract. When the note of the 9th of December was accepted, the discharge of Banker from all obligations as endorser was absolute, and with that discharge why were not his rights under the judgment at the same time extinguished? It has been urged that the debt survived. It is true that Adams remained the bank's debtor for $700, but he was bound by a new contract in a new form with which Banker had no concern. And with the hazard that he might be called upon for payment of the note removed, the vitality of his judgment was destroyed. His assignment could not galvanize it into fresh life, for on the 4th of February, 1875, he had no interest to assign. If the rights of Adams and Bauer were alone involved, there would be no objection to their agreement that it should retain or regain its original efficacy. But nothing which they could do, even in conjunction with Banker, could affect the rights of intervening creditors, which became vested when, by the discharge of Banker as endorser, the conditions ceased to exist which gave to the judgment all the validity it possessed.

Down to the moment when Baur endorsed the new note, he had not been in any way connected with the debt. He was under no obligation to Banker, to Adams, or to the bank. While his endorsement worked the release of Banker, yet it created no duty towards himself, for, as in Talmage *v.* Burlingame (9 Barr, 21) the act was without Banker's knowledge or request, and was done as a "mere volunteer, and under no circumstances of compulsion, moral or legal." And Adams was not competent to clothe Baur with Banker's rights, for that would have been the making a new consideration for and the writing of new conditions in the judgment. It was too late on the 9th of December to create a lien to have priority against other creditors from the 30th of October.

In no instance has the equitable doctrine of subrogation been carried to an extent that would support this decree. Ramsey's Appeal (2 Watts, 228), Dunn *v.* Olney (2 Harris, 219), and the Delaware and Hudson Canal Co.'s Appeal (2 Wright, 512), which were relied on in the opinion of the President of the Common Pleas, were illustrations of Chief Justice GIBSON'S familiar rule, that "he who may at law control the application of two or more funds, shall not be suffered to use his legal advantages in a way to exclude the demands of a fellow creditor whose legal recourse is restricted to but one of them." Cottrell's Appeal (11 Harris, 294) was just the case this would be if the judgment against Adams had been held not by Banker, but by the Wyoming National Bank. An endorser paying Adams's note would become entitled to subrogation to the rights of the bank under the judgment as a cumulative security for a single debt. In Cottrell's Appeal, the endorser of a note of a defendant for the amount of a judgment paid it to the creditor, and

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took an assignment of the judgment. It was very justly ruled that he was entitled to payment in preference to a subsequent judgment entered before the note was given. "When an application is made for substitution," Judge ROGERS said in Erb's Appeal (2 P. & W. 296), "the Court will take care that the subrogation of the surety shall work no injustice to the rights of others." While subrogation is founded on principles of equity and benevolence, and may be decreed where no contract exists, yet it will not be decreed in favor of a mere volunteer, who without any duty, moral or otherwise, pays the debt of another. (Hoover *v.* Epler, 2 P. F. S. 522.) It will not arise in favor of a stranger, but only in favor of a party who, on some sort of compulsion, discharges a demand against a common debtor. (Mosier's Appeal, 6 Sm. 76.) Chief Justice THOMPSON in that case said, "I regard the doctrine as applicable in all cases where a payment has been made under a legitimate and fair effort to protect the ascertained interest of the party paying, and when intervening rights are not legally jeoparded or defeated." Taxes assessed against an owner of land were paid over during several years by the collector, without payment by the owner to him. Subsequently the owner confessed a judgment to the collector as a collateral security. In the distribution of the proceeds of the sale of the owner's estate, it was held that the lien of the taxes was discharged by the payment over by the collector; that he was not to be regarded as a surety; that subrogation could not be allowed, except in a clear case, and where it would work no injustice to others, and that the collector had no priority over liens which preceded his judgment. (Wallace's Estate, 9 P. F. Smith, 401.)

There was no privity of interest and no contract relation between Baur and Banker. Baur could create no duty to himself by a volunteered intervention for Banker's relief. He became Adams's endorser without being under any legal or moral compulsion, and he had no existing interest, ascertained or contingent, to protect. He has no equity to entitle him to subrogation. At the moment when the new note was taken by the bank, and the liability to Banker on the former one was discharged, the only reason for the efficient existence of the indemnifying judgment was swept away, and the judgments of the appellants took its place in the order of priority of liens.

The decree of the Court of Common Pleas is reversed at the costs of the appellees, and it is now ordered and adjudged that the residue of the fund in Court, after the payment in full of the judgment of Robert Baur, No. 217, November term, 1874, be distributed *pro rata* to the judgments Nos. 240 and 359, November term, 1874, in favor of P. R. Webster and Goldsmith Bros., the appellants.

Opinion by WOODWARD, J.

May, '77, 196. May 6, 1878.

Gingrich to use v. Hamaker's Ex'rs.

Suretyship—Promissory note—Partnership—Custom—Evidence.

In a suit on a joint and several note by one of the makers, who has paid the same, against an alleged dormant partner of the other maker, it is inadmissible to show that the rule and custom of the bank, to whose order the note was drawn, and by whom it was discounted, was to take such note with the first name as principal, and the second as surety.

In order to fix the liability of a dormant partner in such a case, it must appear by evidence that the note was given for partnership purposes.

Error to the Common Pleas of Lancaster County.

Assumpsit by Joseph Gingrich to the use of his assignee, against the executors of E. W. Hamaker, deceased, to recover the proceeds of a note alleged to have been used in the business of a partnership in which the defendants' testator was a dormant partner.

The narr. contained the common counts and a special count which averred that Eli W. Hamaker, on March 8, 1867, being at that time a member of the firm known and trading as David L. Brown, made his certain promissory note, which the said plaintiff did also sign as surety, whereby he promised to pay, thirty days after date, $1000 to the First National Bank of Lebanon, which payment he failed to make, in consequence whereof the said plaintiff was obliged to pay the same, etc.

Pleas, non-assumpsit and payment with leave.

On the trial before LIVINGSTON, P. J., the plaintiff produced evidence to show that in November, 1867, David L. Brown was engaged in the distilling business with E. W. Hamaker and Henry Landis as dormant partner, and that the firm traded under the name of David L. Brown, an account in the First National Bank of Lebanon being kept in that name. On November 8, 1867, Brown presented at the bank for discount the following note:—

$1000. November 8, 1867.

Thirty days after date we jointly and severally promise to pay to the First National Bank of Lebanon, at the First National Bank of Lebanon, one thousand dollars, without defalcation for value received.

DAVID L. BROWN.
JOSEPH GINGRICH.

The bank discounted the note, and passed the proceeds to the credit of David L. Brown, by whom they were drawn out, but for what purpose did not appear. On the failure of Brown to meet the note it was paid by the plaintiff. Brown kept only one account with the bank.

The plaintiff offered to prove by the cashier

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that it was in accordance with the custom and rule of the bank at that time, to draw a joint and several note with the first man as principal and the second as surety, that this note was brought to the bank and discounted, and the proceeds passed to the credit of Brown. Objected to by the defendants; objection sustained; exception. The plaintiff then offered the note to show that the proceeds passed to the credit of David L. Brown, doing business in that name for the firm of David L. Brown, of which Hamaker was a partner, and to show that the plaintiff was surety on the note. The defendants having objected that the offer contained no competent evidence that the plaintiff was surety, the Court made the following ruling:—

"This note furnishes no evidence of suretyship, and if proof of suretyship were the only object of the offer, we should have to exclude it. The evidence shows that Brown applied to the bank for this loan, and that the whole proceeds were credited to Brown, and drawn out by him, and as the plaintiff seeks to recover from the defendants' testator as a partner of Brown, the firm doing business under the name of Brown, we allow the note to be read to the jury to show the plaintiff's claim."

The plaintiff gave the note in evidence and rested. The defendants moved for a non-suit, which was granted, the Court saying that while the plaintiff, upon proper proof, might have recovered by way of contribution, he had chosen to rest the case upon an allegation of suretyship, of which there was no proof. A rule to take off the nonsuit having been subsequently discharged, the plaintiff took this writ, assigning for error the rejection of his evidence as to the custom of the bank, and the entry of non-suit.

A. C. Reinœhl and *J. F. Trueauff* (*Boughter* and *Weidman* with them), for the plaintiff in error.

With the note proved, and all the facts of the transaction shown, the Court should have allowed the offer to prove the custom and rule of the bank, and let the evidence go to the jury under proper instructions.

Waln's Assignees *v.* Bank of North America, 8 S. & R. 73.
Meighen *v.* The Bank, 1 Casey, 288.
Carter *v.* Phila. Coal Co., 27 Sm. 286; 1 WEEKLY NOTES, 384.
Adams *v.* Pittsburgh Ins. Co., 26 Sm. 411.
McMasters *v.* Penna. Railroad Co., 19 Id. 374.

After the note was admitted, the plaintiff had the right to have the jury pass upon a claim of contribution. Instead of allowing this, the Court ordered a non-suit, and withdrew the consideration of the note from the jury. The evidence was that the plaintiff took up the note, and there is no presumption that he paid it with joint funds

Wall's Adm'r *v.* Fife, 1 Wright, 394.

E. Franklin and *H. M. North*, contra.

The first objection to the plaintiff's offer as to custom is, that it was an effort to establish the relations of the parties by evidence of a general practice; and this is not allowable.

Schoneman *v.* Fegley, 2 Harris, 380.
Featherman's Adm'rs *v.* Miller, 9 Wr. 104.

The second objection is the want of definiteness in the offer. The custom must be clear, and long persisted in, and well known in the community. The remarks of the Judge in entering the non-suit, show that the plaintiff declined to present his case as one of contribution, but rested solely on his right as an alleged surety. There is no presumption that Brown drew the note for firm purposes.

Burrough's Appeal, 2 Casey, 264.

May 13, 1878. THE COURT. There was no evidence of suretyship, or that the note was given for a partnership debt for which the defendant was liable.

We see no error in non-suiting the plaintiff.

PER CURIAM. Judgment affirmed. SHARSWOOD, J., absent.

Jan. '78, 16. March 6, 1878.

Rapp v. Hains.

Partnership—Injunction to restrain execution of judgment—Special injunction.

Appeal from the Common Pleas of Berks County.

This was an appeal by Henry B. Rapp from a decree continuing a special injunction restraining him from proceeding on a judgment against John Hains.

The bill of Hains, the complainant below, averred that a partnership previously existing between the complainant and defendant was dissolved on November 27, 1874, by a written agreement, under which the complainant purchased the defendant's interest for $531.50. That by the said agreement it was stipulated that all claims due the firm should be collected and divided equally, and that all debts due should be paid equally between them. That there had been no settlement of partnership accounts, but that on such a settlement the defendant would be found indebted to the complainant. That the complainant supposed, when he signed said agreement, that a part of its provisions were that the said sum of $531.50 should be settled for after a settlement of partnership accounts, and on account of what would be due him upon such settlement, but that, by the mistake of the scrivener, this provision was omitted. Further, that the defendant, having sued in covenant, ob-

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tained a judgment against the complainant for the sum of $531.50 mentioned in the agreement, although the complainant set forth in his affidavit of defence an indebtedness growing out of the partnership exceeding said amount, which judgment was affirmed by the Supreme Court on March 13, 1876 (Hains *v.* Rapp, 2 WEEKLY NOTES, 595), and that the defendant threatened execution on the same, which it would be inequitable to allow him to have.

The bill prayed an account of the partnership, and an injunction restraining the defendant from proceeding on his judgment.

On the filing of an injunction affidavit substantiating the averments of the bill, the Court awarded a preliminary injunction. The defendant, in his answer, alleged that an account of the partnership affairs would show an indebtedness of the complainant to him, and denied that any such provision as that averred in the bill was omitted by mistake from the agreement, or was ever spoken of or intended to be inserted. The defendant thereupon moved to dissolve the injunction. The Court below denied the motion, SASSAMAN, J., saying:—

"The Court, on bill and answer where the denial does not satisfactorily show that the defendant is entitled to have the special injunction dissolved, is bound to use its equitable discretion whether the injunction shall be at once dissolved, or whether it shall be continued to the hearing. The general principle of decision is that if the answer shows the existence of an equitable question, such question shall be preserved intact until the hearing. (Adams' Eq. 196.) Upon the hearing of a motion to dissolve an injunction, the defendant is considered as the actor, and on him rests the burden of disproving the equities of the bill; and his answer, always taken to be true, should fully and fairly meet complainant's equities without any evasion. Even then, if a reasonable doubt exists in the mind of the chancellor whether the equity of the bill is sufficiently answered, the injunction will not be dissolved, but will be continued to the hearing. (High on Injunctions, 881.) In this case there would be nothing more equitable than an account stated between the parties. The bill affirms one state of account, and the answer sets up in a general way another state of account between the partners. The answer makes no material statements of fact, but only states conclusions of fact as to the probable result of an account stated; and the Court is left to guess between the two.

"If upon an account stated on the hearing of this case, the defendant should fall in plaintiff's debt, even to an amount not exceeding his judgment, it would be unfair and inequitable to have execution of his judgment, whereby the present plaintiff's property would be sold to pay a debt, already either paid altogether or *pro tanto*. The defendant is secure for the amount of his judgment, but if the plaintiff's property should be taken to pay a debt not really and actually due, it is not shown to us that he would be in any wise secure, for what most likely would be an irreparable injury to him. This leaves us in grave doubt as to where the equities shall eventually be found to be, and we regard it, under the circumstances, as in equity and good conscience, that for the present the preliminary injunction should remain in *statu quo*. The motion to dissolve is accordingly dismissed."

The defendant appealed, assigning for error the refusal of the Court to dissolve the injunction.

Cyrus G. Derr, for the appellant.

A court of equity will not restrain a judgment creditor from profiting by his judgment, on the ground of an open and unsettled account between the parties.

High on Injunctions, § 142.

Shook *v.* Mot, 3 Luz. Leg. Observer, 391.

The bill ought to have alleged urgent danger of irreparable injury before a preliminary injunction was granted.

Biddle *v.* Ash, 2 Ashmead, 219.

Brown's Appeal, 12 Sm. 21.

Upon the coming in of the answer, denying all the equities of the bill, the injunction should have been dissolved.

Kneedler *v.* Lane, 9 Wr. 326.

Daniel and *James N. Ermentrout*, contra.

The Court may, in the exercise of a sound discretion, refuse a dissolution when the circumstances of the case seem to demand this course.

Chetwood *v.* Brittain, 1 Green Ch. 438.

[AGNEW, C. J. Is your injunction affidavit sufficient in averring that there was any *agreement* omitted by mistake?]

Yes. It avers that the complainant supposed a provision was to be inserted, but that it was omitted.

[SHARSWOOD, J. That's only that he supposed it was to be inserted. He don't aver any agreement.]

The burden of disproving the equities of the bill is on the defendant.

High on Injunction, § 881.

March 18, 1878. THE COURT. Special injunction dissolved, and record ordered to be remitted.

PER CURIAM. WOODWARD, J., absent.

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Common Pleas—Law.

C. P. No. 1. June 1, 1878.

Morgan v. Ludecker.

Husband and wife—Note given by a married woman—In order to render a husband liable on a note given by his wife for goods purchased by her to carry on a business in which he is not a partner, it must distinctly appear that the note was given by his authority.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit on a promissory note, by the payee against the husband of the maker. The affidavit of defence set forth that the defendant's wife had been carrying on the jewelry business previous to and since their marriage, under the name of M. Meissner, that being her name before marriage; that the note was given by her in payment of jewelry purchased to carry on the business; that since his marriage he had taken no part in the business; that he was not a member of the firm of M. Meissner, and in no way connected therewith.

Fisher, for the rule.

The affidavit of defence admits that the defendant was married at the time his wife gave the note in suit. Having permitted her to engage in this business, without openly disavowing his liability for her contracts, the defendant made the business essentially his own.

[BIDDLE, J. Do you ask judgment against a husband on a promissory note that is signed only by his wife in the name of her firm, when the husband was not a member of the firm? You will first have to show that she had authority from him to act as his agent.]

The law implies an agency in her to act for him, when she continued the business with his consent. The only reason which seems to have induced the Courts to rule that the law would not imply an agency in the wife to issue negotiable instruments in the course of her separate business, is that the husband might thereby be deprived of a defence in case of unfair or fraudulent dealings with the wife, where such instruments are sued upon while in the hands of subsequent *bona fide* holders for value. No such objection can be urged in this case when the suit is brought by the original holder.

Corson, contra.

C. A. V.

June 8, 1878. THE COURT. The very point raised in this case was decided in Reakert *v.* Sandford (5 W. & S. 164), that, where a note is given by a wife for the purpose of carrying on her trade, it is not enough to show that she bought the goods with her husband's approbation; it must further be shown that the note was issued by his authority. See also Husbands on Married Women, p. 41, § 35.

Rule discharged.

Opinion by BIDDLE, J.

C. P. No. 1. June 1, 1878.

Huddy v. Jones.

Execution—Inquisition and condemnation—Practice—It is not necessary that the return to the writ should show that notice of the time and place of holding the inquisition was given to defendant—It may be proved aliunde.

Rule to set aside the inquisition and condemnation on writs of execution.

The return on the writs was "levied and condemned, property appraised at $1800 clear." There was nothing in the return to show that the notice required by the Act of 16th June, 1836, to be given to the defendant of the time and place of inquisition had been given.

Harrington, for the rule.

The sheriff's return must show not only the time, but the manner of service; it must meet all the requirements of the law, or it will be set aside.

Weaver *v.* Springer, 2 Miles, 42.
Hawkins *v.* Weightman, 21 Smith, 128.
Biddle *v.* Starr, 9 Barr, 468.
Hayes *v.* Gillespie, 11 Casey, 155.

The plaintiff must show notice, since defendant cannot prove a negative.

Heydrick *v.* Eaton, 2 Binn. 215.

C. A. V.

June 8, 1878. THE COURT. It is not necessary that the sheriff should *make return* that he had given notice of the inquisition, but when it is questioned, he should be able to prove that he had done so. The deputy who serves the notice should keep a memorandum of the fact, which would enable him to say when and in which of the three ways pointed out by the Act the service was made. As in the case of posting his bills, the sheriff does not return that he has performed that duty, but his bill poster is presumed to be ready to prove it if required. Unless, therefore, it can be shown in the present case that the notice was given, as required by the Act of Assembly, we will make the

Rule absolute.

Oral opinion by BIDDLE, J.

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C. P. No. 1. June 1, 1878.

Townsend v. Hendrickson.

Landlord and tenant—Eviction—What constitutes—Where the tenant's goods remain on the premises, he will be considered to have retained possession—Entry of landlord to repair damages occasioned by fire is not eviction.

Rule to open judgment.

Action on a lease to recover rent in arrear. Judgment was entered for want of an affidavit of defence. The depositions taken in support of the rule showed that the premises had been partially destroyed by fire, that the landlord had them repaired, and then notified the tenant thereof; the tenant not returning to occupy them, the landlord advertised the premises for rent; that the tenant's goods, however, remained there, and he still kept the key.

Randall, for the rule, contended that there had been an eviction, the landlord having entered. He also stated that the tenant was not served until after the return day, and therefore entered no appearance.

Lister, contra.

To constitute an eviction in the absence of physical ouster, the tenant must have abandoned the premises in consequence of acts on the part of his landlord so decisive and illegal as to be equivalent to absolute physical ouster.

Gilhooley *v.* Washington, 4 N. Y. 217.
Mortimer *v.* Brunner, 6 Bos. 653.

Otherwise the landlord becomes a mere trespasser, and the tenant's remedy is an action for damages.

Elliott *v.* Aiken, 45 N. H. 35.
Upton *v.* Greenlees, 17 C. B. 51.

As to the eviction: Even where a constable delivered the key to the landlord, who put a bill "To let" on the premises, and showed them to parties applying, it was held not to be an eviction nor to discharge the tenants before the end of the time.

Pier *v.* Carr, 19 Smith, 326.
Kiester *v.* Miller, 1 Casey, 481.

June 8. THE COURT. Under the evidence in this case, which shows that the tenant had not abandoned the premises, but left his goods there and retained the key, we think there was no eviction, and therefore discharge the rule.

Oral opinion by PEIRCE, J.

C. P. No. 1. May 25, 1878.

Ward v. Whitney.

Execution—Married women—Separate earnings of wife—Sheriff's interpleader—Where a married woman who is not a feme sole trader claims goods levied on, she cannot give her own bond—Act of April 3, 1872.

Rule to show cause why a married woman claimant should not file her own bond.

The goods claimed by the wife were levied on under an execution against her husband. The affidavit in support of the rule set forth that deponent had duly petitioned the Court, and had obtained the privileges conferred by the Act of April 3d, 1872, which secured to a married woman her separate earnings, free from any legal claim of her husband or his creditors; that the goods levied on were all purchased with her separate earnings, and the title in no way derived through her husband.

Goodwin, for the rule.

The Act provides that the separate earnings of a wife are not subject to the claim of her husband's creditors, and she, being a *feme sole* as to such earnings, should have the same rights in regard to them as *a feme sole trader*, and the latter is allowed to execute a specialty.

Act of February 22, 1718, Purdon, 692.
Act of May 4, 1855, Id. 692, 1008.
Act of April 3, 1872, Id. 1010.
Burke *v.* Winkle, 2 S. & R. 189.
Wilson *v.* Coursin, 22 Smith, 306.
Nice *v.* Hing, 4 WEEKLY NOTES, 478.

Allinson, contra.

In Pennsylvania a married woman claimant in a sheriff's interpleader cannot file her own bond, even when she clearly states in her affidavit that the title was not derived through her husband.

1 Tro. Haly Pr. 905.
Barrett *v.* Gross, 2 WEEKLY NOTES, 324.

The Act of 1872 is only an extension of the Act of 1848, and is not intended to give married women any more extensive powers.

C. A. V.

June 1, 1878. THE COURT. It is contended that, because a married woman has been granted the privileges conferred by the Act of 1872, she can therefore give a valid bond. But no such consequence follows. The Act of April 3d, 1872, gives her simply a right to her own earnings, which she did not possess under the Act of 1848. Her bond, however, is simply void, just as it was before the Act. What a *feme sole* trader can do is of no consequence, as the claimant in this case does not occupy such a position.

Rule discharged.

Oral opinion by BIDDLE, J.

C. P. No. 3. May 4, 1878.

Trust Co. v. Kneedler.

Insanity as a defence to a contract—Mortgage executed by one subsequently found to have been a lunatic—Affidavit of defence by mortgagor, after recovery, setting up his former lunacy—Sufficiency of.

Rule for judgment for want of a sufficient affidavit of defence.

Sci. fa. sur mortgage dated August 18, 1876.

The affidavit of defence, filed by the defendant, set forth that on a petition filed January 30,

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1877, in the Court of Common Pleas No. 4, a commission *de lunatico inquirendo* was issued against deponent upon which an inquisition was held February 12, 1877, finding that deponent was "by reason of lunacy incapable of managing his estate, and was wasting and destroying the same, and that he had been in said state of incapacity by reason of said lunacy for the space of six months last past and upwards, and did not enjoy lucid intervals."

That the six months therein mentioned ran back to August 12, 1876, and thus antedated the said mortgage by six days. That said inquisition and return to said commission were duly filed and confirmed in said Court, and a committee appointed; that said deponent, the mortgagor was therefore insane upon the date of the execution of said mortgage, and that he has no present recollection of ever having executed it. Further that he was subsequently restored and the findings in lunacy were duly superseded by the Court.

Richard L. Ashhurst, for the rule.

The affidavit is insufficient because it fails to allege fraud on the part of plaintiff, either actual or constructive; notice to plaintiff of the lunacy proceedings, or of defendant's condition; or that defendant did not receive the consideration expressed in the mortgage.

Beals *v.* Seé, 10 Barr, 56.

When a contract is executed, so far as the consideration is concerned it would be alike derogatory to sound law and good morals, that the lunatic should be allowed to retain it to swell the corpus of his estate.

Lancaster Nat. Bank *v.* Moore, 28 Sm. 407.
Cook *v.* Parker, 4 Phila. 265.
Campbell *v.* Hooper, 3 Smale & Giffard, 153.

A *sci. fa.* is equivalent to a bill in equity either to foreclose the mortgage or hand back the security; and this being an equitable defence, the party must do equity.

F. E. Brewster, contra.

The affidavit is positive to the point that at the date of the execution of the mortgage, defendant was *non compos mentis*, and the authorities are clear that a grantor may avoid his deed by proof that he was *non compos mentis* at the time of its execution.

Bensell *v.* Chancellor, 5 Wh. 371.
Willis *v.* Willis, 12 Penna. 159.
Cook *v.* Parker, 4 Phila. 265.
Rogers *v.* Walker, 6 Penna. 371.

Bank *v.* Moore (28 Sm. 407) decided that insanity was no defence to a note given at a date on which a subsequent inquest found lunacy, without notice, etc., but conveyance of land and instruments under seal were specially excepted.

C. A. V.

May 18, 1878. THE COURT. It is enough now to say that this is not a case for judgment under the rule.

Rule discharged.

Orphans' Court.

March 19, 1878

Bowker's Estate.

Executors—Liability of for loss incurred in carrying on business of decedent—Purchase by trustee at his own sale, when void—Gift inter vivos—Commissions and stipulated salary, when allowed.

Sur exceptions to auditor's report.

At the audit the following facts appeared: James Bowker died suddenly on the 22d of March, 1873, leaving a widow and a minor child, of whom the mother was appointed guardian. By his will he appointed Samuel Sutcliffe and John Bowker his executors. The child having been born after the date of the will, revoked it *pro tanto*. Samuel Sutcliffe died before the testator, and letters testamentary were granted to John Bowker.

The estate of the decedent was, at the time of his death, apparently insolvent, the liabilities far exceeding the perceptible assets; accordingly, after consultation between the executor, his counsel, and the widow, it was decided that the most advantageous course would be to carry on the business and endeavor to pay off the indebtedness gradually. In pursuance of this decision the executor assumed entire control of the business of the decedent. For his services in this capacity it was agreed that he should receive a stipulated salary. The business was continued until February, 1876, when the stock, good-will, and fixtures were sold at public sale, after due advertisement, to J. Faraday Bowker, a son of the executor, for $5025, for which his notes, endorsed by the executor personally, were taken in payment.

About noon of the day on which the decedent died he gave a pocket-book to his wife, saying: "Here, mom, take this." The pocket-book, when produced and opened in the presence of several witnesses, was found to contain about $2800.

By agreement of counsel the account was submitted to Joseph A. Clay, Esq., as auditor, who reported, *inter alia*, that the executor pursued the only course by which the debts of the decedent could be paid; that the sale to J. Faraday Bowker could not be attacked; that the arrangement that the executor should receive a salary in addition to his commissions was in accordance with an express agreement with the widow, who was the only person interested; that the transfer of the pocket-book to the wife of the decedent was not a valid gift of its contents, and he pro-

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visionally charged the executor with them, requiring him to collect the amount; and also charged him with the difference between the amount of old stock remaining on hand at the time of sale and the amount of the sale.

Exceptions were filed on behalf of the widow and guardian, alleging for error the above rulings, and also that the executor should have been charged with the goods at the inventoried price, with interest to date of sale on the amount remaining invested in old stock, and that there was an apparent double credit in the executor's account of some $9700.

The executor excepted to the report as charging him with the contents of the pocket-book and with the difference between the amount of old stock as per inventory and the amount of the sale.

Hampton L. Carson (with him *J. G. Millette*), for widow and guardian.

An examination of the account will show that it was not necessary to carry on the business in order to pay off the debts, and an executor has no right to involve the estate of a decedent in the risks of trade.

Callaghan *v.* Hall, 1 S. & R. 241.
Wood's Estate, 1 Ash. 314.
Williams on Executors, pp. 1658, 1791.
Barker *v.* Parker, 1 T. R. 295.
Ex parte Garland, 10 Vesey, 119.
Kirkman *v.* Booth, 11 Beavan, 273, 280.

An executor who assumes extra-official duties will be held to the strictest accountability for all profits or depreciation.

Landis *v.* Scott, 8 Casey, 495.
Robb's Appeal, 5 Wr. 45.
Burns *v.* Coxe, 30 Leg. Int. 76.
3 Redfield on Wills, 402.
Piety *v.* Stace, 4 Vesey, 620.
Oram's Estate, 9 Phila. 358.

The executor should be charged with the difference between the inventoried price and the amount of the sale to J. F. Bowker.

Wood's Estate, *supra.*

The executor should be charged interest on the amount of money locked up in old stock

Copeley's Appeal, 3 WEEKLY NOTES, 145.

The sale of the business by the executor to his son was against the policy of the law.

Dundas's Appeal, 14 Sm. 325.

The executor should not be allowed both his commissions and a stipulated salary. The amount of the commissions should be fixed by the Court.

Swartswalter's Account, 4 Watts, 77.
Stehman's Appeal, 5 Barr, 417.
Barr *v.* McEwen, Baldwin's Rep. 154.
McElhenny's Appeal, 10 Wr. 347.

The transfer of the pocket-book was a valid gift to the wife of it and its contents; the executor is not entitled to the money contained therein, and cannot charge commissions on it as part of the estate of the decedent.

Crawford's Appeal, 11 Sm. 52.

The personal agreements of the widow were not sufficient to estop her from objecting to the actions of the executor in her capacity of guardian.

George Junkin (with him *Horatio Gates Jones*), for executor.

The Court will not charge the executor for a mere error of judgment in not selling at once, inasmuch as he acted upon advice of counsel, and with the approbation of the widow.

The salary and commissions were joined by express agreement with the widow, in consideration of the executor giving up his then employment and taking personal charge of the business.

May 4, 1878. THE COURT (after stating the facts). The safe rule for an executor, who desires to curtail as far as possible the responsibility incident to his office, is to convert at the earliest moment the assets of his testator's estate into money. But there are cases, and this is one of them, where a rule which insures safety to the executor may work disastrously to the estate. The evidence is that the decedent had built up a large business, which he left deeply involved, with a heavy stock of goods unsold, and many outstanding debts uncollected; and that some of his own debts were of a fiduciary character, whose non-payment would have seriously affected his reputation. The business, moreover, was one which required very considerable mechanical skill at the hands of any one who should undertake its management. By immediately closing it out and turning the stock into cash, through a forced sale, the executor would undoubtedly have saved himself from the present inquiry; but it would have been at a terrible loss to the creditors, and perhaps to the memory of the decedent. That he acted wisely in choosing rather to keep the business alive for three years, and to work off the old stock by judicious admixtures with new purchases, and to secure old debts by giving time and occasional further credit, is shown by the fact that all the private and business debts of the decedent were in that time paid off, out of an estate which, in the auditor's language, "was apparently largely insolvent."

He is also vindicated by the authorities. The remark of SHARSWOOD, J., in Neff's Appeal (6 P. F. Smith, 97), is directly in point: "Had he at once sued, obtained judgment, issued execution, and sold out the debtor, the probability is that the whole debt would have been lost."

In Keller's Appeal (8 Barr, 288), where an administrator neglected immediately to sue out a note belonging to decedent, whereby it was lost to the estate, Judge COULTER says: "A Court of Chancery always deals with great tenderness towards a trustee acting in good faith." And he adds: "The most stringent of our cases require

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that the administrator should be guilty of gross negligence in order to charge him." Lord HARDWICKE says in Knight *v.* Earl of Plimouth, (3 Atk. 480): "If there is nothing wilful in the conduct of the trustee, no *mala fides*, the Court will always favor him."

In Derbyshire's Estate (2 WEEKLY NOTES, 344), where the executor had completed at a loss a vessel which was left on the stocks by his testator, the Court say: "It would be a harsh judgment to visit the executor with a surcharge because he had not offered the unfinished hulk at public sale." And KING, P. J., in Bosio's Estate (2 Ash. 439), says: "Cases may be readily imagined in which too sudden a sale would be a manifest breach of trust." And he lays down this rule: "Where the administrator acts with good faith, and with that degree of caution which prudent men exhibit in the conduct of their own affairs, he is to be liberally dealt with."

In determining the *bona fides* of the executor's conduct one circumstance must not be overlooked. He continued the business of the decedent with the double disadvantage to himself, that whatever of profit might accrue would go to the estate, and that as to losses incurred, he would be personally liable to creditors as partner. And this although he carried on the trade avowedly as executor. (Labouchere *v.* Tupper, 11 Moore P. C., 198.) And before committing the estate to any hazard he took the advice of counsel, and acted upon it. How far this tended to lessen his liability may be seen in McNair's Appeal (4 R. 148), and Neff's Appeal and Derbyshire's Appeal, *supra*.

There is no reason to question the legality of the sale of the stock to the son of the accountant. The auditor finds that the sale was public, and preceded by the proper notice, and that the price obtained was the highest and best price bidden. There was no pretence that the purchase was in any way to operate to the benefit of the executor; and in Besson *v.* Besson (9 Barr, 280) it was held that even such a purchase, made by the trustee himself through a secret agent, was not absolutely void, in the absence of actual fraud.

The auditor very properly refused to charge interest on unsalable stock, or to surcharge the accountant with the difference between the values fixed in the inventory and the prices obtained at the sale. But he is manifestly in error in surcharging the accountant with $1025 on the ground that only $4000 of the stock sold at the public sale was of the original stock of the decedent, and that the surcharge represented the value of the new stock included in the sale. The accountant had charged himself with the entire proceeds of the sale, which represented all the stock remaining, whether originally of the decedent or bought after his death, with his money; and as to this sum of $1025, he is charged by the auditor twice. The accountant's exception to this item is sustained.

The credit for $9702.95 appears to be a duplicate credit, that sum having been apparently included in Schedule "E," which was embraced in the account. This can be determined only by referring to the books of the accountant, which are in the possession of the auditor. The exception to this credit is sustained.

The remaining exceptions were fully met by the auditor.

The report is recommitted to the auditor for correction, and for a further report as to the credit for $9702.95.

Opinion by ASHMAN, J.

(The account was restated subsequently and reported upon by the auditor.)

April 18, 1878.

James M. Smith's Estate.

Bill of review—Nature of—When allowed—Surety of an executor is a "party interested" within the meaning of the Act of October 13, 1840.

Sur petition for bill of review.

The accounts of Joseph Fearon, Executor of decedent, were referred to an auditor to report a distribution. At the audit the following facts appeared:—

James M. Smith died on the 20th day of May, 1868, leaving a will and two codicils; a widow and six children survived him. Letters testamentary were granted to the widow and Joseph Fearon. The decedent devised all his estate, real and personal, to the widow during her life, for the use of herself and her children. Fearon being a non-resident entered security in $200,000.

At the time of his death the decedent was engaged in business with the accountant and his brother, under the name of Fearon & Smith; various balance sheets of the firm business were struck, but they did not appear to be very accurate as to the actual alue of the stock; a final trial balance was struck in June, 1868; in this no inventory of the merchandise on hand was taken but its value was determined by taking the difference between the debit and credit sides of the "merchandise account" in the ledger. Mr. Fearon estimated that account would overvalue the stock on hand some $15,000.

The auditor (George Junkin) found, *inter alia*, that it was the duty of the accountant to settle the business of the firm at once, and determine the value of the decedent's interest: in the trial-balance this interest appeared to be

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worth about $81,000; this should have been paid in full, as the same sheet shows an amount of assets sufficient to meet it. This, therefore, he charged the accountant with, disallowing commissions and running expenses of the business after the death of the decedent.

The report and exceptions were filed, and after argument the exceptions were overruled, and upon appeal to the Supreme Court the decree of the Orphans' Court was confirmed (4 WEEKLY NOTES, 265).

The surety filed this petition.

David W. Sellers, for petitioner.

In determining the value of an interest of a dead partner, it must be ascertained in the Orphans' Court upon the same doctrines as prevail in settling firm property, that is, by a sale of the assets or their realization gradually, and the payment of the debts; the surplus to be divided according to the capital account, and then according to the individual interests. In this case the auditor has treated the accountant as though he had invested trust funds in a precarious business and lost.

The surety was not a party to the proceedings until the decree was made, and so could not come in and defend before the auditor; his liability only dates from the decree, and he is entitled to see that it was properly obtained; he therefore files his bill of review, alleging for error the action of the auditor in taking as final a trial-balance sheet alleged to be materially wrong both as to the amount and mode of ascertaining the value of the goods, in not inquiring sufficiently into the partnership business to state a true account, in refusing to allow the executor his commissions and the expense of converting the stock into money.

E. Spencer Miller (with him *E. H. Weil*), contra.

The rights of a surety are no higher than those of his principal.

A bill of review can only be granted in certain well-defined cases.

Green's Appeal, 9 Sm. 238.
Hartman's Appeal, 12 Casey, 70.

[PENROSE, J. Does not Whelen's Appeal (20 Sm. 428) leave it in the discretion of the Court?]

The executor cannot be allowed counsel fees and expenses incurred unnecessarily.

Nicklin's Est., 33 Leg. Int. 140.

May 4, 1878. THE COURT. This petition is by the surety of a surviving executor, the latter being a non-resident, for a review of the decree entered September 6, 1876, confirming the report of the auditor, to whom the first and second accounts of the executor had been referred. As a "party interested," contemplated by the Act of October 13, 1840, he is entitled to the review sought for if a proper case be presented. (Zinn's Appeal, 10 Penna. St. Rep. 469; Hartz's Appeal, 2 Grant, 83.) Under the provisions of the Act of Assembly a review of the account of an executor, administrator, or guardian, settled and confirmed by the Orphans' Court, must be applied for within five years after the final decree of confirmation, and can only be granted "as a matter of *right*, for error of law apparent on the face of the record, or for new matter which has arisen since the decree. As a matter of *grace*, a review may be granted for new proof discovered after the decree, which proof could not possibly have been used at the time when the decree was made." (MERCUR, Justice, in Milligan's Appeal, 1 Norris, 395.) A bill of review is in the nature of a new suit founded upon some substantial error of law upon the record of the proceeding it is proposed to review and correct, or upon newly discovered evidence, and the requirements of the Act should be strictly complied with. (Yeager's Appeal, 10 Casey, 173; Russell's Appeal, Id. 258; Cramp's Appeal, 31 P. F. Smith, 90; Pennypacker's Appeal, 1 Leg. Gaz. Reports, 485.)

Nor will it be allowed where its object is merely to re-open the account as to questions of fact already contested before the auditor and the Court, in the absence of new matter or after-discovered evidence. (Cunningham's Appeal, 2 Pitts. 177; Earp's Estate, 6 Philada. Rep. 138.) In the present case no error of law is alleged, and the sole error complained of, is the finding of the auditor of the value of the interest of decedent in the partnership of which he was a member at the time of his death. This was ascertained from the evidence, and the conclusion of the auditor became the foundation of a number of exceptions upon the part of the executor. These were fully argued, afterwards dismissed by the Court, and the report of the auditor confirmed. The petition of the surety is but a re-statement of the exceptions of the executor, and being wholly as to a matter of fact already passed upon by the Court, without alleging new matter, or the existence of evidence not presented to and considered by the auditor, does not come within the purview of the Act of 1840, or call for the exercise of the discretion of the Court to vacate the decree heretofore entered. It is therefore dismissed.

Opinion by HANNA, P. J.

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WEEKLY NOTES OF CASES.

VOL. V.] *THURSDAY, JULY* 11, 1878. [No. 24.

Supreme Court.

May, '78, 47 & 48. Jan. 5, 1878.

Turner v. The Commonwealth.

Criminal law—Homicide—Murder—In what courts triable—Indictment, sufficiency of—Additional law judges, when they may be elected—Act of April 9, 1874—Evidence—When distinct crimes may be proved—When character of witnesses may not be inquired into—Alibi—Effect of failure to establish—Burden of proof.

The Court of "Oyer and Terminer" is a sufficient description of the courts having jurisdiction of homicide cases.

The Act of April 9, 1874, authorizing the election of an additional law judge in the 25th district is constitutional.

Evidence of previous illicit intercourse between the prisoner and the deceased is admissible when it becomes a link in the chain of circumstances connecting the prisoner with the murder.

Evidence of the general character of witnesses should not be submitted to the jury, in the absence of evidence impeaching such character.

When a case against a person charged with a crime rests upon clear and positive evidence, *it seems* that evidence of an alibi should be of like character in order to produce a reasonable doubt; but when the evidence of the prosecution is wholly circumstantial, evidence of an alibi, though not clear, should go to the jury to be considered with other matters of defence.

It seems that the burden of proof in criminal cases never shifts, so that, if from any part of the evidence there arises a reasonable doubt of the defendant's guilt, he should be acquitted.

Error and certiorari to the Court of Oyer and Terminer and General Jail Delivery of Clearfield County.

Martin V. Turner was indicted for the murder of Maria J. Waple. Plea: not guilty. The indictment was in the following form:—

"In the Court of Oyer and Terminer for the County of Clearfield . . . The Grand Inquest of the Commonwealth of Pennsylvania do present, etc., that Martin V. Turner, late of the said county of Clearfield, . . with force and arms, etc., set in and upon the body of one Maria J. Waple . . . did make an assault, and her, the said Maria J. Waple, then and there feloniously, wilfully, and of his malice aforethought, did kill and murder, etc."

This indictment when sent to the Grand Jury room was endorsed, *true bill.*

The trial proceeded before ORVIS, Additional Law Judge, and HOLT and OGDEN, JJ., as associates. The Commonwealth put in evidence the following facts:—

Maria J. Waple, the deceased, was the divorced wife of Thomas Waple, and lived at Wallaceton, Clearfield County, Pa. On November 3, 1876, about 1 o'clock, she started, on foot, to visit her sister who lived about two miles away. She did not reach her destination, and on November 8th her body was found in the woods, about 100 yards from the road, with a gunshot wound in her breast and another in her head. The Court, under objection from the defendant, admitted evidence to show that from 1871 to 1876, during part of which time Thos. Waple was in prison, Turner and the deceased lived in criminal intimacy, and that in June, 1876, they quarrelled, and their relations ceased. The admission of this evidence formed the substance of the 1st and 9th specifications of error.

It was shown that Turner and the deceased met at the latter's gate at 12 o'clock, on the day of the murder, and then engaged in conversation. About one o'clock, as before stated, she hurried off in the direction of her sister-in-law's house. Soon after, two shots were heard proceeding from the direction of the place where the body was afterwards found. Turner, who lived a short distance from the place, left his house while the family were at dinner, about one o'clock, his father remarking that he had gone to shoot squirrels. He returned to the house in the evening, stating that he had been at the house of one Stanner. He had with him his double-barrel gun, which was unloaded. He said that he had fired several times at squirrels, but had missed them every time. During the search for the body, tracks, apparently those of a man and a woman were found near the body, and tracks corresponding somewhat in size to Turner's boots were found pointed from that place towards the house of one Williams, about a mile and a half distant. Mrs. Williams testified that Turner came there on the afternoon of November 3, about three o'clock, with a gun.

On the part of the defendant there was some evidence in rebuttal of most of this testimony, and many witnesses were called to prove an alibi. There was some testimony to show that Turner, after leaving the dinner table on November 3, worked at some repairs to the roof of the house until about half-past one o'clock. Geo. Morgan, the freight agent at the railroad station, testified that Turner came to the station between two and three o'clock, and helped him at his work in checking manifests for fifteen or twenty minutes. On cross-examination it seemed that Turner, several times, called Morgan's attention to his presence. Other evidence as to the alibi, which

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was criticized at the trial, is quoted in the opinion of the Court (*infra*). The defendant offered to prove that when the constable came to arrest him, he was in his father's house in bed, and when told the object of the visit, he said "All right; I will go with you; I am innocent." Objection. Offer rejected. Exception. (2d assignment of error.)

The defendant then showed, in order to rebut the presumption of his guilt, that Thomas Waple, the divorced husband of the murdered woman, returned from the penitentiary where he had been serving a term in May, 1875; that he then, although divorced from his wife, lived with her until September, 1875, when they quarrelled, and he left her; that he was afterwards arrested and confined in jail for non-payment of the costs in the divorce; that in the latter part of October, 1876, he requested his wife to bail him out, but she refused to do so; that he was released, and was seen at Mrs. Waple's house on November 3, the day of the murder, and afterwards by David Quigley and Jacob Strickland, at the same place, the following Monday evening. The Commonwealth, on cross-examination, asked Quigley what Waple said to him on the last occasion. Objected to. Admitted. Exception. (3d assignment of error.) Quigley testified that Waple told him he was searching for traces of the murder.

The Commonwealth, in rebuttal, offered to prove the whereabouts of Thos. Waple from November 3 to November 6. Objection. Evidence admitted. Exception. (5th assignment of error.) The Commonwealth also put in evidence some facts in contradiction of the alleged alibi.

The defendant requested the Court to charge, *inter alia*:—

First. The jury must be satisfied beyond a reasonable doubt that a murder was committed, and that the prisoner was the guilty agent therein, or they must render a verdict of acquittal. Affirmed.

Fifth. The jury must acquit the prisoner unless the evidence of the facts proved is absolutely incompatible with his innocence, and cannot be explained upon any other reasonable theory than that of his guilt; and if they find that the crime could have been committed by another, and the facts proved still be true, they must acquit the prisoner. *Answer.* We told you in our general charge that the facts proved must be such as to exclude every reasonable hypothesis but that of the prisoner's guilt. We affirm this point.

The Judge in his general charge said, *inter alia*, "[It is further alleged on the part of the Commonwealth that the defendant made efforts to manufacture testimony that was not true; that he attempted to get witnesses to swear to his presence at times and places where he was not; that he called witnesses' attention to pretended conversation. . . . Now is this a fact sustained by the proof? If it is proved that the defendant did so attempt to manufacture evidence which was false, it is a fact which you must consider.] . . . . You must bear in mind all of those facts by which the credibility of the witnesses can be determined, to ascertain whether the proof of the alibi, or of his being elsewhere at the time the murder was committed, is made out; . . you must scrutinize the evidence; you must consider the witnesses, who they are, what their character is in the community, whether their character for veracity has been assailed . . . An alibi is a perfect defence when it is fully, clearly and satisfactorily established, but the burden is upon the person asserting to establish it. . . . if proved, it constitutes a complete defence; if not proved, and you think it has not been proved, the attempt to manufacture evidence is a circumstance which always bears against the person. No innocent person is driven to manufacture evidence . . . "

Verdict, guilty of murder in the first degree. Judgment thereon, and afterwards ORVIS, J., pronounced sentence of death.

The defendant took this writ, assigning for error (22d and 23d assignments) that the indictment was found, and the defendant tried and sentenced, in a Court unknown to the law, and that the defendant was tried and sentenced to death by an additional law judge who had no constitutional power to try pleas of murder in a double district. (24th, 25th and 26th assignments) That the indictment had never been found a true bill, inasmuch as it was sent to the Grand Jury room with the endorsement *true bill;* that the indictment was defective in failing to aver that Maria Waple was living when assaulted by the prisoner, and in failing to state the station, title or degree of the prisoner (1st, 9th, 2d, 3d and 5th assignments). The admission and rejection of offers of evidence as set forth above (7th, 8th, 10th, 11th, 13th, 17th, 18th, 20th, and 21st assignments). The action of the Court in permitting the jury to find a verdict of guilty, upon a degree of proof less than that required by law in capital cases (15th assignment). In submitting to the jury the question of the credibility of the defendant's witnesses to prove the alibi (12th assignment). That portion of the charge inclosed in brackets.

Wm. A. Wallace (with him *D. L. Krebs*), for the plaintiff in error.

The title of the Court where the prisoner should have been indicted is "The Court of Oyer and Terminer and General Jail Delivery." That is the only Court where capital cases can be tried.

Constitution of 1873, Art. 5, §§ 1–3.

The record, throughout, gives but half this name to the Court.

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The Act of April 9, 1874 (P. L. 55), is unconstitutional in providing for an additional law judge in the 25th district; and Judge ORVIS, who tried this case, was without jurisdiction. The Act was avowedly in pursuance of the following mandate of the Constitution:—

"Wherever a county shall contain 40,000 inhabitants it shall constitute a separate judicial district and elect one judge learned in the law; and the General Assembly shall provide for additional judges as the business of the said district may require. Counties containing a population less than is sufficient to constitute separate districts shall be formed into convenient single districts, or, if necessary, may be attached to contiguous districts as the General Assembly may provide," etc.

The term single, as contradistinguished from separate, districts, refers to districts having but one judge. The Act of April 9, 1874, violated this provision.

See debates in Convention, *passim*.

The Court erred in admitting evidence of the criminal relations between the prisoner and the deceased. A distinct crime, unconnected with the indictment, cannot be given in evidence.

Shaffner *v.* The Commonwealth, 22 Sm. 60.
People *v.* Jones, 31 Cal. 565.

Granted that evidence of a distinct crime may be admitted to show a motive for the crime charged, no motive has been shown. It does not appear that the quarrel between the prisoner and the deceased grew out of their criminal relations.

The prisoner's declarations at the time of the arrest should have been admitted as part of the *res gestæ*.

Rhodes *v.* The Commonwealth, 12 Wr. 400.

Waple's declarations were incompetent and irrelevant, and should have been excluded. They were admitted on the ground that they tended to rebut the presumption of Waple's implication in the murder, but the defendant offered evidence as to Waple's whereabouts at the time of the murder only to suggest traces of other agencies; to rebut the presumption of the defendant's guilt, without raising an issue as to Waple.

The allegation of the indictment is that Turner did "then and there" kill. This is traversed by the plea "not guilty." *Alibi* is a defence thereunder, and in no sense a plea of confession and avoidance. The Commonwealth must, upon the whole case, prove every essential part of the crime beyond a reasonable doubt. The burden of proof is not shifted. A failure to establish an alibi is not a circumstance of weight against the prisoner.

State *v.* Flye, 26 Me. 312.
Chaffee *v.* United States, 18 Wall. 544.
Toler *v.* State, 16 Ohio, 583.
State *v.* Collins, 20 Iowa, 86.
State *v.* Josey, 64 N. C. 56.

Thos. H. Murray (with him *Wm. M. McCullough*), contra.

In several places, the Constitution of 1873 uses the designation—the Court of Oyer and Terminer.

After a reading of the debates of the convention it cannot be believed that the framers of the Constitution intended to prohibit the Legislature from authorizing the election of additional law judges in any county. The Legislature could, of course, do whatever they were not prohibited from doing.

Evidence of the criminal relations between the prisoner and the deceased was properly admitted.

Shaffner *v.* The Commonwealth, *supra*.

The prosecution cannot attack the character of the prisoner by proving acts not in the indictment, either to show general character or a tendency or disposition to commit the crime charged, but wherever such acts are so connected by circumstances with the case that their proof has a bearing upon the issue other than the above, such acts may be proved.

State *v.* Lapage, 57 N. H. 245

When the *scienter* or *quo animo* constitute a necessary part of the crime charged, as in cases of murder, testimony of such acts of the person as tend to prove such knowledge or intent is admissible.

Dunn *v.* The State, 2 Ark. 229.
Tharp *v.* The State, 15 Ala. 749.

Declarations of a party accused of a crime, after the commission of the crime, are not evidence for him, unless the accompanying acts are part of the *res gestæ*.

State *v.* Hildreth, 9 Iredell, 447.
State *v.* Scott, 1 Hawk. 24.

The Court properly instructed the jury to consider whether the prisoner had manufactured evidence of an alibi, and to give attention to that fact, if proved.

1 Starkie, 499.
1 Greenleaf, 37.
Commonwealth *v.* Webster, 5 Cushing, 311.

May 6, 1878. THE COURT. The exceptions in this case are very numerous, and we must, as far as we can, classify and examine them in this manner. Naturally those exceptions which go to the jurisdiction of the Court first claim our attention. It is alleged, firstly, that the indictment was found, and the defendant tried and sentenced, in a Court unknown to the Constitution and laws of this Commonwealth. This allegation is based on the fact that the record names the Court as the "Oyer and Terminer," and omits "and General Gaol Delivery." This, however, is exactly what is done in the eighth and ninth sections of the fifth article of the Constitution of 1874, so that such a Court cannot be said to be unknown to the Constitution. The first of the above-named sections designates the criminal Courts of Philadelphia and Allegheny counties as "the Courts of Oyer and Terminer and Quarter Sessions of the Peace;" the second connects

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the term "General Gaol Delivery," not with the Court of Oyer and Terminer, but rather with, as it immediately follows, the Quarter Sessions. This latter section is that which confers upon the Judges the power to hear and determine all cases of a criminal character. Thus it comes to pass that our Judges have, in a single commission, all the powers which the English Judges derived from several. Indeed, as we learn from Blackstone's Commentaries (vol. 4, p. 270), anciently it was the custom to issue separate writs of gaol delivery, called writs *de bono et malo*, for each case. This practice, being found to be attended with inconvenience, was in the course of time abolished, and instead thereof, a general commission was substituted for all prisoners triable at a particular term. This commission, unlike that of oyer and terminer, ran only to "try and deliver" prisoners in each separate gaol. (Id. 271, note.) The reason for this was, that as the commission of oyer and terminer only empowered the Judges to "inquire and determine," they could proceed under it only upon indictments found at the same term as that at which the several trials were heard, hence the necessity of an additional writ for the disposition of indictments and other cases previously found and instituted. Under our system this writ has no place; and it is obvious that the name itself can have no legal significance, since it but imports a power which every Judge possesses by virtue of his general commission. We conclude, therefore, that the omission of the words "general gaol delivery" was of no importance, and, had the attention of the Court been called thereto, might have been supplied by amendment.

It is alleged, secondly, that the defendant was tried and sentenced by an additional law Judge, who had no constitutional power to try pleas of murder in a "double district." The validity of the commission of Judge ORVIS, who held the Court of Oyer and Terminer in which the defendant was convicted, is thus called in question. It is insisted that the Act of Assembly which authorized the election of an additional law Judge for the 25th district, composed of the counties of Clearfield, Centre, and Clinton, was and is unconstitutional and void. This point is raised under the 5th section of the 5th article of the Constitution. It will be observed that when, by this section, a county is to compose a *separate* district, provision is made for additional law Judges; but for *single* districts, formed of several counties, no such provision is made. The learned counsel for the defence regards this omission as significant. Not, indeed, because, without more, the Legislature would not possess the power to create such Judges, since it is conceded that such power must necessarily belong to that body if it be not in terms withheld, but because it is said the phrase "single district," as used in this section, means a district having but a single law Judge. To prove this reference is had to the debates in the convention. But if these prove anything, they prove too much for the argument which they are adduced to support, for they advocate districts with single Judges, without regard to whether those districts were to be composed of one or several counties. As the idea was dropped as impracticable in single county districts, we may well suppose it was also abandoned as to those formed of several counties; for it is not reasonable to suppose that, whilst provision was being made for the possible wants of districts having populations of forty thousand, those having possibly double that number should have been wholly neglected. We are inclined to think that that word "single," directly connected as it is with the word "district," is to be regarded as a synonym of "separate," and as having been used to avoid tautology. If not, its use, in the connection in which it now stands, was unfortunate, for grammatically it qualifies and characterizes the judicial districts, and does not limit the number of Judges.

The first and ninth assignments of error cannot be sustained. They relate to admissions of evidence and the charge of the Court on the subject of the relations existing between Turner and Mrs. Waple. That adulterous intercourse may be proved as a circumstance leading to the commission of crime, is ruled in the case of Ferrigan *v.* The Commonwealth (8 Wr. 386), and it would thus seem to follow that if the criminal conduct proposed to be proved becomes, in any way, a link in the chain of circumstances which connects the defendant with the crime charged, it is admissible in evidence. That such circumstance is, in its character, criminal, and tends to exhibit another crime than the one charged, is no reason for its exclusion. It certainly does not follow that evidence, otherwise legitimate, should be excluded only because it tends to exhibit a character not accordant with an honest life. We need not say how important this testimony is to the case now in hearing, and how little there would be without it to connect the defendant with the offence charged; it is enough to say, that it is a legitimate part of the case, and that it was properly admitted. It is conceded that an independent crime, unconnected with the matter in trial, may not be put in evidence, for this is but proof of character, and that in its most objectionable shape; such, however, is not the case with the testimony under consideration. The criminal relation is but one of a series of facts connecting the defendant with the homicide, and a proper use was made thereof by the prosecution.

The second assignment covers nothing of importance. Turner's voluntary declarations of

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innocence at the time of his arrest explained nothing in connection with that act; they were purely gratuitous, and hence no part of the *res gestæ*. The case of Rhodes *v.* The Commonwealth is not in point, for in that case the circumstances of the search rendered explanation necessary, and therefore the declarations of the defendant became as much a part of the transaction as the search itself.

There is nothing in the third and fifth assignments. If it is deemed important by the defendant to prove that Waple asked Quigley and Strickland to come into the house, it was proper for the prosecution to ascertain why they were so asked, and what was said and done after they had complied with the invitation. The whole was one transaction, and could not be dissevered to suit the purposes of either party. In like manner, when the defence undertook to show Thomas Waple's whereabouts at and about the time of the murder, and his *animus* towards the deceased, it was altogether proper for the Commonwealth to endeavor to rebut the presumptions arising from those facts; for, however concealed, their purpose could have been nothing less than to direct the attention of the jury to Thomas Waple as the real criminal.

The seventh, eighth, tenth, eleventh, thirteenth, seventeenth, eighteenth, twentieth, and twenty-first assignments are not sustained. In these the complaint is that the Court permitted the jury to find a verdict against the prisoner upon a degree of proof less than that required by law in capital cases. We think this complaint not well founded. The evidence, if believed, was sufficient to warrant a conviction; and an examination of the charge shows that, in submitting that evidence, the Court omitted no proper instruction. The attention of the jury was called to the duty resting upon it of carefully and faithfully weighing and examining the evidence. That body was told that in order to work a conviction each material fact must have been satisfactorily proved, and if it remained in doubt, or if the defendant's proof showed that it could not be true, it must not be regarded as a fact in the case. The learned Judge further says, in answer to the defendant's first point, "you must be satisfied beyond a reasonable doubt, first, that the murder was committed; second, that this defendant was the guilty agent, or you would not be justified in finding a verdict of guilty." Again, in answer to the fifth point, "we told you in our charge that the facts proved must be such as to exclude every reasonable hypothesis but that of the prisoner's guilt." Surely if the jury misunderstood this language it was no fault of the Court; everything was said that the defendant had a right to require.

We pass the 24th, 25th, and 26th assignments, with the remark, that we are not convinced that there is either anything wrong in the indictment, or that it was not proper for the grand jury to adopt the words "true bill" as printed on the back thereof.

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So far we agree with the rulings of the Court below, but we must now advert to some particulars of this trial which compel us to dissent. And, first, it was improper to submit the general character of the witnesses to the jury without evidence touching such character. There is a very wide distinction between the personal character of a witness and the character of the evidence which he may give in a particular case. If the former be good, though the latter be impeached by facts and circumstances developed during the trial, yet the defects in such testimony may be accounted for by mistake or lack of memory, and whatever of it remains uncontradicted may be accepted without hesitation; on the other hand, if the former be bad, corroboration must follow the evidence in all its material parts or it is worthless. This submission was erroneous in that it gave to the jury the power of testing evidence by that which could be found only outside of the trial itself, perhaps in the personal knowledge of some of the jurors. Perhaps this submission was inadvertent, and from its generality may have been harmless; nevertheless, we have thought proper to advert to it in order that its repetition may be avoided.

A much more important error is found in the 12th assignment. This covers the submission to the jury of the alleged attempt by the defendant to manufacture evidence. As was said by the Court, "If it was proved that this defendant did so attempt to manufacture evidence that was false, it is a fact which you must consider." The matter is thus put as an important element of the case. Now if there was testimony to support this submission no fault could be found with it, but we have looked in vain for such testimony, though, in this, we have had the assistance of the able counsel for the Commonwealth. The evidence on this branch of the case is as follows: George Morgan testifies to Turner's presence at the depot at Wallaceton, between two and three o'clock of the afternoon of the day of the murder. He says the defendant was in the office before the arrival of the freight train, and assisted him in checking his manifests. On cross-examination, he stated that at two or three times, or, perhaps oftener, Turner had called his attention to this fact, and that, previous to these reminders, on the part of Turner, he had not recollected the time. As, however, Morgan seems to have been a reputable witness, it would seem, that the defendant but called his attention to what was the truth, and thus, in a legitimate

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manner, obtained for himself an important piece of testimony. This act, unaccompanied as it was by anything resembling an attempt to corrupt his witness, was altogether proper, unless, indeed, one accused of crime is to make no effort in the way of self-defence. Then, it is said, he was seen in close conversation with a witness named David Snyder, but what he said to Snyder, or Snyder to him, is wholly unknown. Certainly nothing in the way of evil should be predicated of a matter such as this, unless the intent was to convict the defendant on bare suspicion.

Again, it is said, he contradicted John Rice; but John Rice does not allege that. Here is his testimony:—

Ques. Mr. Turner went to the jury inquisition? *Ans.* He was here. Yes, sir. I told Martin that the *old man had contradicted me.* He says, "did I tell you this was Friday night?" I says, yes. He says, "I must have been mistaken, it was on Thursday."

Ques. He corrected you? *Ans.* No; he did not correct me. He said he had been down to John Stamers's to see about the value of switch ties; he did not say he had been out hunting."

In this there is nothing which resembles a contradiction of the witness; on the contrary, his statement is taken for verity, and Turner says, "I must have been mistaken."

Beyond what we have recited we discover nothing that tends, even remotely, to sustain the charge of an attempt, by the defendant, either to manufacture or to prevent evidence, and we cannot but pronounce as wrong the submission of such a question to the jury.

We must also take issue with the learned Judge on the rule which he has announced as the governing one in a defence resting upon an *alibi.* He says (page 20 of the paper-book), "an *alibi* is a perfect defence when it is fully, clearly, and satisfactorily established, but the burden is upon the person asserting it to establish it." And further on (page 23), "If proved it constitutes a complete defence; if not proved, and you think it has not been proved, the attempt to manufacture evidence is a circumstance which always bears against the person. No innocent person is driven to manufacture evidence."

As an abstract proposition the first part of this instruction might be regarded as correct, for, in the first place, as is said in Briceland *v.* The Commonwealth (24 P. F. S. 463, per AGNEW, J.), when a defence rests upon proof of *alibi,* it must cover the time when the offence is shown to have been committed, so as to preclude the possibility of the prisoner's presence at the place of murder.

It thus necessarily follows, that if the evidence on this point is imperfect it comes to nothing. So, if the case of the Commonwealth rested upon positive and undoubted proofs, it might require like testimony to beget a reasonable doubt, and hence, less than full, clear, and satisfactory evidence would be worthless. The fault, however, with this instruction, in the present case, which is one depending wholly upon circumstantial evidence, is, that, under it, if the testimony fails to reach a strength sufficient to work an acquittal, it is in effect excluded from the case. This is a rule admissible in modern criminal jurisprudence; for proof of an *alibi* is as much a traverse of the crime charged as any other defence, and proof tending to establish it, though not clear, may, nevertheless, with other facts of the case, raise doubt enough to produce an acquittal. We are inclined to think with Mr. Greenleaf (Ev. vol. 1, sec. 81, b.), that the true rule in criminal cases, notwithstanding some decisions to the contrary, is, that the burden of proof never shifts, but rests upon the prosecution throughout, so that, in all cases, a conviction can be had only after the jury have been convinced, beyond a reasonable doubt, of the defendant's guilt. From this it results, that, if from any, or from all the evidence taken together, a reasonable doubt of the defendant's guilt is raised, there should be an acquittal.

The latter part of the instructions above cited is manifestly wrong in this, that the jury are told that the defendant, having undertaken to defend himself on the ground of *alibi,* must produce evidence sufficient to work his acquittal, or, if not, his failure is in itself evidence of guilt. This is adding a penalty to what may be, not the defendant's crime, but his misfortune—a result that we cannot sanction. Were the defendant detected in an attempt to corrupt witnesses or to manufacture evidence, it would certainly weigh heavily against him, but his mere failure to prove a given point of his defence is no evidence of such attempt, and it ought not to have been submitted as such.

The sentence of the Court of Oyer and Terminer is reversed, and a new *venire* is ordered.

Opinion by GORDON, J.

July, '76, 119. Jan. 16, 1878.

Hartman v. The New York Manufacturing Company.

Suit on foreign judgment—Irregularity of exemplification of record—Affidavit of defence—Sufficiency of.

An affidavit of defence setting forth irregularities in an exemplification of the record of a foreign judgment is insufficient in an action of debt on such judgment.

Error to the Common Pleas No. 3, of Philadelphia County.

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This was an action of debt on a judgment recovered in the Supreme Court of the State of New York, by the New York Manufacturing Company against John Hartman.

The plaintiff duly filed an exemplification of the New York record. The defendant filed an affidavit of defence, setting forth: (1) that neither the exemplification itself nor the certificate of the Clerk of the Supreme Court attached thereto, showed that the exemplification was a copy of the whole record; (2) that the clerk's certificate was not in accordance with the Act of Congress regulating such matters; and, (3) that although the judgment certified was obtained for costs of suits, etc., the exemplification did not show the items of such costs.

The plaintiff took a rule for judgment for want of a sufficient affidavit of defence, which the Court below made absolute. The defendant thereupon took this writ of error, assigning for error the entering of this judgment.

J. G. Brinckle (with him *C. H. Russell*), for plaintiff in error.

The clerk's certificate should have stated that the copy certified was a true copy of the *whole* record, otherwise the exemplification was not admissible in evidence.

Eberts *v.* Eberts, 5 Sm. 110.
Commonwealth *v.* Trout, 26 Id. 379.
Christine *v.* Whitehill, 16 S. & R., 107.
Hampton *v.* Speckenagle, 9 Id. 221.

The certificate was irregular, in that it did not state that the Justice whose name was attached was *Chief* Justice; and by the decisions the admissibility of an exemplification depends upon the certificate.

Van Storch *v.* Griffin, 21 Sm. 240.
McCormick *v.* Irwin, 11 C. 119.

J. W. Patton, contra.

The argument of the other side treats this case as if the question were as to the admissibility of the exemplification in evidence upon a trial, whereas the ruling of the Court below was that a defect in the certificate cannot avail to prevent judgment for want of a sufficient affidavit of defence. This ruling is sustained by the following authorities:—

Wetherill *v.* Stillman, 15 Sm. 105.
Moore *v.* Fields, 6 Wr. 467.
Packer *v.* Boyer, 1 WEEKLY NOTES, 130.
Winsor *v.* Warehouse Co., Id. 403.
Schreiner *v.* Teller, Id. 221.

Moreover, even if the plaintiff in error's view of this point be correct, the affidavit was insufficient, for the exemplification is in all respects regular.

Act of Congress of May 26, 1790, U. S. Rev. Stat., § 905.
Clark *v.* Depew, 1 C. 509.

Jan. 28, 1878. THE COURT. No sufficient defence to the *debt* evidenced by the New York record of judgment appears in the affidavit. The sufficiency of the evidence of the record was not the matter to be denied. What would be thought of an affidavit of defence to a note or bond set out which should aver no defence to the debt demanded, but should allege that the plaintiff had not produced proof of the signature (Wetherill *v.* Stillman, 15 Sm. 105).

PER CURIAM. Judgment affirmed.

Jan. '78, 116. Feb. 6, 1878.

Steel's Appeal.
Kulp's Estate.

Partition—Right of widow—Jurisdiction of the Orphan's Court—Incumbrances.

A widow's interest in the real estate of her husband may be set apart to her in kind, or she may, by petition in the Orphans' Court, have the same charged upon the land in the hands of the heir, or, if he will not accept, in the hands of the purchaser under an order of sale; and this whether the husband died testate or intestate.

Her right to petition exists, though there be but one heir.

On such a petition the Orphans' Court has jurisdiction to order a sale, and mortgages or other incumbrances placed by the heir or his alienee after the death of the husband will be discharged thereby.

Appeal from the Orphans' Court of Philadelphia County.

This was an appeal by the purchaser at Orphans' Court sale under proceedings in partition, from a decree requiring him to make specific performance of his contract.

It appeared by the partition of Sarah R. Kulp, widow and administratrix of Abraham Kulp, that the said decedent died in July, 1870, intestate, leaving to survive him a widow, the petitioner, and one daughter, Sarah, married to N. S. Large. At the time of his death he was seized of a messuage and tract of land in Germantown, containing about twelve acres. By deed dated June 28, 1873, Large and wife conveyed these premises to one Bruner, who, on the same day, reconveyed them to N. S. Large. On February 12, 1876, the widow presented a petition praying that partition of the premises might be made between her and Large, on which petition due proceedings were had, and Large, neglecting to accept or refuse, an order of sale was made; one-third of the purchase-money to remain charged on the land, and the interest thereof to be paid to the widow. Robert Steel, the appellant, became the purchaser for $9200. The petition prayed that Steel, the purchaser, might be decreed to carry out his contract.

To this the respondent below made answer

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that the premises were subject to mortgages executed by Large to the amount of $12,000, to judgments against Large and Sarah R. Kulp, and to the taxes for 1876 and 1877; that these encumbrances, far exceeding the purchase-money, were not discharged by the sale; because, first, as to the mortgages their lien was preserved by Act of Assembly; and, second, because the Court had no jurisdiction to make the order of sale under the circumstances.

The petitioner replied that the mortgages were discharged by the sale, because they were created by the grantee of the heir, and not by the intestate, and averred jurisdiction in the Court.

The Court entered a decree in favor of the petitioner, and the respondent took this appeal, assigning the decree for error.

Henry Wharton, for the appellant.

The Act of 29 March, 1832 (Purd. Dig. 433, pl. 136) does not give the Orphans' Court jurisdiction in partition instituted by a widow, to make an order of sale. It authorizes nothing more than a valuation and charge of the widow's interest on the land. In this case, where there was but a single heir, what purpose is answered by a sale? The only result is to leave the widow's share charged, as it would have been if no sale had been made. The Act of 1832 is clear that, though the widow may institute proceedings, as her interest is *pro tanto* involved, where no partition can be made in kind, her agency ceases.

Painter *v.* Henderson, 7 Barr, 50.

George W. Thorn, contra.

The Court below had jurisdiction to award an inquest to make partition between the widow and the alienee of the heir, by the Act of 1832. There may be a partition between a widow and an only child (Bishop's Appeal, 7 W. & S. 251), and the alienee of the heir may have partition.

Ragan's Estate, 7 Watts, 442.

Stewart's Appeal, 6 Sm. 241.

The Court had also jurisdiction to order a sale by the Act of 1832, section 42 (Purd. Dig. 440, pl. 170), and by the Act of 25 April, 1850 (Purd. Dig. 441, p. 174). Painter *v.* Henderson is not in point, as it decides only that the widow cannot take at the valuation.

Feb. 18, 1878. THE COURT. The Act of March 29, 1832, expressly gave to the widow of an intestate the power to apply to the Orphans' Court of the proper county for a partition of the real estate of the decedent. It has been held that the widow's share may be set out in kind to her for life; though she cannot accept under an appraisement, or a partition without allotment to her. (Bishop's Appeal, 7 W. & S. 251; Painter *v.* Henderson, 7 Barr, 48.) Yet, having the right to apply for partition, it is clear jurisdiction taken under her petition, is not lost. Her right to partition exists where there is but a single lineal descendant. (Bishop's Appeal, *supra.*) The proceeding, therefore, must be prosecuted to the end, so as to give to her the right she seeks to have enforced, to wit, a charge upon the real estate in the hands of the heir, or, if he will not accept, in the hands of a purchaser under an order of sale.

If this cannot be effected, her remedy by petition for partition would be useless and illusory; for it is seldom an estate can be so divided as to set apart a portion of it to the widow for life. Nor does it make any difference, since the Act of 20th April, 1869, whether the decedent died intestate or testate, a widow refusing to take under the will being authorized to proceed for her share under the intestate law, in lieu of dower. (Purd. Dig., 530, pl. 10 and 11.) This Act expressly directs the proceeding to go on to a *sale* under her application, thus confirming the interpretation given to the Act of 1832. (See also Neeld's Appeal, 20 P. F. Sm. 113; Cote's Appeal, 2 WEEKLY NOTES, 251; 29 Sm. 235.) It is clear the Orphans' Court had jurisdiction and power to decree a sale, and under it to secure the widow's interest upon the property, according to the provisions of the Act of 1832.

It is evident that a mortgage or other incumbrance placed by the heir or his alienee, after the death of the intestate, upon the premises, cannot affect the title passing under the Orphans' Court sale. The law makes express provision for a distribution of the proceeds of the sale among lien creditors.

Decree affirmed at the cost of the appellant, and the appeal dismissed.

PER CURIAM.

Jan. '78, 57. Jan. 21, 1878.

Kellberg's Estate.
Kellberg's Appeal.

Decedent's estate—Administrator, removal of, for mismanagement—Act of May 1, 1861—Patents—Application for reissue by the assignee of deceased patentee—Acts of Congress of July 8, 1870, March 3, 1837, and July 4, 1836.

Those interested in a decedent's estate are entitled to have it administered by one whose interests are not adverse to theirs.

The inventor of certain improvements in printing presses assigned the patent therefor to a company of which he was an employé, for a certain royalty payable quarterly. Upon the patentee's death, the secretary of the company, having induced the widow to renounce her right in his favor, took out letters of administration upon the estate of the patentee, but refused to enforce the claim for royalty

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against the company, upon the ground that the claim terminated with the inventor's death. The decedent's widow thereupon filed a petition in the Orphans' Court for the removal of the administrator for mismanagement of the estate, which the Court below dismissed.

Held (reversing the decree of the Court below), that there was neither necessity nor just or legal reason why a representative of the company assignee, and interested in promoting the company's profit, should be at the same time a representative of the decedent's estate.

Per WOODWARD, J. Under recent Acts of Congress the assignee of a deceased patentee may make direct application for a reissue of the patent, without action on the part of the executor or administrator.

Appeal from the Orphans' Court of Philadelphia County.

Laura M. Kellberg filed a petition in the Orphans' Court setting forth the following facts:—

John W. Kellberg died November 1, 1876, leaving surviving him a widow, the petitioner, and three minor children. He was the inventor and patentee of certain improvements in printing presses, letters patent for which are still running. By agreement dated April 4, 1874, between the Bullock Printing Press Company and him, he agreed to assign to the company his patents for the consideration, *inter alia*, of the payment to him, in addition to his regular salary of $2600, the sum of $150 every three months thereafter. Shortly after Kellberg's death, Frank B. Williams, the secretary and business manager of the Bullock Printing Press Company, induced the widow and her eldest son, then a minor, to renounce their right to letters of administration, representing that the decedent had assigned the patents to the company, to which they had a right, and which they wanted to have renewed, and promising to give the estate the benefit of any advantage therefrom. Williams then took out letters of administration in his own name, after the grant of which he refused to assert any claim against the company for the quarterly payments under the agreement, on the ground that Kellberg's right ended with his death.

The petitioner therefore prayed for the removal of the administrator upon the ground of mismanagement of the estate.

The administrator in his answer averred that he was willing to bring suit or to allow his name to be used in bringing suit against the company. He alleged that his reason for not suing was the advice of counsel that as matter of law the quarterly payment stopped with the death and salary of the decedent. He denied that any inducement of future advantage to the estate was held out to the petitioner in order to allow him to administer, but averred that his reason for administering was a rule of the Patent Office that the personal representatives of the original patentee alone could apply for a reissue of a patent, notwithstanding an assignment. He averred that he had acted in good faith, and that irreparable harm and inconvenience would ensue to the assignees of the decedent in procuring reissuances of the improvements in the patent, if they were deprived of the letters of administration; concluding with the suggestion that the matter alleged in the petition was insufficient in law to give the Court jurisdiction to remove him. A replication was filed, which was withdrawn before the hearing.

The Court, after argument, dismissed the petition. (Reported in the Court below, with opinion of HANNA, P. J., 4 WEEKLY NOTES, 478.) Laura M. Kellberg took this appeal, assigning for error, *inter alia*, the dismissal of her petition.

J. Cooke Longstreth and *Leonard Myers* for the appellant. The administrator took no steps to assert or enforce the claim of royalty, which is a perpetually recurring liability under the agreement, until he was cited. This was such mismanagement of the estate as falls within the Act of May 1, 1861 (P. L. 680). As to what constitutes mismanagement of an estate, see—

Piper's Appeal, 8 Harris, 67.
Chew's Estate, 2 Parsons, 153.
Drake *v.* Green, 10 Allen, 124.
Thayer *v.* Homer, 11 Metcalf, 104.
Winship *v.* Bass, 12 Mass. 199.
Harper *v.* Straws, 14 B. Monroe, 48.

The suggestion that the assignees of a patent can be relieved of liability for royalties by the death of the inventor is a novelty. A reissue of the patent can be obtained by the assignee without difficulty under the provisions of the following U. S. statutes:—

Act of July 8, 1870, § 33, 202.
Act of March 3, 1837, § 6, 193.
Act of July 4, 1836, § 13, 122.

Pierce Archer, Jr., and *Lewis C. Cassidy*, for the appellees. The construction of the contract of assignment of the patent, upon the question as to whether the payment ceased with the life of the assignor, was submitted to counsel, who advised against the right of recovery. There was therefore no bad faith on the part of the administrator, who moreover is willing to sue or to allow his name to be used in suing for the alleged breach of the agreement. There was not such waste or mismanagement of the estate as contemplated by the Act of May 1, 1861. To remove an executor or administrator clear evidence of mismanagement is necessary. (Parson's Appeal, 1 Norris, 465.) If the administrator has failed in his duty, and the petitioner desires to test her rights under the contract of assignment, her remedy is by suit at law or by motion to surcharge the administrator when he files his account.

May 6, 1878. THE COURT. At the time of the death of John W. Kellberg, on the 1st of

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November, 1876, an agreement was in force between the Bullock Printing Press Company and himself, which had been executed on the 4th of April, 1874, with the stipulation that it should date from the first day of July, 1873. By this agreement Kellberg assigned to the company all his interest in certain patents which had been issued to him for improvements in printing machines, the company promising, among other considerations, to pay him—he having been and consenting to remain in their employment—"in addition to his regular salary of twenty-six hundred dollars, the further sum of one hundred and fifty dollars every three months thereafter—that is to say, on the first day of the months of July, October, January, and April."

On the 18th of August, 1877, the petition of Laura M. Kellberg, the appellant, and the widow of the decedent, was presented to the Orphans' Court, averring that after her husband's death she and her son, then a minor, were induced to renounce their rights to letters of administration by the representations of Frank B. Williams, the secretary or business manager of the Printing Press Company, that they wanted the patents which her husband had assigned to them renewed, and had a right to the renewals; and by his assurance that if any advantage should come to her husband's estate she should have it. Williams thereupon was appointed administrator. The petitioner then complained that from the time of his appointment he had refused to assert any claim against the company for the quarterly payments accruing after Kellberg's death, on the ground that the right to them ceased at that time, whereas the petitioner insisted that the right was to continue during the term of the letters patent, which had still several years to run.

Alleging mismanagement of the estate, the petitioner prayed the removal of Williams and the grant of administration to herself.

The answer denied in express terms that any suggestion was made to Mrs. Kellberg of future advantage to her husband's estate to induce her to renounce her right to administer in favor of the respondent. It alleged that the only reason for taking out letters was the rule of the Patent Office requiring personal representatives of original patentees to apply for reissues of patents, notwithstanding an assignment. The respondent also declared that he was ready and willing to bring suit against the company for the quarterly payments, or to permit the use of his name for that purpose by the petitioner's counsel. He explained the reason why proceedings had not been begun, to be that he had been advised by counsel that as matter of law the quarterly payments stopped with the death and salary of the intestate. As the replication filed by the petitioner was withdrawn from the record before the hearing, the rights of the parties must rest on the uncontroverted facts disclosed by the petition and answer.

It is clear that the relations between the administrator and the legal representatives of the decedent are not harmonious. It may or may not be that a continuing liability for the quarterly payments stipulated for in the agreement of the fourth of April, 1874, survived Kellberg's death. Whatever the event, the question is one which the appellant has a right, in a proper forum, to have tried.

The manifest interest of the administrator is on the side of the company, and there would be not only incongruity, but hazard of delay, mistake, or wrong, in leaving him to represent a claim to which his business relations render him directly adverse. Nothing but some controlling necessity would justify his retention in his position, and no such necessity is indicated by the facts presented. In Hassinger's Appeal (10 Barr, 454) the opinion was *per curiam*. It was said that "there are certainly *prima facie* rights to priority of administration; but they may be controlled by evidence of incompetence or unfitness from circumstances." There the interests of some of the next of kin were antagonistic to those of the decedent, and the Court held that the administration "ought to be committed to an impartial stranger to them, who alone would have their confidence, or would perhaps deserve it." In referring to some English authorities which had construed the statutes of 31 Edw. III., and 21 Henry VIII., Judge ROGERS said, in Ellmaker's Estate (4 Watts, 34), that "the right to administration is put expressly on the ground of interest, on the reasonable presumption that the person most interested to increase the estate is most competent to administer." The office of administrator is one of trust and confidence, and ought not to be committed to an heir who has an interest in opposition to other heirs of the estate. (Bieber's Appeal, 1 Jones, 157.) "Courts," in the language of Judge BURNSIDE in that case, "have constantly declined putting in persons as administrators so situated." Winship *v.* Bass (12 Mass. 199) involved the construction of a statute which authorized the intervention of the Judges of probate when any executor or administrator should become insane, or otherwise incapable of, or evidently unsuitable to discharge the trust reposed in him. The controversy arose out of the refusal of an executor to pay a debt due by him to his testator's estate until compelled by the judgment of a Court. It was held, PARKER, C. J., delivering the opinion, that it was "unsuitable that he who represents the estate, and without whose agency a suit cannot

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be conducted, should remain in office when such suit may be ecessary to coerce the payment of the debt."

In this State, authority to remove any executor, administrator, guardian, committee of a lunatic or habitual drunkard, or any other trustee, was conferred by the 1st section of the Act of the 1st of May, 1861, whenever, among other causes, it should be made to appear that he was wasting or mismanaging the property under his charge, "or that, for any reason, the interests of the estate or property are likely to be jeopardized by the continuance of such executor, administrator, guardian, committee, or trustee." Here there are at least alleged interests involved as to which the views of the administrator and those of the legal representatives do not coincide. Their conflicting relations make jeopardy to those interests possible. In any legal steps the appellant may desire to take in the enforcement of her claims, she is entitled to the unhampered use of her own process, and the estate has the right to be freed from the fetter of a hostile representative, passive though the hostility may be.

In his answer to the petition the respondent suggested that the vacation of the letters of administration granted to him would cause irreparable harm and inconvenience to the assignees of the decedent in procuring reissues of the patents which they hold. The participation of the personal representatives of deceased patentees in applications for extensions could always be readily enforced if such participation were legally required. But the Acts of Congress of recent years have apparently not contemplated any action on the part of executors or administrators in the cases of extensions of patents granted to original patentees, who, having made assignments while living, have subsequently died. The 11th section of the Act of the 4th of July, 1836, made every patent assignable in law, either as to the whole interest, or any undivided part thereof, by any instrument in writing. The 13th section, which related to the surrender and reissue of defective patents, conferred, in the case of the death of the original patentee, or of an assignment by him, all the rights to which, if living, he would be entitled, upon his executors, administrators, or assignees. By the 18th section it was declared that the benefit of any renewal of a patent for seven years should extend to the assignees and grantees of the thing patented, to the extent of their respective interests therein.

By the 6th section of the Act of 3d March, 1867, any patent thereafter to be issued could be made and issued to the assignee or assignees of the inventor or discoverer, the assignment thereof being first entered of record, and the application therefor being duly made, and the specification duly sworn to by the inventor. And by the 33d section of the Act of 8th of July, 1870, "to revise, consolidate, and amend the statutes relating to patents and copyrights," it was enacted that patents might be granted and issued or reissued to the assignee of the inventor or discoverer, the assignment thereof being first entered of record in the Patent Office; but in such case, the application for the patent was required to be made and the specification sworn to by the inventor or discoverer; and also, if he should be living, in case of an application for a reissue.

It was stated by the appellant's counsel on the argument that the rules of the Patent Office have been framed in precise conformity to the statutes. There is neither necessity nor just or legal reason why a representative of the Bullock Printing Press Company should, in order to promote their interests, be at the same time the representative of John W. Kellberg's estate.

The decree of the Orphans' Court is reversed at the costs of the appellee; and it is now adjudged and decreed that the prayer of Laura M. Kellberg be granted. And it is ordered that the record be remitted that this decree may be carried into effect.

Opinion by WOODWARD, J.

Oct. & Nov. '77, 236. Nov. 21, 1877.

New Castle & Franklin Railroad Co. v. McChesney.

Railroad company—Location of railroad on a city street—Damage caused to property fronting thereon—Act of Feb. 19, 1849—Evidence—Must be limited to the mischief arising from an excavation or embankment within the boundaries of the street—Measure of damages.

A railroad extending across a street in an incorporated city in front of plaintiffs' property was so constructed as to impede the channel of a water-course adjoining and flood back the water on to the lot and into the cellar of the plaintiffs. In a proceeding to recover damages under the provision of the Act of Feb. 19, 1849, which declares "that whenever any railroad company shall locate its road in and upon any street or alley in any city or borough ample compensation shall be paid to the owners of lots fronting upon such street or alley for any damages they may sustain by reason of any excavation or embankment made in the construction of such road:"

Held (reversing the judgment of the Court below), that plaintiffs could recover only for damages done to their property by the railroad embankment or excavation within the lines of the street. With the consequences produced by work outside those lines, the Court and jury in this proceeding had nothing to do.

Held, further, that defendant had the right to ask the exclusion of the effects of the operation of the road in depreciating the value of plaintiffs' property from the deliberations of the jury.

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Error to the Court of Common Pleas of Lawrence County.

This was in the Court below an appeal from the report of viewers appointed to assess damages done to the property of Martha A. and Margaret M. McChesney, on Mill Street, in the city of New Castle, in the location of the New Castle and Franklin Railroad upon said street.

The defendant company was incorporated under the Act of March 25, 1864, subject to the provisions of the general railroad law of Feb. 19, 1849 (P. L. 83), the third proviso of the 10th section of which declares:

"That whenever any railroad company shall locate its road in and upon any street or alley in any city or borough, ample compensation shall be made to the owners of lots fronting upon said street or alley, for any damages they may sustain, by reason of any excavation or embankment made in the construction of such road, to be ascertained as other damages are authorized to be ascertained by this Act. (Purd. Dig., p. 1218, § 34.)

The railroad came out on Mill Street near the corner of plaintiffs' lot, and crossed the street and an intersecting alley diagonally in a curved line fronting plaintiffs' house. The situation of the lot was low, adjoining a piece of marshy ground and a natural water-course. The effect of the construction of the railroad was to impede the channel of the water-course and flood back the water on to the lot and into the cellar of plaintiffs. These proceedings were had under the provisions of the Act of 1849 given above.

At the trial, before McJUNKIN, P. J., plaintiffs proposed to show that in the construction of the railroad, the road was located and built so as to obstruct the water in its natural course, and cause the same to flow back into the cellar, thereby causing damage to the property. Defendant objected to evidence of the location and construction of the railroad at any other place than in the street and alley immediately fronting upon plaintiffs' lot; also to all evidence of injury, inconvenience, and damage resulting to plaintiffs from the effects of the railroad at any other place or places, and also to all evidence of injury or damage to plaintiffs' lot from the railroad, even on the street and alley fronting on plaintiffs' lot, except that arising directly from excavation and embankment.

Objection overruled and evidence admitted. Exception.

Defendant presented, *inter alia*, the following points:—

(1) "The defendant's railroad being located and constructed, not upon the plaintiffs' lot, but across or upon a street and alley fronting upon said lot, in an incorporated city, the plaintiffs can recover for nothing but damages accruing by reason of excavation and embankment upon said street and alley immediately fronting upon said lot." *Answer.* "The instruction requested in this point is refused, and we say that the plaintiffs in this case are not confined to damages resulting to their property from excavation or embankment upon the street and alley immediately fronting upon their lot, but excavations and embankments are elements, with all other facts when proved as resulting from the construction and operation of defendants' road, and as injuriously affecting the market value of the property of plaintiffs, to be considered by the jury."

(2) "Even if plaintiffs hold title to the land to the middle of said street and alley, they hold subject to an easement in favor of the public; and the Legislature had the power to grant and did grant to the defendant the right to construct and use its railroad thereon, subject only to the payment of damages sustained by excavation and embankment therein fronting on said lot." *Answer.* "The instruction requested in this point is refused, with the explanation and qualification given in answer to first point."

(5) "For injury or damages to plaintiffs' lot by difficulty in draining it, in consequence of the construction of defendant's road outside of the street and alley fronting on said lot, the defendant is not liable." *Refused.*

(6) "For any depreciation in the value of plaintiffs' lot by reason of danger to persons or property from passing trains, danger from fire from locomotives, increase of rates of insurance, the noise, smoke, soot, jarring, and other inconveniences from passing trains, the plaintiffs are not entitled to recover in this proceeding." *Refused.*

The Court charged the jury, *inter alia*, that they should "take into careful consideration all the evidence in the case bearing upon the question of advantages and benefits, as well as disadvantages and injuries done to plaintiffs' property by defendant's road, and apply it all to ascertaining and fixing the open market value of the plaintiffs' property, house and lot, before the defendant built and operated the road complained of, as it was then unaffected in any way by the road; and the market value of the property after the defendant built and operated its road, and as affected by such building and operation. . . . . But if the market value of the plaintiffs' property is depreciated and reduced as a consequence of, and so affected by the construction and operation of defendant's railroad, where and as it is constructed and operated, then the difference in market value, as you may conclude it to be by a careful review and consideration of all the evidence in the case bearing on the point, would be the damages which the plaintiffs have sustained, and the measure of the compensation therefor, which they would be entitled to recover."

Verdict and judgment for the plaintiffs for $459.

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Defendant took this writ, assigning for error, *inter alia*, the admission of the evidence objected to, the answers to the points, and the portion of the charge given above.

D. B. Kurtz (with him *E. T. Kurtz*), for plaintiff in error.

The Court below received all evidence tending to show injury and depreciation in the value of plaintiffs' lot resulting in any manner from the construction and use of the railroad, and charged the jury on the same, wholly ignoring the distinction made by the Act of 1849, as to the damages for which the company were liable.

Philadelphia & Trenton R. R. Co., 6 Wharton, 25.
Faust *et al. v.* Passenger Railway Co., 3 Phil. 164.

Neither the State nor a corporation acting by virtue of a constitutional law, is answerable for consequential damages occasioned by the construction of a highway further than is specially provided by the law itself.

Monongahela Navigation Co. *v.* Coons, 6 W. & S. 101.
Henry *v.* Pittsburgh & Allegheny Bridge Co., 8 W. & S. 85.
Mifflin *v.* Railroad Co., 4 Harris, 182.
Cleveland & Pittsburgh R. R. Co. *v.* Speer, 6 Sm. 325.
O'Conner *v.* Pittsburgh, 6 Harris, 187.
Snyder *v.* Penna. R. R. Co., 5 Sm. 340.

The evidence should have been confined to the damages alone resulting from excavation or embankment in the street or alley immediately fronting plaintiffs' lot.

Pittsburgh, Virginia, and Charleston R. R. Co. *v.* Rose, 24 Sm. 362.

J. McMichael (with him *R. B. McComb*), contra.

As the embankment made by the railroad company in the street and alley was but a part of a continuous line near two hundred feet long, every part of which served as a dam, and without any part of which the water might have escaped to its natural channel, the whole of the embankment was necessarily brought into the case, and we think the Court was not in error in permitting us to show, not only the obstruction of the water-course in the alley, but also that defendant's road left no reasonable means by which plaintiffs could rid themselves of the water. The difficulty in avoiding the nuisance is certainly a legitimate subject to be considered in estimating the damages.

The plaintiff made no claim for consequential damages.

The Court submitted to the jury but one question, viz., whether the market value of the plaintiffs' property was depreciated by the construction and operation of the railroad there, the difference between its market value before and after the construction of the railroad, was the true measure of damages which the plaintiffs were entitled to recover. This has been the uniform rule for the assessment of damages as laid down by this Court.

Schuylkill Navigation Co. *v.* Thoburn, 7 S. & R. 411.
Penna. & N. Y. Railroad Co. *v.* Bunnell, 31 Sm. 414.
Pitts. Virginia and Charleston R. R. Co. *v.* Rose, 24 Sm. 362

Jan. 7, 1878. THE COURT. In building their road, the New Castle and Franklin Railroad Company, the defendant below, carried it across Mill Street in the city of New Castle. The track, extending from a southwesterly direction, struck the western boundary of the street near the corner of a lot belonging to the plaintiffs, and crossed it diagonally and in a curved line in front of the house standing on the lot. The effect of the construction of the railroad was to impede the channel of a water-course that ran past the property of the plaintiffs. The lot was near a piece of swampy ground which was drained off in a northeastwardly direction, and the railroad embankment obstructed the flow of the water, and flooded it back into the cellar of the house. How much of the mischief complained of resulted from the work done on the street did not precisely appear. The plaintiffs were permitted, under exception, to give evidence of the consequences produced by the embankment on the land adjacent to the street on the southwestwardly side of it, as well as in the line of the street itself. And all the facts tending to show the connection between the entire embankment and the obstruction of the water-course were submitted as elements to be considered by the jury in the ascertainment of the damages. In their first, second, and fifth points, the defendants asked the Court, in substance, to charge that the plaintiffs could not recover for injuries caused by the construction of that part of the railroad which was outside of the street line. The instruction asked for was refused, and the admission of the evidence and the answers to the points have been made the subjects of the first, third, fourth, and fifth assignments of error.

It may be assumed, under the verdict which the jury rendered, that to some extent, at least, the plaintiffs were injured by the obstruction of the water-course, although, as the cause was tried, the recovery may have been rested on other grounds. But it may also be assumed that some portion of the amount of damages awarded was compensation for consequences resulting from the embankment built across the swamp before the line of the street was reached. While for such consequences the plaintiffs could, perhaps, resort to an action at common law, they were not entitled to redress in the form they adopted. This is a statutory proceeding under the third proviso of the tenth section of the Act of the 19th of February, 1849, which declares that "whenever any company shall locate its road in and upon any road or alley, in any city or bor-

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ough, ample compensation shall be made to the owners of lots fronting upon such street or alley for any damages they may sustain by reason of any excavation or embankment made in the construction of such road." However injurious the effect of the company's structures might be, if neither the street nor the property of the plaintiffs had been touched, the statute could give the plaintiffs no relief. It was for mischiefs arising from an excavation or embankment within the boundaries of a public highway, by which the value of private property would be impaired, that the Legislature intended to provide. The Act of 1849 cannot be carried by intendment beyond the purpose it expressed. No remedies in statutory form can be asserted, and no remedies at common law can be defeated by implication from its terms. So far as the property of the plaintiffs was damaged by the railroad embankment within the lines of the street, they had the right to compensation. With the consequences produced by work outside those lines, the Court and jury in this proceeding had nothing to do.

In their sixth point the defendants asked instructions that "for any depreciation in the value of plaintiffs' lot by reason of danger to persons or property from passing trains, danger of fire from locomotives, increase of rates of insurance, the noise, smoke, soot, jarring, and other inconveniences from passing trains, the plaintiffs are not entitled to recover." The point was refused, and in the general charge the jury were directed carefully to consider the advantages and disadvantages resulting from the construction of the railroad, "and apply it all to ascertaining and fixing the open market value of the plaintiffs' property, house, and lot before the defendants built *and operated* the road complained of, as it was then unaffected in any way by the road, and the market value of the property after the defendant built *and operated* its road, and as affected by such building *and operation*." The measure of compensation was stated to be the amount of depreciation caused by "the construction *and operation* of defendant's railroad, where and as it is constructed *and operated*." The same language was used in several other instances in the course of the charge, and was repeated in the answer to the first point of the defendants. A glance at the testimony is sufficient to show the mischief this submission of the effect of the "operation" of this road was capable of working. One witness, Henry Wagner, said: "In estimating damages I consider the cars might run off the track and through the house; the noise and smoke, and increased price of insurance make part of the damage; also that the cellar is damp, and the water can't get off. Can't tell whether the road would do any damage independent of the running of trains." Margaret McChesney attributed the depreciation in the value of the property to "danger of fire, the smoke, noise, jarring of the house, and the water in the cellar." A. S. Wagner stated his opinion in substantially similar terms. Joseph Kissick testified: "I don't take the water into consideration; all the cellars along there will have water in them. I take into consideration the noise and smoke of cars, and the running of trains." The testimony seems to have been received without objection, and may have been elicited on cross-examination; but the defendants had the right to ask the exclusion of the effects of the operation of the railroad from the deliberations of the jury nevertheless. The subject-matter of legitimate inquiry was the extent of the damage caused to the plaintiffs by the embankment made by the defendants in Mill Street. The liability of a railroad company was expressly limited to cases in which an "excavation" or an "enbankment" should be made in the course of "the construction of their road." If the track had conformed to the grade line of the street, the plaintiffs would have had no remedy at all, for the statute would have had no application. It is well settled, even under more comprehensive legislation than this, that contingent disadvantages cannot be taken into account as a subsequent claim for damages. (Searle *v.* The Lackawanna and Bloomsburg Railroad Company, 9 Casey, 57.) In the tenth section of the Act of 1849, as was said by Mr. Justice LOWRIE in the Lehigh Valley Railroad Company *v.* Lazarus (4 Casey, 203), in speaking of that company's charter, the Legislature intended to provide for all real damages and nothing more. In consequence of the hurry of the trial in the Common Pleas, perhaps, or possibly from inadequate presentation, the principles applicable to the questions which this cause presented were misconceived, and it must go back to be tried again.

Judgment reversed, and *venire de novo* awarded.

Opinion by WOODWARD, J.

Common Pleas—Law.

C. P. No. 1. June 1, 1878.

Moller v. Ohse.

Affidavi of defence — Mortgage — Legality of clause for attorney's commissions—Five per cent. is not an unreasonable amount unless the mortgage is very large—When the amount is excessive the Court in its discretion may reduce it.

Rule for judgment for want of a sufficient affidavit of defence.

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Sci. fa. sur mortgage.

The mortgage contained the usual proviso that on default of payment of interest for thirty days after any half yearly payment should become due, a *sci. fa.* should immediately issue for the principal of the mortgage, and that an attorney's commission of five per cent. might be recovered in addition to the principal, interest, and costs.

The affidavit of defence set forth that defendant is ready and willing to pay the principal sum and interest with a reasonable amount for the professional services of counsel, but protests against being compelled to pay five per cent. on $3300, the amount of the mortgage, for the following reasons: (1) Because before the return day of the writ defendant tendered plaintiff the principal, interest, and full costs, together with $25 as a counsel fee, which plaintiff refused. (2) Because since the return day defendant was informed by plaintiff's agent that he would assign said mortgage on payment of debt, interest, and costs, with a counsel fee of $50; that defendant tendered the same, but it was declined, and defendant submits that it is unlawful and oppressive to make him pay a fee of five per cent. for collection, amounting to the sum of $165; but avers his willingness to pay such reasonable amount as the Court may decide just and lawful.

Hunsicker, for the rule.

C. A. V.

June 8, 1878. THE COURT. The point was taken in Robinson *v.* Loomis (1 Smith, 78), that the five per cent. clause for expenses of collection in a mortgage was in the nature of a penalty, and that there should be some evidence of actual expenses. But the Supreme Court decided that it could in no sense be regarded as a penalty, but that it was an agreed compensation for expenses incurred by the mortgagee in consequence of the default of the mortgagor. In Schmidt's App. (1 Norris, 524; 3 WEEKLY NOTES, 282) it was held that the 5 per cent. commission clause in a judgment note was as much a part of the judgment as the interest, and as easily computed. (See also Huling *v.* Drexell, 7 W. 126; McAllister's Ap., 9 Sm. 204.) In Woods *v.* North (4 WEEKLY NOTES, 241) it was simply decided that such a clause attached to a promissory note destroyed its negotiability. Among the reasons assigned it was said, "The amount of percentage cannot be arbitrarily determined, it must be only what would be a reasonable compensation to an attorney for collection." This is explained by what the learned Judge who delivered the opinion said in McAllister's App., *supra*. In answering the objection that twenty-five to fifty per cent. might be agreed upon, he said that an unreasonable sum could be set aside or reduced, not only as an invasion of the usury laws, but in the exercise of the powers of a court of equity over oppressive terms imposed by the creditor upon the necessitous debtor. It was not meant that every case must go to a jury, that the amount of the collection fee might be determined on a *quantum meruit*.

The Supreme Court have, in the cases cited, approved of this collection fee proviso, and have held five per cent. a reasonable amount for the collection of sums very much in excess of the amount here claimed.

Rule absolute.

Oral opinion by BIDDLE, J.

[See Faulkner *v.* Wilson, 3 WEEKLY NOTES 339.]

C. P. No. 3. June 13, 1878.

Hull v. Mooney.

Statute of limitations—Where the charges in a book account are more than six years old, the entry of a credit within six years is insufficient to toll the statute, unless it be proved aliunde that the payment was made before the statute barred the claim—New trial.

Rule for new trial.

Assumpsit on book account. The last entry of goods sold and delivered was dated April 23, 1867, and there appeared an entry of cash paid on account $50, May 24, 1867, in the bookkeeper's handwriting. The writ was issued May 14, 1873, more than six years after the last entry of goods sold and delivered, but within six years of the alleged payment on account. The bookkeeper being dead, his handwriting was proved in court. Verdict for plaintiff.

Carroll, for the rule.

Entries of credit are not sufficient without proof outside the account itself that they were made before the statute barred the claim; otherwise, instead of being against plaintiff's interest (upon which ground they are admitted), they might, as in this case, be to his interest in bringing the whole account within the limit of the statute.

Guillou *v.* Perry, 1 WEEKLY NOTES, 39.
Kinsloe *v.* Baugh, Id. 147.
Burr *v.* Burr, 2 C. 284.
Shaffer *v.* Shaffer, 5 Wr. 51.

C. A. V.

June 19, 1878. Rule absolute.

C. P. No. 4. April 13, 1878.

Fox v. Mausman.

Affidavit of defence law—Instrument not within the act—Agreement to pay in a commodity.

Rule for judgment for want of a sufficient affidavit of defence.

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The instrument filed, upon which suit was brought, after preliminary recitals, continued: "Now this writing witnesseth that I do hereby assume the payment of the said sum to the said Michael Fox, and hereby agree in consideration of the promises to pay and deliver to the said Michael Fox or order the sum of $240 in groceries from my store on Frankford Road at such times as the said Michael Fox may send for the same."

Filed with the copy was an averment sworn to by the plaintiff, that: "he has sent for the groceries to the store of the defendant, and has gone there himself, and the said defendant refused to deliver any groceries to him or to his order under the foregoing agreement."

The defendant filed a suggestion of defence that the instrument is not such as would entitle the plaintiff to judgment for want of an affidavit of defence; and in addition thereto, an affidavit of defence upon the merits.

Jas. H. Stevenson, for the rule.

Where a debt is payable in a commodity, failure to make or offer such payment fixes a liability to pay in money.

Moore *v.* Kiff *et al.*, 2 WEEKLY NOTES, 451.
Singerly *v.* Armstrong, 5 Id. 139.

Rule discharged.

[See Cozzens *v.* Thayer, 1 WEEKLY NOTES, 267.]

Orphans' Court.

May 22, 1878.

Winpenny's Estate.

Executors and legatees—An executor who is also a legatee, subject to the rights of creditors, may apply the funds of the estate to the payment of his own legacy—Election—Practice.

Sur petition for an attachment and answer.

From the petition the following facts appeared. At the final adjudication of the account of Bolton Winpenny, executor of the estate of A. J. Winpenny, the auditing judge awarded to John Winpenny, the petitioner, the sum of $3002.73, as administrator *c. t. a.* of Martha Winpenny. The petitioner was also her residuary legatee, and shortly afterwards obtained an order on Bolton Winpenny for the payment of the sum awarded, to which Bolton Winpenny filed an answer alleging that after the death of the testator he had advanced to Martha Winpenny herself the sum of $285.48, and after her death had more than paid the sum awarded at the adjudication, upon various individual orders of John Winpenny, several among them being for the latter's private debts.

The prayer of the present petition was for an attachment against Bolton Winpenny for neglecting to pay in performance of the order of the Court.

John A. Bickel, for the petition.

The answer filed was insufficient, because it does not show any payment after the adjudication. It is the duty of a person making answer to an order to pay to show affirmatively when the amount was paid. A mere acceptance of an order is not payment. He had no right after the adjudication to set off the amounts paid by him.

John Dolman, contra.

June 1, 1878. THE COURT. On the settlement of his account, Bolton Winpenny, executor of the above estate, was ordered to pay to John Winpenny, administrator of Martha Winpenny, deceased, $3002.73. His answer set up that in her lifetime he had paid to Martha Winpenny $285.48, and a sum more than sufficient to cover the balance upon orders drawn after her decease, by John Winpenny, who was her sole residuary devisee and legatee, as well as executor, and who took substantially her whole estate. No replication was put in, and the answer must therefore be taken to be true. The allegations are that two of the orders drawn by John Winpenny were in favor of legatees under the will of his testatrix, and two others in payment of his private debts, and that he had authorized Bolton Winpenny to charge all of these payments against the share of his testatrix in Jackson Winpenny's estate.

It does not appear that there are any creditors of Martha Winpenny, and the single proposition is, shall payment of a balance due the estate of his decedent be made to an administrator who admits that he has already received it as legatee? The only result of such payment would be that equity would oblige him at once to return the money to the hands from which he had received it. No rights of creditors having intervened, the Court will not lend itself to such circuity of action. The objection is futile that the orders were not signed by him as administrator. Subject to the claims of creditors, he had a right as residuary legatee, to appropriate the moneys belonging to Martha Winpenny's estate as his own (Clarke *v.* Tufts, 5 Pick. 335), and he made that election when he drew the orders in payment of his own debts.

The petition for an attachment is dismissed.

Opinion by ASHMAN, J.

[See Hanbest's Estate, *ante*, 429.]

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WEEKLY NOTES OF CASES.

VOL. V.] *THURSDAY, JULY* 18, 1878. [No. 25.

Supreme Court.

July, '77, 120 & 121. Jan. 29, 1878.

Appeal of The Fidelity Insurance, Trust, and Safe Deposit Company.

Trusts, when active—Trusts for sole and separate use—Wills—Precatory words, how far effective.

By a deed of trust the trustee was empowered to collect the interest and dividends for the *cestui que trust*, to sell the estate and reinvest the proceeds, without restraint, subject in certain cases to the assent of the *cestui que trust;* the *cestui que trust* to receive the income during her life, whether she was married or single, and on her death the estate was to go to her appointees by will, or, in default of a will, to her legal representatives:

Held, that the trust was active, and although among other objects of the trust was the preservation of the estate to her sole and separate use, which use, owing to the absence of a contemplation of marriage, did not arise, the trust did not fail for want of that object.

Precatory words in a will, though in themselves inoperative, may be of value in the construction of a deed avowedly in pursuance thereof.

Earp's Appeal (25 Sm. 119), Ashhurst's Appeal (27 Sm. 464), Williams's Appeal (2 Norris, 377), cited and approved.

Appeals from the Common Pleas No. 1, of Philadelphia County.

These were two appeals from the decrees of the Court below, granting the prayers in the bills of Jean, Marquis de Montmort, and Isabella Hamilton, Marquise de Montmort, his wife, in right of the said Isabella, and of Henry, Vicomte de Dampierre and Elizabeth Taylor his wife, in right of the said Elizabeth, filed against the above corporation.

The bill of the Marquis de Montmort *et al.* set forth the following facts: James Hamilton died in 1829, and by his will gave certain portions of his estate to his grandchildren, directing that when his eldest grandchild attained the age of twenty-one, his estate should be valued and each grandchild should receive a portion. The testator declared:—

"and it is further my wish that, when the grandchild who may be entitled is a female, her portion shall, in the event of her marriage, either before or after coming of age, be secured to her sole and separate use."

Isabella Hamilton Corbin, afterwards Marquise de Montmort, one of the complainants, was the testator's eldest grandchild, and she came of age in October, 1848. She then executed a power of attorney to Henry D. Gilpin. In this instrument she recited that she was desirous that James Hamilton's estate should be distributed in accordance with his will, and that her portion of the estate should be secured to her sole and separate use, and for that purpose should be as early as possible—

. . . "conveyed to her father Francis P. Corbin . . . in trust . . . to receive, take, hold, and enjoy all the aforesaid estate . . . to and for the sole and separate use of the said Isabella H. Corbin during her life, whether she is married or single, so that the same, and the rents, proceeds, profits, and use thereof shall not be in the power, disposal, or control of any husband which she may have . . . and to expend, disburse, and bestow at all times such necessary charges and expenses in the law or otherwise as may from time to time be necessary for the defence, possession, and protection of the said estate . . . and to receive for her use as aforesaid, and to pay over to her as soon as received, for her sole and separate use, all the rents, profits, and dividends . . . and to sell, dispose of, and convey at any time, and for such estates and prices as he, the said trustee, may deem expedient (but always first having received the assent and approbation so to do of the said Isabella in writing), the said estate, real or personal, or any portion thereof . . . and when any portion of the said real or personal estate shall be sold or disposed of, or any investment, securities or property in which the same may at any time be invested, shall be paid off, to reinvest all sums of money which shall in such event come to the hands of the said trustee, in real estate, public securities, or good and sufficient ground rents or mortgages at his discretion. And also (provided the assent and approbation of the said Isabella be first obtained in writing) in stocks of incorporated companies, or in good, sufficient, and valuable personal property or security, and to take, hold, and enjoy the same when so reinvested, and to receive and pay over the rents, dividends, and profits thereof in the same manner . . . and on the death of the said Isabella to assign . . the hereinbefore mentioned estate in such manner, as she, the said Isabella, shall . . . appoint by any writing under seal in the nature of a last will . . . and in default of any such appointment . . . to the right heirs and distributees of the said Isabella."

The instrument then empowered the said Henry D. Gilpin to carry out these trusts. On January 20, 1849, Isabella H. Corbin by her said attorney conveyed her estate to her father in trust for the foregoing purposes, and by deed dated July 9, 1849, she ratified and confirmed the preceding deed.

The bill then set forth that Isabella made the acquaintance of Jean, Marquis de Montmort, in 1858, and married him in 1860, and that they had ever since lived in France; that the said F. P. Corbin acted as trustee until 1876 when he died, and the Court appointed the Fidelity Company, the defendant, in his stead; the bill averred that the trust attempted to be created for the sole and separate use of the said Isabella was inoperative and void, and prayed that the Court might so decree it, and direct the defendant corporation to account, and convey the property in its hands to the said Isabella freed from all trusts.

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The defendants in their answer admitted all the averments of the bill except as to the effect of the will and the deeds therein mentioned, which they averred was a gift to the granddaughters of James Hamilton until their marriage, and then to their sole and separate use, and they averred that the trust in the complainant's share still subsisted.

The bill filed by Henry, Vicomte de Dampierre, and Elizabeth Taylor his wife, was similar to the preceding bill except in the following averments: that Elizabeth was the second granddaughter of James Hamilton, and that she came of age on April 21, 1852; that she then executed a letter of attorney similar to her sister's letter, which was acted upon in the same way; that in 1853 she first met her future husband and was married to him in 1855. The prayer of this bill and the answer corresponded to those in the De Montmort suit.

The two cases were heard together on bill and answer, and the Court, ALLISON, P. J., made decrees in accordance with the prayers of the bills, holding, that by the will of James Hamilton there was an absolute devise to his granddaughters unaffected by the declarations of his wishes, that the duties imposed on the trustee by the deeds of trust were not active, and that, there being in neither instance a contemplation of marriage, no trusts were created.

The defendant took this appeal, assigning the decree of the Court for error.

E. Olmsted, for the appellants.

All expressions in a will indicative of the testator's wish are commands, except when an independent disposition has been made, and the testator expresses a wish in regard to the use of his bounty.

Burt *v.* Herron, 16 Sm. 400.

The execution of the deeds of trust was unnecessary. Any competent Court would have appointed a trustee upon the marriage to carry out the provisions of the will. The trusts could not have failed for want of a trustee.

Wright *v.* Brown, 8 Wr. 224.

But both the parties expressly conveyed their estates to carry out the provisions of the will. There is no doubt that the purpose of the will was to preserve the property of the granddaughters during coverture.

Junkin, contra.

Where the sole purpose of a trust has ceased, or the necessity for it did not exist at the time when the deed or will took effect, even though the duties of the trustee are active, the trust itself becomes inoperative, or will be held never to have existed, unless there be a necessity to preserve the estate for the protection of contingent remainders or a like purpose.

Dodson *v.* Ball, 10 Sm. 492.
Wells *v.* McCall, 14 Id. 212.
Ogden's Appeal, 20 Id. 507.
Ashhurst's Appeal, 27 Id. 464.
Williams's Appeal, 2 Norris, 388.

If the precatory words of the will were in themselves strong enough, which they were not, to create a trust, the above principle prevented a trust from ever arising in this case.

It was not contended that Mr. Hamilton's granddaughters were in contemplation of marriage when they executed the deeds of trust. They neither of them had even met their future husbands. The trusts attempted to be created were solely for their separate use. The deeds did not alter the course of descent. No trusts were created.

May 6, 1878. THE COURT. Isabella Hamilton Corbin executed a letter of attorney, dated October 28, 1848, to Henry D. Gilpin, in pursuance of which her share of the estate of James Hamilton, deceased, was conveyed to her father, Francis P. Corbin, in trust, as expressed in said letter of attorney; by deed executed July 9, 1849, she ratified and confirmed the deed so made to Francis P. Corbin.

The corpus of the estate is vested in the trustee and put under his exclusive management, she has no power or control over it other than direction or appointment in the nature of a will by writing under seal. The trustee may sell the estate as he may deem expedient without restraint, except first having her assent; but she cannot sell or order a sale. He may invest as directed by the deed, being restrained only from investing in certain stocks or personal securities till her assent be given. She is entitled to the net income "*during her life, whether she is married or single*," to be paid to her by the trustee. Here is an active trust, to end only with the life of the *cestui que trust*, and then the estate shall be transferred and conveyed to her appointees by will, and in default thereof, to her heirs. The fact that she intended, as one of the objects of the trust, to preserve the estate from the authority and title of her husband, she then being unmarried and not in contemplation of coverture, though that object be considered inoperative and void, does not invalidate the trust, if for other reasons it ought to be supported. (Ingersoll's Appeal, decided at this term. Per SHARSWOOD, J.)

The provision in James Hamilton's will that the portion of a female grandchild "should, in the event of her marriage, either before or after her coming of age, be secured to her sole and separate use," would help to explain any ambiguity in the deed, but not control its clearly defined objects. Especially would the obvious intent of the deed, which necessarily fulfils the testator's wish, have effect, after having been

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acquiesced in by the grantor and *cestui que trust* for eleven years before her marriage, and her coverture still continuing.

There is a marked distinction in the deed between the income and the estate itself. The income is expressly for the use of Isabella Hamilton Corbin for life, whether married or single. The estate is for her heirs, the persons who would be entitled to it under the intestate laws. The manifest intention is, that the trustee shall hold the property to enable him to receive and apply the income only to her use, without regard to coverture, and then to carry over the *corpus* to her appointees or heirs after her death. The trusts in this deed, in all material particulars, are identical with those in the deed of Virginia Eyre in Ashhurst's Appeal (27 P. F. Smith, 464); also with the trusts of the will of Robert Earp in Earp's Appeal (25 P. F. Smith, 119); and also with those of the will of Thomas Williams, Williams's Appeal (2 Nor. 377). In the light of those cases the plaintiff's bill should have been dismissed. It would be supererogation for me to attempt adding to the well-considered opinions therein by AGNEW, C. J., and SHARSWOOD, J. If they have not made the distinction clear, between this class of trusts and simple trusts, such as found in Dodson *v.* Ball (10 P. F. Smith, 492), Yarnall's Appeal (20 Ibid. 335), and Ogden's Appeal (Ibid. 501), I fear any remarks of mine would only darken counsel.

Decree reversed; and now it is ordered and decreed that the bill be dismissed at the costs of the appellees.

Opinion by TRUNKEY, J.

Oct. & Nov. '77, 162. Oct. 22, 1877.

McLaughlin v. McLaughlin.

Execution—Stay of writs of execution—Effect of—Who may take advantage of.

Whether a writ shall be executed or stayed is a matter entirely within the control of the party issuing it so long as the rights of third parties are not affected.

A *fieri facias* against real estate after levy was stayed by the plaintiff's attorney; subsequently a certified copy of the writ issued and proceedings up to sheriff's sale were had thereunder. In ejectment by the sheriff's vendee under a junior execution which had been levied upon the interest of the same defendant subsequently to the first sale:

Held (reversing the judgment of the Court below), that staying the first *fi. fa.* was a mere suspension of the process which it was at any time competent to resume, or that at most it was an irregularity of which the defendant in the execution could alone take advantage.

Per WOODWARD, J. Where the essential requisites of a judicial proceeding are shown to have been complied with, the law will not annul it for failure of directory formalities.

Error to the Common Pleas of Armstrong County.

Ejectment by Thomas McLaughlin against Mary McLaughlin for twenty-two acres of land in Cowanshannock Township, Armstrong County. Plea, "Not guilty." The facts were as follows:—

William McLaughlin, the husband of Mary McLaughlin, was lawfully seized of the premises in question. On March 21st, 1861, a judgment was entered against William McLaughlin at the suit of John Hildinger for the use of Thomas McLaughlin (the plaintiff in this ejectment), to March Term, 1861, No. 70. On April 3d, 1861, a judgment was entered against the same defendant to the same Term, No. 102, at the suit of J. E. Willis. Upon this latter judgment a *fi. fa.* issued to June Term, 1861, No. 78. Under this writ the sheriff levied (no date given), but afterwards endorsed: "This writ stayed by order of plaintiff's attorney. So answers," etc.

On January 30, 1862, pursuant to an order of the plaintiff's attorney, a certified copy of this *fi. fa.* was issued and placed in the sheriff's hands, an inquisition was held, and condemnation made, which upon return were duly approved by the Court. And subsequently a *vend. ex.* issued and the property was sold at sheriff's sale to Willis, the plaintiff in the execution.

William McLaughlin remained in possession of the land by virtue of a lease from Willis until his death in September, 1864. Mary McLaughlin continued to reside on the land as tenant of Willis until 1869, when she purchased the premises and received from Willis a fee simple deed therefor.

Upon the Hildinger judgment a *sci. fa.* to revive was issued to September Term, 1863, and subsequently a *fi. fa.* levied on the "interest, etc., of the said William McLaughlin" in the land in question, and after inquisition and condemnation, a *vend. ex.* issued and the property was sold to Thomas McLaughlin the equitable plaintiff in the execution and the plaintiff in this ejectment.

Upon the trial, before MCDERMOTT, P. J., the title of Wm. McLaughlin on March 21, 1861, being admitted, and the plaintiff having offered in evidence the sheriff's deed under the Hildinger judgment and rested, the defendant offered in evidence the records of the various proceedings upon the Willis judgment under which she claimed title. These were rejected by the Court. Exceptions (1st, 2d, and 5th assignments of error).

The defendant requested the Court to charge, substantially, that staying the *fi. fa.* (No. 78, J. '61), neither destroyed nor vitiated it, but simply suspended its execution; that it was competent to resume this process, and that the issuing of a certified copy of the *fi. fa.* and the subsequent

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proceedings thereunder were regular and proper methods of effecting this resumption. (These points were answered in the negative.) That whatever defects there may have been in the proceedings could only have been taken advantage of by the defendant in the execution, and are, even as to him, cured by the acknowledgment of the sheriff's deed. With some qualification these points were likewise answered in the negative.

In the general charge his Honor instructed the jury, "That the sheriff's deed to Willis, under whom the defendant claims, vested no title in him because the *fi. fa.* after it had been stayed became as if it had never issued; that if the evidence reasonably satisfies you that the sheriff's deed to Thos. McLaughlin was for the land in controversy, then your verdict must be for the plaintiff." . . . Exception. (Twelfth assignment.)

Verdict and judgment for plaintiff. Defendant took this writ, assigning as error, *inter alia*, the subject matter of the exceptions above noted.

John Gilpin (*J. V. Painter* with him), for plaintiff in error.

What was the effect of the order to stay the *fi. fa.*? The Court below held that it was annihilation, and destroyed not only all future action upon the writ, but also everything that had been previously done under it. Was this ruling correct? A writ stayed for a definite period is but suspended during that period, and we submit that a stay for an indefinite period is but a suspension until the plaintiff in execution gives notice to the sheriff to proceed.

Deacon *v.* Govett, 4 Phila. 7.

Or at most, it merely stays the further execution of that writ. The arrival of the return day before the sheriff has fully executed a *fi. fa.* may prevent him making a further levy thereunder, but surely a levy which he had previously made is not thereby annulled.

E. S. Golden, for defendant in error.

The only practice in existence in Armstrong County is what we believe to be the general practice in the Commonwealth, when the sheriff has levied upon real estate by *fi. fa.* and returns inquisition not held for want of time, or where he has actually held inquisition which has been subsequently set aside by the Court, in either case he may take out copy of *fi. fa.* and after giving due notice, hold an inquisition. But where the writ has been stayed after levy and before inquisition and so returned to the office and docketed, that writ is ended, and if the plaintiff desires further proceedings upon his judgment, he may, upon motion to the Court, strike off the levy and proceed *de novo* or issue an *alias fi. fa.* with copy of levy.

Jan. 7, 1878. THE COURT. In the trial of this cause in the Court below, the parties asserted their respective titles to the land in controversy under conflicting sheriff's sales made of it as the property of William McLaughlin. The first sale was by virtue of process issued in a judgment entered on the 3d of April, 1861, in favor of J. E. Willis. A *fieri facias* went into the sheriff's hands on the 5th of April, 1861, under which a levy on this land was made, and on which it was endorsed. Subsequently the writ was stayed by the order of the attorney for the plaintiff, and was returned to the office files. On the 30th of January, 1862, in pursuance of the *præcipe* of the attorney, a certified copy of the writ was made out and delivered to the sheriff, who held an inquisition on the 28th of February, when the property was condemned. The inquisition was approved by the Court on the 5th of March. A *venditioni exponas* was issued on the 14th of July; the land was sold to J. E. Willis, the plaintiff in the judgment, on the 30th of August; and the sheriff's deed was acknowledged in open court on the 3d of September, 1862. Throughout the proceedings, William McLaughlin, the defendant in the judgment, was in possession of the property, and immediately after the execution of the sheriff's deed entered into a written lease with Willis, and became his tenant. He was drafted into the army in 1864, and was killed in the early part of 1865. His widow, the defendant below, remained in possession as Willis's tenant until the 10th of September, 1869, when she purchased and received a conveyance of the land.

An earlier judgment than that of Willis was a lien against William McLaughlin. It was entered on the 21st of March, 1861, in favor of John Hildinger as plaintiff, and the same land was levied on and condemned under a *fieri facias* to December Term, 1863, and sold under a writ of *venditioni exponas* to Thomas McLaughlin, the plaintiff below, on the 30th of January, 1864.

Numerous exceptions were taken in the course of the trial, and twelve errors have been assigned to the rulings of the Court on questions of evidence, to the answers to the points presented and to the instructions given to the jury. Everything contained in them, however, that is essential in the present inquiry is covered by the first, second, and fifth errors assigned, to the final rejection of the defendant's first two offers of evidence, and the offer specified in the fifth error, which in the first instance had been admitted; and by the twelfth error, complaining of the peremptory direction in the concluding portion of the charge, that "the sheriff's deed to Willis, under whom the defendant claims, vested no title in him." The reason for the direction

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had been previously stated by the Judge to be that when a writ of *fieri facias* "has been stayed by order of the Court, or by the plaintiff when he has the power to do it, inquisition and condemnation cannot be had on it, for it is then as though never issued."

In many of the counties of the Commonwealth, and the northern counties are more especially referred to, the practice of placing writs on which real estate levies had been made and endorsed, and which had been stayed by direction of the plaintiffs or their attorneys, in the sheriff's hands for purposes of inquisition and condemnation, has been uniform and of long standing. Writs have been sometimes stayed in pursuance of agreements between the parties, sometimes to serve the convenience of sheriffs, sometimes for want of time, and sometimes on account of the absence or engagements of attorneys. Would a writ thus stayed become a simple nullity? Or would the levy only be annulled, and an *alias fieri facias* be the only process open to the plaintiff? What, then, would be the fate of the levy? How could it be eliminated from the face of the record? The fact of its existence would be just as absolute as the fact of the existence of the *fieri facias* itself. A fresh writ against chattels could not go out, for the levy would intervene between the judgment and such a writ. A *venditioni exponas* could not go out, for an inquisition would not have been held on the land. In Shryock *v.* Jones (10 Harris, 303) it was held that "process is under the control of the party issuing it until the rights of others become vested. The plaintiff or his attorney may stay the writ at any moment before the sale, provided his dominion over it be so exercised as not to mislead the purchaser; but whether it shall go on or be stayed is a matter over which the plaintiff, while it is *in fieri*, has absolute authority. Even a stay of proceedings on a writ levied on personal property does not involve the loss of the lien, and does not affect the plaintiff's right as against the defendant or the goods, although it exposes him to the risk of having his execution postponed. (1 Tr. & H. 831.) A stay by the order of a plaintiff of a *venditioni exponas* of goods, where there is no collusion shown between him and the defendant, and where the property was left in the defendant's possession, was used by him as before the levy, and either consumed or disposed of by himself, or sold under subsequent judgments and executions, will not operate to postpone in favor of junior judgments the lien of the plaintiff's judgment on the real estate of the defendant. (Morrison *v.* Hoffman, 1 Barr, 13; Campbell's Appeal, 8 Casey, 88.) So the plaintiff may withdraw his writ without necessarily discharging his lien on the real estate as respects other judgment creditors. (Cathcart's Appeal, 1 Harris, 416.) The case is still stronger in favor of a plaintiff whose writ has been levied on land. As between him and the defendant, particular inquiries might be raised by particular circumstances; but as against judgment creditors and other outside parties, he has the right after levy to delay proceedings to secure condemnation so long as may suit his own reasonable convenience. And this right seems to have been recognized throughout the history of the State. In Weaver *v.* Lawrence (1 Dallas, 380, 405), decided in 1788, it was held, where an inquisition on lands under a *fi. fa.* had been quashed for irregularity, the sheriff might proceed to hold a new inquest after the return of the *fi. fa.*, without a new writ. Usually the original has been withdrawn from the file, but it may well be that the more methodical and safer practice in all cases would be that which was pursued here of delivering a certified copy into the sheriff's hands.

Not only were the proceedings on the Willis judgment not objected to by William McLaughlin, but after the sale was made he became the tenant of the purchaser. He acquiescing in the validity of the process by which his title was divested, no other person, in the absence of proof of collusion or fraudulent practice, could make that process the subject of debate. At the utmost, the condemnation by the sheriff's inquest, under the authority of the certified copy of the original writ, was an irregularity, and of that the defendant in the judgment could alone complain. In Crawford *v.* Boyer (2 Harris, 380), it was held that only the defendant, and he within a reasonable time, might object to the want of a confirmation of an inquisition as required by the Act of 1836. And the consent of the defendant will validate a sheriff's sale of improved land without inquisition, although without such consent the sale would be void. (Wray *v.* Miller, 8 Harris, 111.) A sheriff's sale of a defendant's real estate upon a judgment and execution against him, without a condemnation or waiver of inquisition in that particular case, and a deed acknowledged to the purchaser without objection, and the proceeds of sale appropriated to the defendant's debts, will divest the title of the defendant to the premises, and a subsequent sheriff's sale of the premises as the property of the defendant will confer no title on the purchaser. A defendant must object in a reasonable time, and such reasonable time is before the confirmation of the sale and the acknowledgment of the deed. (Spragg *v.* Shriver, 1 Casey, 282.)

Where the essential requisites of a judicial proceeding are shown to have been complied with, the law will not annul it for failure of directory formalities. A levy and sale by a sheriff on an execution issued upon a judgment against a testator's executors, without naming them, vests a

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good title in the purchaser. (Jones *v.* Gardner, 4 Watts, 416.) In Speer *v.* Sample (4 Watts, 367), an execution issued on a judgment after the death of the defendant was held not void, but only voidable, and a sale on the execution was held to vest in the purchaser a good title. Here the inquisition was expressly approved by the Court on the 5th of March, 1862, five days after it was taken, and on the 3d of September, 1862, the deed was duly acknowledged. The effect of this action has been settled by a long line of cases. "The Act of 1806, as well as the subsequent statutes, made it the duty of the sheriff to give a notice of an inquisition to be held on real estate which he seized in execution. But the omission to give notice was an irregularity for which the sale might have been set aside. It never was a reason for declaring the purchaser's title void after deed made and payment of purchase money." (BLACK, C. J., in Meanor *v.* Hamilton, 3 Casey, 137.) The provisions of the Act of Assembly in relation to the acknowledgments of sheriff's deeds are directory, and after a deed has been acknowledged and delivered to the purchaser, it is to be presumed that they have been complied with. (Stroble *v.* Smith, 8 Watts, 280.) It is true that the acknowledgment by a sheriff of a deed executed by him is not such *res adjudicata* as precludes an inquiry into the legality of the proceedings. (Braddee *v.* Brownfield, 2 W. & S. 271.) And the absence of authority, or the presence of fraud utterly frustrates the operation of a sheriff's sale as a means of transmission of title, and might be insisted on after the acknowledgment. (Shields *v.* Miltenberger, 2 Harris, 76.) But it is sufficient to raise the presumption, in the first instance, that the statutory requisites for notice to parties have been complied with, and this presumption must prevail until it is rebutted by satisfactory countervailing proof. (St. Bartholomew's Church *v.* Wood, 30 P. F. S. 219.) It cures all defects of the process or its execution which the Court has power to act upon. (Thompson *v.* Phillips, 1 Bald. 246.) And it cures mere irregularities of every kind. (Blair *v.* Greenway, 1 Browne, 219.) The stay of the *fieri facias* of Willis was a mere suspension of the proceeding against William McLaughlin's land. But if it had been more than that, if strict rules of practice had required an application to strike off the levy and for leave to issue a fresh writ, the confirmation of the inquisition by the Court, the award of the *venditioni exponas*, and the acknowledgment of the sheriff's deed, would have clothed the process with thoroughly effective vitality, and have cured all irregularities and defects of form. The evidence specified in the first and second assignments of error, and the testimony specified in the fifth assignment, should have been submitted to the jury. The cause must go back for a fresh trial. It may possibly present other features than those now disclosed. If it do not, however, it is not seen how the defendant's right to a verdict can be made a debatable question.

Judgment reversed, and a *venire facias de novo* awarded.

Opinion by WOODWARD, J. SHARSWOOD, J., absent.

Jan. '77, 57. March 25, 1878.

Mathias v. Sellers.

Bailment—Lien of tradesman—What is a waiver of—Tender—Replevin—Pleading—Practice.

A tradesman's lien upon goods deposited with him for manufacture or repair is not waived by a special agreement merely for the payment of a fixed sum for the labor bestowed upon the goods; but a contract for the payment of a fixed sum, together with a special agreement as to the time and mode of payment, is strong evidence of an intention to waive the right of lien.

A bailor is not entitled to maintain replevin for goods left by him with a tradesman to be manufactured, until payment or tender of all charges for which the tradesman has a lien upon such goods.

Macky *v.* Dillinger, 23 Sm. 85, distinguished.

In replevin, under the plea of "property," the defendant is entitled to show on the trial that he has a special interest in or lien upon the goods replevied, without previous notice to the plaintiff of the nature of such interest or lien. This plea of itself imposes on the plaintiff the necessity of establishing his title and the right of exclusive possession.

Where parties, without remonstrance, go to the jury upon an issue of fact raised by the evidence, the Supreme Court will not reverse because such issue was not raised upon the pleadings.

Gillespie *v.* Goddard, 1 Pitts. Rep. 306, doubted.

Error to the Common Pleas of Montgomery county.

Replevin by Sellers *et al.* against Mathias for a lot of cigars. The defendant entered a claim property bond, and pleaded "*non cepit*" and "property."

Upon the trial, before Ross, P. J., it appeared that in the autumn of 1872 Sellers & Radey entered into an agreement with Mathias to furnish him with tobacco at certain specified prices, which was to be worked up by him into such qualities and brands of cigars as should from time to time be designated by them. It was also agreed that Mathias should sell the cigars to Sellers at fixed prices, if he desired to take at such prices, or that he could sell to others, accounting for them at such fixed prices; and that if any of the tobacco proved to be of inferior quality, a corresponding deduction should be made in the price

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of the cigars; it was further agreed that advances should be made to Mathias for stamps and wages as the work progressed.

Under this agreement the defendant manufactured from the tobacco furnished him, and had in his possession, in November, 1873, about 90,000 cigars, valued, at the rate agreed upon, at $2820. The stamps for them were bought in the name of the defendant by a clerk of the plaintiffs, and with the plaintiffs' money. The boxes containing the cigars were stamped, and as they were about being shipped, the defendant refused to part with them unless a settlement were first made; whereupon the writ of replevin was issued. An examination of the books showed that the defendant owed the plaintiff about $2585 upon the tobacco furnished him. The defendant claimed a deduction because a portion of the tobacco was damaged, and because some of the cigars had not been paid for. Had the cigars in controversy gone into the possession of Sellers & Radey, they would have been indebted to the defendant in the sum of several hundred dollars. Neither this amount, nor any part of it, was tendered to the defendant before his refusal to part with the cigars and the issuing of the writ.

It was in evidence on behalf of the plaintiff that when the boxes were stamped, prior to the intended shipment, an agreement was made with the defendant by which they were to be taken away, and a full and final settlement was afterwards to be made; this was denied by the defendant.

Ross, P. J., charged the jury, *inter alia:* "There are but two questions for your consideration in this case: (1) Was the plaintiff, at the time the cigars were replevied, entitled to the possession of the cigars? (2) What amount, if anything, the defendant had the right to recover. . . . .

"I am requested to charge you that, inasmuch as it appears that the work in manufacturing the cigars had not been fully paid at the impetration of the writ, Mr. Mathias had the right to retain them as security for his payment, and that the plaintiffs had no right to the possession of the cigars until they had paid this amount, or tendered its payment. It is true, gentlemen, that a mechanic or a manufacturer has a lien upon goods, on which or over which he has expended his labor, until he is reimbursed. Thus, if I give a tailor cloth out of which he is to make me a suit of clothes, he may hold the garments until I pay him for his labor, or offer to pay him by tender legally made.

"[Were it not for a comparatively recent decision of our Court of last resort, I should rule that this action could not be maintained because the amount is still due, being over $200, and there is no evidence of any tender; but in a recent case a rule has been adopted in cases of this character, and it is declared that in actions of this class, when goods are the subject of a lien or charge, the charge upon them can be enforced by way of recoupment. (Macky *v.* Dillinger, 23 P. F. S. 85.) . . . .

"I charge you, therefore, that the existence of a balance due the defendant, for work done in manufacturing these cigars, will not defeat the plaintiff's right to maintain this form of action.]

"The same rule will apply to the other grounds of defence. You will consider them. If you find they are valid and just cases for which the defendant should be compensated, you will reduce your verdict, if you should find for the plaintiff, by the sums which you shall ascertain to be a just admeasurement of the defendant's rights."

The following points were presented by the defendant: (1) If the jury find that if upon the delivery of the cigars to Sellers there would have been anything due to Mathias upon the price, the plaintiff cannot recover in this case without a tender of the amount so due before suit.

Answer. We decline to affirm this point; and for further answer, we refer to the general charge.

(2) Mathias had a right to retain the cigars until the payment of the price agreed upon, and if any of the price remained unpaid, the plaintiffs had no right to maintain this action without first tendering to the defendant the full amount due.

Answer. If the conclusions stated in this point be true as matters of law and fact, the plaintiffs cannot maintain this action, unless they first tendered the defendant the amount in full of the unpaid purchase money, of which there is no evidence.

Verdict for plaintiffs in the sum of $2809.14 and six cents costs and judgment thereon. The defendant took this writ, assigning as error the answers to his points and that portion of the charge quoted in brackets.

B. M. Boyer (*J. Wright Apple* with him), for the plaintiff in error. Every bailee for hire who by his labor and skill has imparted an additional value to the goods, has a lien upon the property for his compensation.

2 Kent's Commentaries, 635.
Story on Bailment, 440.
McIntyre *v.* Carver, 2 W. & S. 392.
Pierce *v.* Sweet, 9 Casey, 151.
Hoover *v.* Epler, 2 Sm. 524.

The ruling of the Court below was based on a misinterpretation of the case of Macky *v.* Dillinger. The language of the opinion was quite correct when applied to that particular case, or to the class of cases to which it might be said to belong. But surely it could not have been intended to apply to actions of replevin in general, where there is an existing lien in favor of the defendant. If it is to be so understood, then it

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sweeps away the old and well-settled characteristics of this form of action, and the right to retain possession is converted into a new right, which is nothing else than the right of set-off. If it does not mean this, then the right to recoupment comes in only when the right of possession does not exist. Macky brought himself within the principle, that when a party refuses delivery except upon terms to which he is not entitled, he waives his right to a tender on the terms which otherwise he could demand, as an act precedent to the bringing of the suit against him. After that it is true his only remedy is by way of recoupment. This is the ground upon which the ruling in Macky *v.* Dillinger is expressly put.

James Boyd, for the defendant in error.

The points presented were irrelevant to the issue. The question of a lien was not raised by the pleadings.

Gillespie *v.* Goddard, 1 Pittsburgh R. 306.
2 Troubat & Haly, 182, ed. 1853.
Pearle *v.* Bridges, 3 Saunders, 402.
Smith *v.* NcNeal, 18 Sm. 164.
Aiken *v.* Stewart, 13 Id. 33.
Reber *v.* Wright, 18 Id. 471.

But aside from this, the case is ruled by Macky *v.* Dillinger.

If the jury found the fact of waiver, then the case is ruled by

Lee *v.* Gould, 11 Wr. 398.

May 6, 1878. THE COURT. In the fall of 1872 Sellers and Radey, the plaintiffs below, entered into an agreement with Mathias, the defendant, to furnish him with tobacco at prices that were specified. This tobacco was to be worked up by the defendant into cigars of such kinds and brands as the plaintiffs from time to time should designate. Fixed prices for the manufacture of the cigars according to their quality were to be allowed, and advances were to be made by the plaintiffs to the defendant for stamps and wages as the work should be done and the cigars be delivered. On the 6th of November, 1873, the defendant had manufactured 90,000 cigars, which were in his possession. The stamps for them were procured and paid for by the plaintiffs, who alleged at the trial that an agreement was then made with the defendant by which they were to take them away when stamped, and a full and final settlement was afterwards to be made. Under this agreement the plaintiffs insisted that the right the defendant possessed to retain the cigars as security for the balance due for their manufacture had been waived. There was conflicting evidence on this branch of the case, the defendant denying the existence of the supplementary agreement. The question was one of fact for the jury, but it does not appear to have been submitted. As the Court held that the defendant was not in any event entitled to a lien, it became unimportant to ascertain whether it had or had not been waived. When the replevin issued, the balance of the account of the plaintiffs against the defendant was $2585.40. This sum included $450 paid for stamps on the 6th of November, 1873, and $54.65 paid to the sheriff, apparently for expenses in the action. The value of the 90,000 cigars the defendant had made was shown by the testimony to be $2820.

Including in the charges against him the $54.65 paid to the sheriff, there was due to the defendant, therefore, the sum of $234.60. Suit was brought without payment or tender of the amount, and the Court charged at the trial that the existence of a balance for work done in manufacturing the cigars did not defeat the right of the plaintiffs to maintain the action.

It has long been a settled rule of the common law that goods deposited with a tradesman or artisan for manufacture or repair are subject for the work done on them to a specific lien. Thus a tailor who has made a suit of garments out of the cloth delivered to him, is not bound to deliver the suit to his employer until he is paid for his services. Neither is a ship carpenter bound to restore the ship which he has repaired; nor a jeweller the gem which he has set, or the seal which he has engraved; nor an agister the horse which he has taken on hire, until their respective compensations are paid. (Story on Bailments, § 440, and the cases there cited.) Though the right of lien probably originated in those cases in which there was an obligation, arising out of the public employment, to receive the goods, it is not now confined to that class of persons; a particular lien is given by the common law to any one who takes property in the way of his trade or occupation, to bestow labor and expense upon it. And it exists equally whether there be an agreement to pay a stipulated price, or only an implied contract to pay a reasonable price. (2 Kent's Com. 635.) It was said by HOLROYD, J., in Crawshay *v.* Homfray (4 Barn. and Ald. 50), that the principle laid down in Chase *v.* Westmore (5 Maule & Sel. 180), where all the cases came under the consideration of the Court, was this: that a special agreement did not of itself destroy the right to retain, but that it did so only where it contained some special term inconsistent with that right. In 2 Selwyn's Nisi Prius, 540, the rule is stated to be that the right of detaining a thing until the money due upon it be paid, may be waived by a special agreement as to the time or mode of payment, but not merely by an agreement for the payment of a fixed sum. The existence of the principle in its full reach has been recognized in Pennsylvania. McIntyre *v.* Carver (2 W. & S. 392) was a replevin for thirty-four panel doors, which McIntyre had made from lumber delivered to him

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by Carver. The suit was brought without payment or tender of payment for the work McIntyre had done; but whilst it was pending, the money was offered and received. It was held that the tender and acceptance came too late to help the plaintiff. "The suit was brought," Chief Justice GIBSON said in entering the judgment, "before the right of action was complete, and such a defect cannot be cured by any subsequent act, except a binding agreement not to take advantage of it." In Pierce *v.* Sweet (9 Casey, 151) it was decided that a bailee to whom logs had been delivered to be converted into boards, had a lien on them for his labor, independent of any special agreement, and that he could maintain an action against an execution creditor of the bailor by whom they had been taken out of his possession. It is clear, under all the precedents, that, unless the defendant here waived his lien by some such new agreement as that which the plaintiffs set up at the trial, he had the right to retain the cigars in controversy until he was paid for the work he had done in making them.

Nothing that was decided in Macky *v.* Dillinger (23 Sm. 85) was in conflict with the settled law of lien. Dillinger consigned goods to Moorehead, who advanced $1500 on them, and then pledged them with other property to Macky to secure a loan for $3700. Macky knew they belonged to Dillinger. When they were demanded by Dillinger, Macky refused to deliver them except on the condition that his loan to Moorehead should be paid. Nothing was said at the time of Moorehead's advances, and in the action of replevin which Dillinger brought, it was held that Macky had no right to set up Moorehead's lien in his own defence; that as against him Dillinger could maintain his action without tendering repayment either of the loan made by himself or of the advance made by Moorehead; and that the amount of the advance could be recouped from the damages Dillinger was entitled to recover. The decision was stated in the opinion of the present Chief Justice to rest on "the general doctrine of tender, that when a party declines to accept payment or performance except in a particular way to which he is not entitled, he cannot insist that the action is prematurely brought."

At the argument here the ground was taken that the pleadings did not present the issue tried in the Court below, and that the question of the defendant's right to a lien on the cigars in controversy could not be raised under the pleas of *non cepit* and property. If the point had been made at the trial, it may be that under the authority of Gillespie *v.* Goddard (1 Pittsburgh R. 306) a special plea would have been required to be filed, although in the current practice of our courts, questions of lien and of general and qualified ownership have usually been determined upon the pleas that were entered here. *Non cepit* and property were pleaded in McIntyre *v.* Carver. In Murray *v.* Paisley (1 Yeates, 197) the plea was property, *absque hoc*, under which the defendant offered to show a submission and award, establishing his right to retain the goods in suit in a certain defined contingency. The Court said: "The evidence is certainly admissible. The defendant is at liberty under his plea to show either a general or special property in himself, either by bill of sale, delivery from the plaintiff, contract, or otherwise. The defendant is not bound to give information to his adversary under what pretensions he claims the article in question." The plea of property imposes on the plaintiff the necessity of establishing his title and the right of exclusive possession. (Reinheimer *v.* Hemingway, 11 Casey, 432.) But it is not proposed to inquire into the scope and force of Gillespie *v.* Goddard as a precedent. Whatever the abstract rule might be held to be, it is too late to invoke it now. The points were presented to the Court by the defendant's counsel, and the jury were charged in reference to them without objection or remonstrance. Where parties have gone to trial on the merits of a cause, this Court has refused to reverse, although the pleadings made no issue for the jury. (Lewisburg R. R. Co. *v.* Stees, 27 P. F. S. 332.) "In this State," Judge SHARSWOOD said in that case, "it is settled that the omission to compel the opposite party to perfect the pleadings beforehand, is a tacit agreement to waive matters of form, just as going to trial on a short plea is a waiver of the right to demand a plea in full form." The merits of the cause were presented by the parties precisely as if a special plea had been upon the record.

The points really contested in the Common Pleas are brought up fairly for review, and form the only issues which, with justice to the defendant and his counsel, this court can reach.

Judgment reversed, and *venire facias de novo* awarded.

Opinion by WOODWARD, J. AGNEW, C. J. absent.

Jan. '77, 68. Jan. 25, 1878.

Newton's Appeal.
MacEuen's Estate.

Contracts—Decedent's estate—Orders upon a third person for payment of money—Equitable assignment of fund—Evidence of indebtedness as against general estate of decedent.

About eighteen months before his death M., the beneficiary under a trust for a spendthrift son, drew an order

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upon his trustees to pay to B. $2000 "in consideration of her kind services." The same persons were his trustees as well as executors of his father, and in the latter capacity held a fund of $4000, which had been received by their testator as guardian of M., but which had not been handed him when he came of age, nor had he ever filed an account thereof. The order was not presented to the trustees nor accepted by them, but after M.'s death was presented by B. as a claim against his estate:

Held, That it was evidence of indebtedness as against his individual estate, and that the claim was properly allowed.

Appeal from the Orphans' Court of Philadelphia county.

This was an appeal from a decree confirming the adjudication of the account of the executors of Malcolm MacEuen, deceased.

The decedent died April 23, 1875, having by his will, dated June 14, 1873, bequeathed all of his estate to the accountants, Adelia and Silah Newton, who were also appointed executors.

Dr. Thomas MacEuen, father of the decedent, had died in March, 1873, having by his will given to his executors one-half of his residuary estate, to be held for the benefit of his son Malcolm, without any liability for his debts, and with the usual clauses of a trust for a spendthrift son. In the year 1844, Dr. MacEuen had received, as guardian for his son, a sum of money due him as a legacy, but he had never filed any account therefor. Malcolm MacEuen was a man of very intemperate habits and difficult to control. He had been boarding with Mrs. E. C. Barton for about five years before his death, and received from her great kindness and unusual attention. On September 27, 1873, he gave to Mrs. Barton the following order:—

"The trustees of my father's estate will please pay to Mrs. E. C. Barton, on my account, in consideration of her kind services to me, the sum of two thousand dollars ($2000). MALCOLM MACEUEN.
Saturday, Sept. 27, 1873."

It was in evidence that he had previously given to Mrs. Barton an order somewhat similar to this, which he destroyed, stating that it had no consideration expressed, and that the second would be good on this account. His board bill was paid in full after his death. The order was never presented to the trustees before his death. In February, 1874, the executors of Dr. MacEuen filed his guardianship account, showing a balance of $4019.93 due the estate of Malcolm MacEuen. When the account of the executors of Malcolm MacEuen was audited, Mrs. Barton presented this order as a claim against the estate, and although objected to on behalf of the legatees, it was allowed by the auditing Judge, with interest from April 23, 1876, that being one year from the date of his death. The decree of the Court confirming this adjudication was appealed from by the legatees. (Reported in the Court below, 3 WEEKLY NOTES, 158.)

John B. Thayer, for appellants.

The order was without consideration and void. The relations of the parties, the amount and character of the instrument, the existence of a previous paper without the words "kind services," the omission to present it for payment, the payment in full of a high rate of board, and the absence of proof of any services rendered in expectation of reward except those paid for, show this. There was no precedent moral obligation to sustain it.

Addison on Contracts, 15.
Wennall *v.* Adney, 3 Bos. & Pull. 249, and note.

No bill of exchange given by the maker to the payee as a gift *inter vivos* can be enforced by action at the suit of the donee.

Byles on Bills, 227.
Mines *v.* Dawson, 5 Excheq. 948.

It cannot be sustained as a testamentary disposition, and it is void as an equitable assignment, being without delivery and not an irrevocable disposal of the chose in action.

Longstaff *v.* Rennison, 11 Eng. L. & Eq. R. 269.
Greenfield's Estate, 12 Harris, 232.

It was not presented for acceptance within a reasonable time, even if it could be regarded in the light of a bill of exchange.

Arthur M. Burton, contra.

This was a positive direction to the trustees, who were also the executors of his father's estate, to pay $2000 to Mrs. Barton, and constituted an equitable assignment of the fund against which it was drawn.

Nesmith *v.* Drum, 8 W. & S. 9.
Story's Eq. Juris., §§ 1044–47.

The authorities agree that where unsolicited services have been rendered, the recipient is under a moral obligation to repay them, which is sufficient to support a subsequent promise to do so.

Cooper *v.* Martin, 4 East, 76.
Cunningham *v.* Garvin, 10 B. 366.
Landis *v.* Royer, 9 Sm. 95–98.

A gift will be supported in equity if the donor clearly manifests his intention to make it, and does all in his power to pass the property. Where, as in this case, it is impossible to effect a manual delivery, it is sufficient if the donor by some unequivocal act shows an intention to confer a present interest.

Crawford's Appeal, 11 Sm. 52.

This order was founded upon such a consideration as would give Mrs. Barton a claim upon his general estate, irrespective of the assignment of any part of this particular fund, and was therefore proper evidence of indebtedness to her by the estate.

Cottrell's Appeal, 4 W. N. C. 237.

Thayer in reply. If this was an equitable assignment it was an assignment of the income which he was entitled to from the trustees, and cannot be an assignment of part of a totally different fund in their hands as executors.

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February 4, 1878. THE COURT. The order on the *trustees* of Thomas MacEuen, the father, did not make the trust in their hands liable for the debt of Mrs. E. C. Barton, for it was contrary to the terms of the trust. But the estate of Thomas MacEuen was indebted to Malcolm MacEuen, the son, for a legacy received by the father for his son. This money in the hands of Malcolm's executors was liable to the payment of his debt, being a property outside of the trust. Now though the order, as such, was inoperative, it was evidence of the debt expressed upon its face, and hence was property collectible out of the estate of Malcolm in the hands of his executors. We discover no error, and the decree of the Orphans' Court is therefore affirmed with costs to be paid by the appellants, and the appeal is dismissed.

PER CURIAM.

SHARSWOOD, J., absent.

Common Pleas—Equity.

C. P. No. 3. Feb. 5, 1878.

Peters et al. v. Kerper et al.

An executor buying at his own sale holds the property in trust for those interested—Limitations—Act of April 22, 1856—Time at which the limitation begins to run—Act of March 26, 1785—Time at which rents, interest, and income accrue—When averments in a bill must be denied—Trustee ex maleficio—Violation of confidence.

Hearing on bill and supplemental bill, answers and examiner's report.

From the bill in equity filed by Mary Ann Peters, widow, and William R. Peters, Kate Marple, with George W. Marple, her husband, and Emma S. Peters, children of George W. Peters, deceased—the supplemental bill filed by Isabella Peters, widow of Jacob Peters, deceased—the answer of the defendants, Josiah Kerper and Robert Cresswell, executors of the will of Jacob Peters, Junior, deceased, and guardians of Jacob Peters, 3d—and the testimony taken before an examiner, the following facts appeared:—

The said Jacob Peters died March 13, 1854, leaving a last will and testament, in which he devised, *inter alia*, certain real estate to three of his children, the said Jacob Peters, Jr., Levi R. Peters, and the said George W. Peters, subject to certain charges, and of which he appointed as executors, Jacob Peters, Jr., Levi R. Peters, Charles Hebner, and Robert Cresswell. Levi R. Peters died June 21, 1857. George W. Peters died October 24, 1860, leaving a will, in which he devised and bequeathed all the rents and interest of his estate to his wife, Mary Ann, for the maintenance of his children, viz., William R., who was born May 15, 1850, Kate, born May 3, 1852, and Emma S., born February 25, 1855, until his youngest child should come of age; upon the happening of which event two-thirds of his estate were to be divided among his children, and the rents and interest of the remaining third to be received by his wife. The said real estate of Jacob Peters was divided into parcels, numbered 1, 2, 3, 4, 5, and 7, and No. 1 was subdivided into two portions. The surviving executors of Jacob Peters being anxious to wind up the estate, obtained an order from the Orphans' Court for the sale of the real estate, and it was arranged between them that one of them, Jacob Peters, Jr., should through an agent, John Gay, buy the parcels, Nos. 1, 2, 3, 4, and 5, at a valuation, he saying that in the event of a sale by him at an advance within a reasonable time, he would divide the advance so obtained between the heirs of his brothers, Levi R. and George W., and himself. The properties were sold March 16, 1864, in parcels as described, and together with No. 7, were purchased by Gay. He conveyed them June 9, 1864, to Jacob Peters, Jr., in fee. There was evidence that the arrangement thus carried out prevented other persons from bidding at the sale. The price paid was $32,000, clear, and the testimony as to value ranged from $50,000 to $90,000. On the 14th of October, 1864, Jacob Peters, Jr., made an agreement to sell the five parcels for $55,000, but being unable to make a title, because of his having purchased at his own sale, the matter was dropped.

It was averred in the bill that after the sale Jacob Peters, Jr., admitted to one of the complainants that they still retained their interest in the real estate, and he promised to provide for them in his will. It was further averred in the bill that the complainants did not know of the arrangement made by Jacob Peters, Jr., until after his death, and it was averred in the supplemental bill that the complainant, Isabella Peters, did not know of it until she had read the bill The answer did not deny these statements.

Jacob Peters, Jr., died July 8, 1876, leaving a will, in which he devised the said real estate to his son, Jacob Peters, 3d, in fee, and of which he appointed the defendants, Kerper and Cresswell, his executors. Jacob Peters had a posthumous son, Howard Peters, who was born September 14, 1854, and died February 2, 1856,

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through whom his mother, the said Isabella Peters, claimed.

The bill, which was filed January 19, 1877, prayed that it might be decreed that Jacob Peters, Jr., was a trustee during his lifetime of the interests of the complainants, and that the defendants, as executors and guardians, be directed to account for the rents and profits.

Barger and *Gross*, for the complainants in the bill, and *J. Davis Duffield*, for those in the supplemental bill.

An executor purchasing at his own sale, whether it be private or public, and without regard to his honesty of intent, takes a voidable title.

Bruch *v.* Lantz, 2 Rawle, 392.
Painter *v.* Henderson, 7 Barr, 48.
Herr's Estate, 1 Grant, 272.
Beeson *v.* Beeson, 9 Barr, 279.
Rham *v.* North, 2 Yeates, 117.
Pennock's Appeal, 2 Har. 446.
Musselman *v.* Eshelman, 10 Barr, 394.
Chorpenning's Appeal, 8 Cas. 315.
Gilbert's Appeal, 28 Sm. 266.
Webb *v.* Dietrich, 7 W. & S. 401.
Campbell *v.* McLain, 1 Sm. 200.
Shuman's Appeal, 3 Cas. 64.
Rosenberger's Appeal, 2 Cas. 69.

Under the Act of March 26, 1785, § 2 (Purd. Dig. 927, pl. 3) the bar of the statute does not begin to run until a right of entry or action accrues, viz., where there is a precedent particular estate, it does not begin to run against the remainder man until it vests in possession.

Hall *v.* Vandegrift, 3 Binney, 374.
Shepley *v.* Lytle, 6 Watts, 500.
Poe *v.* Foster, 4 W. & S. 355.
Marple *v.* Myers, 2 Jones, 125.
Gernet *v.* Lynn, 7 Cas. 94.
Montgomery's Estate, 3 Brewst. 306.
Miltenberger *v.* Croyle, 3 Cas. 170.

The rents accrue from day to day, and the widow's title to the rents to February 28, 1876, was only a chattel interest. The rule in freehold estates, that a devise of the rents and profits is a devise of the land, does not apply.

The widow, therefore, is entitled to an account of all the rents and profits for a period of five years before suit brought, to February 28, 1876; and from that period she will be entitled to one-third of the rents and a conveyance of one-third for life. The title to the two-thirds did not vest in possession as to the children until February 28, 1876, and the title to the remaining third will not vest in possession until the death of the mother.

No act will amount to a confirmation of an impeachable transaction, unless the party has been aware of the fraud and is also aware that his act will have the effect of confirming it.

Murray *v.* Palmer, 2 Sch. & Lefroy, 486.
Hill on Trustees, star pages 168–169.

When the defence is not put upon the ground of the lapse of time and knowledge by plaintiff of material facts, the plaintiff is not called upon to prove his real situation and the time when he first discovered the deception practised upon him.

Doggett *v.* Emerson, 3 Story, 740.

General rumor of the fact is not sufficient to place a party on inquiry.

Maul *et al. v.* Rider, 9 Sm. 167.

There was fraud in not carrying out his agreement with his co-executors and selling the property at the advanced price offered for it, when he could have made title to it by the proper proceedings, and this was such a fraud as to make him a trustee *ex maleficio*.

Wolford *v.* Herrington, 24 Sm. 311.
Beegle *v.* Wentz, 5 Sm. 369.
Boynton *v.* Housler, 23 Sm. 453.
Seichrist's Appeal, 16 Sm. 237.
Cook *v.* Cook, 19 Sm. 443.
Faust *v.* Haas, 23 Sm. 295.
Sheriff *v.* Neal, 6 Watts, 534.
Seylar *v.* Carson, 19 Sm. 81.

This fraud continued through his life, and was consummated only at his death on July 8, 1876, and there were five years from that date in which to bring suit.

Maul *v.* Rider, 1 Sm. 377.
Church *v* Rulard, 14 Id. 432.

Even if there had been possession of the real estate of Jacob Peters, Sr., by his heirs under his will for twenty-one years; yet that possession, under agreement between Isabella Peters and the heirs of Peters, Sr., was amicable instead of adverse, the agreement giving her other and different rights from those given by the will and in lieu thereof. The point, however, cannot apply to the subject of proceedings where everybody's rights have been in abeyance since the date of the conveyance to Jacob Peters, Jr., June 9, 1864, so far as the limitation of twenty-one years is concerned.

D. W. Sellers, contra.

A purchase made by an executor at his own sale creates a trust arising by operation of law, which in this case, not having been reduced to writing, was barred within five years, and minors or persons under disability are not excepted from its operation.

Act of April 22, 1856 (Purd. Dig. 930, pl. 14).
Warfield *v.* Fox, 3 Sm. 382.
Folmar's Appeal, 18 Sm. 482.
Hegarty's Appeal, 25 Sm. 517.

April 27, 1878. THE COURT (after stating the facts). The facts developed in both cases are substantially the same, and as the principles involved are to a great extent identical, the bill and its supplement will (except as hereafter indicated) be considered together.

What legal consequences flow from the facts thus established?

1st. Jacob Peters, Jr., having purchased at his own sale as an executor, took a title voidable by heirs and devisees. This principle is so well

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settled as scarcely to need the citation of an authority to support it. Said BLACK, J., in Sheuman's Appeal (3 Casey, 66), "It is certainly not necessary to decide now that an executor who buys at his own sale, or what is precisely the same thing, gets another to buy for him, holds the land on the same trusts that it was subject to before the sale." Long before that decision was rendered, the law had been settled. In Beeson *v.* Beeson (9 Barr, 279), BELL, J., discusses the whole subject, and there held that even when one executor obtains the order of sale, and the other purchases, a voidable title only will pass.

Since these decisions were rendered the law has been strictly maintained down to the present time.

No matter whether a sale is private or judicial, and made with the most honest intent, the policy of the law declares that it is and must remain voidable only. The purchaser commits what the law calls, not indeed an actual, but a *legal* fraud.

There is, however, a statutory limit beyond which we may not go, in a case in which nothing but *legal* fraud appears. The Act of April 22, 1856, reads as follows: "No right of entry shall accrue or action be maintained for a specific performance of any contract for the sale of any real estate . . . or to enforce any implied or resulting trust as to realty, but within five years after such contract was made, or such equity or trust accrued, with the right of entry, provided that as to any one affected with a trust by reason of his fraud, the said limitation shall begin to run only from the discovery thereof, or where, by reasonable diligence, the party defrauded might have discovered the same."

By the terms of this Act the bar of the statute begins to run "within five years after . . . such equity or trust accrued, with the right of entry."

In so far as the rights of the children of George W. Peters to the share of the estate in controversy are concerned, their rights did not vest in possession, as to two-thirds thereof, until February 28th, 1876, and as to the remaining one-third their title will not vest in possession until the death of their mother. As to them the statute would seem to be no bar, and they are entitled to a conveyance of two-thirds, and the remainder in the other third after the death of the mother.

As to the claim of the widow of George W. Peters the effect of the statute is not so clear. Guided, however, as we must be, by analogy, we find the authorities united in sustaining the principle that under the Act of March 26th, 1785, § 2, which provides that "after the expiration of twenty-one years next after his, her, or their right or title to the same first descended or accrued," the statute does not begin to run until a right of entry or action accrues. (See Hall *v.* Vandergrift, 3 Bin. 374; Sheply *v.* Lytle, 6 Watts, 500; Marple *v.* Myers, 2 Jones, 125; Miltenberger *v.* Croyle, 3 C. 170; Gunet *v.* Lynn, 7 C. 94.)

Applying the principle of the authorities to the rights of this widow, we agree with the counsel for the complainants in the first bill filed, when they contend, that the interest of the widow in the rents was but a chattel interest, and that they accrued from day to day.

The widow of George W. Peters is therefore entitled to an account of all the rents and profits for a period of five years before suit brought to February 28th, 1876. From that time she is entitled to one-third of the rents, and a conveyance of one-third for life.

The principles above stated include all the properties bought by Jacob Peters, Jr., in 1864.

2d. The second point presented in this case is of vital importance to the parties to this suit, and if decided for complainants, gives to our decree a searching effect.

It is contended that Jacob Peters, Jr., by reason of his agreement with his co-executor to give the benefit of a re-sale of the properties purchased by him, at an advance within a reasonable time, and numbered 1, 2, 3, 4, and 5, to the heirs of his brothers, and we may add the widow of Jacob Peters, Sr., as heir at law of her son, became as to these properties only, because he failed to comply with his agreement, a trustee *ex maleficio*.

If Jacob Peters, Jr., was indeed such a trustee, then the proviso of the Act of April 22, 1856, applies, for it is enacted, "that to any one affected by a trust, *by reason of his fraud*, the said limitation shall begin to run only from the discovery thereof, or when, by reasonable diligence, the party defrauded might have discovered the same."

The fraud here spoken of means, of course, actual, as distinguished from legal fraud.

We must recur at this point to the evidence in the cause, for if the discovery of what is now called a fraud, was made more than five years before suit was brought, or if the party alleged to have been defrauded, might, by reasonable diligence, have discovered the same, it would be useless to determine the character of the trust, or the legal nature of the trustee.

The bill in paragraph 13 charges, that the plaintiffs had no knowledge of the existence of the agreement until after the death of Jacob Peters, Jr. The answer does not deny the fact, and hence it may be taken to be admitted.

Apart from this condition of the case, it has been decided, that when the defence is not put upon the ground of lapse of time, and knowledge by the plaintiff of material facts, plaintiff is not called upon to prove his real situation and

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the time when he first discovered the deception practised upon him. (Doggett *v.* Emerson, 3 Story, 740.)

It is undeniable, however, under the evidence, that the only persons who knew of the agreement were the executors, their counsel, and the auctioneer. Mr. Cresswell, upon p. 3 of the evidence, says: "This agreement I made in the line of my duty as executor, and did not communicate it to any one but the auctioneer." Could the parties interested by "reasonable diligence" have discovered the same?

Under the decision of the Court in Maul *v.* Rider (9 P. F. S. 167), general rumor of a fact is not sufficient to put a party on inquiry. There must be some act or declaration from an authentic source, which a person would be careless if he did not regard. No such act or declaration or evidence thereof appears in this case. Judge SHARSWOOD, who delivered the opinion of the Court, makes this criticism upon the language of the law: "The words of the Act of Assembly are not 'when the party defrauded might have discovered the same,' but when by 'reasonable diligence' he might have done so. These words are surely not to be rejected, and the act construed as if they were not in it. . . . There must be some reason to awaken inquiry, and direct diligence in the channel in which it would be successful. This is what is meant by reasonable diligence." Other authorities might be cited to the same point; the above, however, is enough to guide us.

Under another view of this case, it is probable that the fraud, if one was perpetrated by Jacob Peters, Jr., was not consummated until his death.

The agreement *was a continuing one.* He might at any moment have sold the properties during his lifetime, and divided the proceeds, or he might, by his will, have made a proper provision for those whose interests he had in charge, and whose confidence, it is alleged, he had gained.

Although this case is not on all fours with Church *v.* Ruland (14 P. F. S. 444), the principle there decided is broad enough to cover this cause. There it was held: "That the fraud under which the trust arose was not consummated until the devisee's death, without making a will in favor of those for whom she promised."

Having thus disposed of whatever may stand in the way of an investigation of the remaining question in this cause, we are brought face to face with that question. It must now be answered, in so far as the widow of George W. Peters, and the widow of Jacob Peters, Sr., in her right as heir of her son, Howard, are concerned.

Was Jacob Peters, Jr., a trustee *ex maleficio* for these parties?

It is not pretended that the agreement originally entered into by Peters with his co-executor, was *per se* an artifice or trick, intended to deceive or defraud.

That imputation would be an unjust one. Peters was not anxious to enter into the agreement, and he did it doubtless at the time with an intent to protect and manage the estate.

With that agreement was, however, coupled another, to wit, to sell within a reasonable time if possible, at an advance, and then distribute the proceeds among the heirs in just proportions. If the evidence established the fact that the agreement could not be executed, or that the property had depreciated, the case would present another aspect. By the testimony, however, it appears that the lowest price fixed amounted to about $50,000, and the highest $90,000. The price paid was $32,000, clear.

The test of value consists in the fact, that three years after the sale, the property actually sold for $55,000, subject to $7000 in ground rents. This sale was defeated by the defect in the title arising from the purchase by the executor at his own sale.

We have said there was no trick or artifice at the inception of this agreement, but there was *a clear and unmistakable violation of confidence* when Jacob Peters, Jr., having actually made a sale, at a largely increased price over the sum at which he had bought, neglected to take the necessary steps to perfect that sale, or in any other way to protect those who had a legal right to suppose their confidence would not be violated.

While Jacob Peters, Jr., may be acquitted of the charge of *deliberate* fraud, yet his supine negligence has been such, under circumstances which demanded vigilant and energetic action, that his conduct can only be interpreted to mean that he did not intend to do what he had agreed to perform.

Under these circumstances the transaction, in its results, can only, in a court of equity, be held to be actually fraudulent, and the trustee a trustee *ex maleficio.*

Sins of omission are often as fatal in their consequences as sins of commission, and this case is an instance, of what results may be reached, by a mere neglect to do that which justice and equity demanded should be done.

The plain principles above stated have their foundation in the numerous adjudications of our court of last resort.

That tribunal has, in many instances, uttered no uncertain sound upon this subject, and the decisions are based upon the deep, broad and pure principles of equity and justice.

Said SHARSWOOD, J., in Faust *v.* Haas (23 P. F. S. 301): "But when trick and artifice are resorted to in order to procure the property at an

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undervalue—as, for example, by deterring bidders at a sheriff's sale, or in any other way—the rule is different." See also the authorities cited in the opinion on page 301. He concludes this portion of the opinion by a citation from Seichrist's Appeal (16 P. F. S. 237), wherein the present Chief Justice sums up the principles applicable to this branch of the law, and renders it unnecessary for us to add another word. The learned Judge thus delivers the opinion of the Court: "Although no one can be compelled to part with his own title by force of a mere verbal bargain, yet when he procures a title from another, which he could not have done except by a confidence reposed in him, the case is different. Then if he abuse the confidence reposed in him, he is converted into a trustee *ex maleficio*. The statute which was intended to prevent fraud turns against him as the perpetrator of a fraud."

The discussion of this case under the second point cannot affect the rights of the children of George W. Peters; their rights are, in any event, protected.

So far as the rights of Isabella Peters, widow of Jacob Peters, Sr., are concerned, even if there had been possession of the real estate of Jacob Peters, Sr., by his heirs, under his will, for twenty-one years, yet that possession, under the agreement between Isabella Peters and the heirs of Jacob Peters, Sr., was amicable, and not adverse, as by that agreement she obtained, in lieu of the will, different rights; and we agree with the counsel for Isabella Peters, when he argued that "the point cannot apply to the subject of these proceedings, when everybody's rights have been in abeyance since the date of the conveyance to Jacob Peters, Jr. (1864), so far as the limitation of twenty-one years is concerned."

The other points made by the counsel for Isabella Peters, in her right as heir-at-law of her son, Howard Peters, deceased, have been fully considered. As they are covered by what has already been said, it is unnecessary to extend this opinion.

As we are with the complainants, the case will now go to a master, in the usual way, to state an account. This account shall be stated as to Mary Ann Peters, William R. Peters, George W. Marple, and Kate Marple, his wife, in right of his said wife, and Emma S. Peters, according to the principles stated in the first part of this opinion, including all the properties specified in the bill as originally filed; and as to the widow of George W. Peters, and Isabella Peters, the additional plaintiff in the supplemental bill filed, as to the rights of the said widow, and of the said Isabella Peters, in her right as heir-at-law of her son, Howard Peters, including the properties numbered 1, 2, 3, 4, and 5, respectively, treating the trustee, Jacob Peters, Jr., as a trustee *ex maleficio*.

Opinion by LUDLOW, P. J.

Common Pleas—Law.

C. P. No. 3. March 14, 1878.

Linden v. Kelly.

Practice and pleading—Husband and wife—Where a married woman executed a sealed agreement with another party, her husband being present and signing the paper as a witness, the husband may maintain an action of covenant in his own name against the other party as defendant.

Sur demurrer to narr.

Covenant. The plaintiff, in his declaration, alleged *inter alia* that on the 8th day of August, 1877, at the county aforesaid, a certain agreement, under seal, was made between the plaintiff's wife, Laura Linden, "by and with the consent and authority of the said plaintiff" of the one part, and the defendant of the other part, wherein the latter agreed to employ the said Laura Linden at a certain weekly salary to perform as leading woman at the New National Theatre for the fall and winter season then next ensuing; that the said Laura Linden "by and with the consent of the plaintiff," confiding in the covenant and agreement of the defendant, did enter into his employment in the capacity aforesaid, and has always been ready and willing to remain therein for the whole period of the fall and winter season, yet the defendant did not nor would continue her in his employment, but before the expiration of the said term discharged her without reasonable cause "by means whereof the said plaintiff hath been deprived of all the salary, wages, etc., which he otherwise would have derived from the said Laura Linden's being continued in the employment of the said defendant, etc., and hath sustained damage, etc., wherefore he brings suit, etc."

The defendant craved oyer, and, the agreement in the said declaration mentioned being read to him, it appeared that the defendant and Laura Linden had signed as parties thereto, and the plaintiff as witness.

Thereupon the defendant demurred to the said declaration, and assigned as causes therefor: (1) that the plaintiff was not a party covenantor or covenantee to the said alleged writing obligatory, and never sealed the same, and the signature and seal of his alleged wife, the said Laura Linden, being in law of no force or validity, the said plaintiff cannot bring an action of covenant thereon against the defendant; (2) that the execution of the said alleged writing by the said Laura Linden being of no legal force and validity, and no suit thereon against her or her said husband being

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possible, the said defendant is not bound thereby, there being no consideration for his execution and no mutuality of contract; (3) that even if defendant be bound as a covenantor, the plaintiff cannot sue thereon in his own name; and (4) that if defendant be liable as covenantor, the said wife should have been joined as plaintiff with her husband.

E. Spencer Miller, for the demurrer, relied upon—

Belles *v.* Hayes, 5 S. & R. 427.

John Dolman, contra.

The wife made an agreement in the presence of the husband with his permission, and he signed it as a witness. Upon proof of these facts the defendant could maintain an action of assumpsit if she refused to act, and that once admitted, our right to an action of covenant is clear.

Moreover, had this agreement been signed by none but the defendant, he would still be liable if this woman had entered upon her duties under the contract.

Directors of the Poor *v.* McFadden, 1 Grant, 230.
Gilhousen *v.* Willink, 3 Pitts. L. J. 214.

C. A. V

THE COURT. Demurrer overruled.

C. P. No. 4 July 6, 1878.

Guillou v. Toudy.

Affidavit of defence—Entire contract—Part performance—Performance prevented by the act of God—Consideration payable in instalments before completion of the work—Partial failure of consideration.

Rule for judgment for want of a sufficient affidavit of defence.

The copy filed set forth an agreement under seal in which the plaintiff "agrees to furnish steam heat for the rooms now occupied by said H. J. Toudy & Co.," and the defendants "agree to pay one hundred and fifty dollars for the said steam heat, payable $75 on the first day of November, 1877, and $75 on the first day of April. 1878. The said heat to be used from October to such time in the following spring as it may be needed." It was accompanied with an averment that seventy-five dollars were due April 1, 1878, under the agreement, and that amount and interest were claimed.

The affidavit of defence averred that the understanding at the time the agreement was made was that the steam heat should be furnished during the whole of the cool weather, beginning with October, 1877, and continuing until the warmth of the season in the following spring should make it unnecessary; that the heat could have been reasonably required until June 1, 1878; and that a fire consumed the apparatus of the plaintiff on the 25th day of March, 1878, and since that time he has neither furnished nor offered to furnish any heat.

Maxwell, for the rule.

Defendant having covenanted to pay the money upon the first of April, must do it. A tenant must pay his rent, though the house burn down. There is no averment of a demand after March 25th, and the fact is that defendant's own property was also destroyed, and he did not need the heat after that date.

Pennypacker, contra.

The contract was entire.

Lucesco Oil Co. *v.* Brewer, 16 Sm. 354.
Quigley *v.* De Haas, 3 WEEKLY NOTES, 315.
Feigel *v.* Latour, 1 Id. 335.

Being entire, plaintiff cannot recover for part performance, without showing that the defendant prevented him from performing the rest.

Shaw *v.* Turnpike Co., 2 P. & W. 458.
Martin *v.* Shoenberger, 8 W. & S. 367.

Partial failure of consideration is a good defence.

Kavanaugh *v.* Woll, 3 WEEKLY NOTES, 242.
Crompton *v.* Restein, 2 Id. 154.

The act of God does not excuse the entire performance of the contract, unless it be shown that it became impossible. Mere difficulty is not enough.

2 Parsons on Contracts, 672.

Rule discharged.

C. P. No. 4. June 29, 1878.

Linville v. Dalsam et al.

Appeal from magistrate—When the 20th day falls on Good Friday, the appeal may be perfected on the secular day next succeeding.

Rule to strike off appeal from the judgment of a magistrate.

The judgment was obtained March 30, 1878, and the appeal was taken out on April 20th, 1878. The twentieth day expired on Good Friday, April 19th, 1878.

Greenbank, for the rule.

The spirit of the Act of April 12, 1869, does not favor the extension of time. Negotiable instruments falling due on Good Friday, or any other *dies non*, become due the preceding day.

Moore, contra.

When the 20th day falls on Sunday, the defendant has the whole of the following day in which to perfect the appeal.

Moore *v.* Krier, 2 WEEKLY NOTES, 724, and cases cited in note.

The same rule should apply to Good Friday, and other legal holidays.

Rule discharged.

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WEEKLY NOTES OF CASES.

VOL. V.] *THURSDAY, JULY 25, 1878.* [No. 26.

Supreme Court.

Jan. '77, 172. March 28, 29, 187.

Darlington v. Darlington et al. Darlington's Appeal.

Husband and wife—Rights and disabilities of—Married woman's conveyance of her realty to her husband—Physical and mental weakness of the wife—Undue influence of the husband—Constructive fraud—Fiduciary relations—Arbitration—Submission by married woman—Practice—Amendment.

In dealings between trustee and *cestui que trust*, attorney and client, and all others standing in a fiduciary relation, where the trustee or attorney seeks to derive any benefit from a contract made with his *cestui que trust* or client, the burden of proof is upon him to show the utmost good faith on his part, and that he took no advantage of his influence or knowledge, and also to establish the perfect fairness, adequacy, and equity of the contract. If this be not affirmatively proved, any contract between parties standing in these relations will be avoided, even though there is no suspicion of actual fraud.

The same principles apply to transactions between husband and wife.

The conveyance of a wife's estate for a husband's use will be held void, unless it affirmatively appears from the attending circumstances, or otherwise, that it was her voluntary act, and not induced by his undue influence.

Where the rights of innocent purchasers have not intervened, a certificate by a magistrate of a married woman's acknowledgment of a conveyance of her separate estate is of no effect, when her heirs attack the conveyance upon the ground of fraud and undue influence practised upon her by her husband.

When a bill in equity shows a substantial ground upon which the complainant is entitled to relief, an amendment in form will be permitted even after the case is heard in the Supreme Court.

Although a married woman is not bound by an award of arbitrators, appointed under a submission in which her husband does not join, if a bill in equity, framed to enforce a specific performance of the award, shows substantial merit in the complainant's case, appropriate relief will be given.

Appeal from the Common Pleas of Chester County.

Bill in equity, filed July 23, 1873, by Jacob H. Darlington against Job Darlington, Franklin Darlington, Hoopes Darlington, Sidney D. Pennock, Samuel Dixon, and Hannah J. Dixon his wife, to compel the defendants to pay to the plaintiff the value of a certain farm in Chester County according to an award made by arbitrators mutually chosen by the parties, or to convey to the plaintiff all their interest in the farm, with six months' rent thereof, and also the sum of one thousand dollars with interest thereon. The case was referred to W. E. Barber, as Master, who found the following facts:—

The plaintiff is the only child of Joshua and Martha T. Darlington. The defendants are children of the same father by a former wife. Martha T. Haines, at the time of her marriage with Joshua Darlington, in September, 1841, was thirty-six years of age, and the owner of a farm of about eighty acres, and a lot of five acres of woodland, exclusive of considerable personal property. She was physically infirm, defective in speech, dull of hearing, and mentally weak. On November 8, 1841, about two months after her marriage, she joined her husband in a conveyance of all her real estate, reserving to herself a life estate, to John H. Brinton, Esq., for the consideration of one dollar. Brinton upon the same day reconveyed the property to her husband. The acknowledgment was taken before a justice of the peace, one of the witnesses to which testified that she seemed to him to be reluctant and not cheerful in what she was doing. These deeds were not recorded until January 2, 1868, their existence being kept secret in order not to disquiet an old aunt of Martha. Not long after the marriage, and before the passage of the Act of 1848, Joshua Darlington reduced his wife's choses in action to possession. On December 9, 1863, the lot of woodland was sold, the purchase-money for which was paid to Joshua Darlington, and appropriated to his own use. Martha T. Darlington died March 9, 1870. Upon the death of Joshua, on November 8, 1872, the plaintiff claimed the farm and the value of the woodlot as the only child of Martha. The defendants resisting the claim, all matters in controversy as to the distribution of the estate were referred to the final determination of three arbitrators mutually chosen by the parties. The submission to arbitration was signed January 11, 1873, by all the parties, the husband of Hannah J. Dixon not joining therein. The arbitrators made their award in writing, March 2, 1873, wherein, after reciting that they had heard, examined, and considered the allegations, witnesses, and evidence of the parties, they determined that the farm, worth in their judgment $18,000, equitably belonged to Jacob H. Darlington, and awarded the same to him, or in lieu thereof $18,000 of the estate of Joshua Darlington, and $1000, the proceeds of sale of the woodlot, with six months' interest thereon up to April 1, 1873, half the rent of the farm for the year ending April 1, 1873, and also that he was enti-

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tled to retain, without accounting to his father's estate, whatever money, property, and securities were handed him by his father, after his mother's death, out of her chest. They further determined that all the other real and personal estate of Joshua Darlington equitably belonged to the other children, exclusive of Jacob, to be divided among them equally, half of the expenses of the reference to be paid by Jacob, and the other half by the other children of Joshua. Soon after this award was rendered, the plaintiff, with the knowledge of and without objection on the part of the defendants, took possession of the farm, requesting the defendants to release to him. The defendants refusing to execute the award, the plaintiff gave them notice to elect whether they would release to him the farm or pay him in lieu thereof $18,000. Upon the refusal of the defendants to elect, the plaintiff elected to take $18,000 in lieu of the farm, and filed this bill in equity to compel the defendants to perform their part of the award. The Master reported that the award was binding upon all the parties except Hannah J. Dixon, who, being a married woman, had no capacity to enter into the submission without her husband's assent, evidenced by his signature and her separate acknowledgment, under the Act of February 4, 1770. The Master suggested that the defendants, excepting Hannah J. Dixon, should pay to the plaintiff the sum of $15,000, being five-sixths of the valuation of the farm in the award, that the plaintiff should convey to the defendants one-sixth of the farm, and render an account of the rent, and that one-fifth of the expenses of the proceedings be paid by the plaintiff, and the remaining four-fifths by the defendants, excepting Mrs. Dixon.

To this report exceptions were filed by both parties.

The Court (BUTLER, P. J.) after a hearing upon the exceptions, delivered the following opinion: "The plaintiff's case (as presented by his bill) is founded on the award alone; whether he could sustain a claim for the farm, independently of it, we need not, therefore, inquire. The question is not before us.

We agree with the Master, that Mrs. Dixon is not bound by the award. She was incompetent to join in the contract on which it rests. This would be so, we think, even if it did not embrace (as it does) the transfer of land.

We also agree with him that the award is nevertheless binding on the other defendants, and that its observance should be enforced. Aware of Mrs. Dixon's coverture, they are presumed to know that she was not bound, and might not perform. With this knowledge they proceeded with the case at great length, involving a large expenditure of time, labor, and money, and took the chances of a favorable result. Justice, therefore, requires them to stand by what was done (Summerville *v.* Painter, 8 Wright, 110; Russell on Arbitrators, pages 22, 26, 529, 637)." A decree was entered in accordance with the views expressed in this opinion, directing all the defendants, with the exception of Mrs. Dixon and her husband, to convey their estate in the land to the plaintiff.

The plaintiff took this appeal, assigning for error the decree of the Court in not directing Mrs. Dixon to make conveyance of her interest in the land.

Wayne McVeagh and *Joseph J. Lewis*, for the appellant.

The question in this case is whether a wife of weak mind may be divested of her property by her husband, and the title vested in him by the mere presentation of a deed executed and acknowledged by her according to the forms of law.

The circumstances of the case were such as to raise the presumption of fraud, coercion, and undue influence on the part of the husband. A conveyance by a wife under such circumstances is invalid.

Louden *v.* Blythe, 4 Harris, 532.
Weeks *v.* Haas, 3 W. & S. 521.
Methodist Church *v.* Jaques, 3 Johns. Ch. 78.
Drury *v.* Foster, 2 Wall. 31.
Milnes *v.* Busk, 2 Vesey, 488.

To support a deed from a wife to her husband it must be shown that no fraud or imposition was practised upon her, and such proof must be in addition to her separate acknowledgment.

Swisshelm's Appeal, 6 Sm. 475.
Huguenin *v.* Baseley, 14 Vesey, 273.

It is not a sufficient answer to these well-settled doctrines that there was a separate acknowledgment, to which very slight importance is attached.

Louden *v.* Blythe, 4 Harris, 532.
Schrader *v.* Decker, 9 Barr, 14.

The proper construction of the award required the plaintiff to elect upon the refusal of the defendants. The submission to arbitrators is binding upon Mrs. Dixon.

Williard *v.* Williard, 6 Sm. 119.
McMahan *v.* McMahan, 1 Harris, 376.
Darlington's Appropriation, Id. 430.

George W. Biddle (with whom were *Abner Pyle* and *William M. Hayes*), contra.

There is no allegation of a change in Mrs. Darlington's mental condition between September 4, 1841, the day of her marriage, and November 8, 1841, the date of the execution of the deed of conveyance. If competent to contract marriage, she was equally competent to convey to her husband. The requirements of the Act of 1770 having been complied with, the grantee took a *prima facie* title. For over thirty years there has been no complaint on her part, or on that of her representative, and there is not a tittle

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of testimony to show that she ever denied her act. There is not a scintilla of evidence of fraud, duress, or undue influence. Not one of these essential averments to entitle the plaintiff to cancellation of the deed is found in the bill. The fallacy consists in the assumption that the plaintiff had the right of election. It is well settled that when arbitrators award that the party against whom they decide shall perform either one of two acts, the option of choosing which of the two acts that party will perform lies with the party himself. Where an award is made against a party, he has a right, when the suit is brought to plead performance. The award being in the alternative the defendants can plead performance of either alternative. It is fatal to the award that no time is fixed for carrying out its terms.

Carnochan *v.* Christie, 11 Wheaton, 446.

The award is not binding upon Mrs. Dixon, who, at the time of signing the submission, was a feme covert. By the general rule of common law the sole submission of a feme covert is void.

Moore on Arbitrations and Award, 27.

The effect of the decree of the Court below is to produce inequality in the division of the estate among the defendants. Such a settlement is inequitable.

Wistar's Appeal, 2 WEEKLY NOTES, 613.

May 6, 1878. THE COURT. An act or contract though not originating in any evil design or contrivance to injure another, yet tending to deceive and mislead or violate private confidence, is a constructive fraud equally reprehensible with actual fraud and prohibited by law. Constructive fraud often exists where the parties to the contract have a special confidential or fiduciary relation, which affords the power and means to one to take undue advantage of or exercise undue influence over the other. Whenever from such relation, considerable authority or influence necessarily exists on the one side, and a corresponding reliance and confidence is placed in the other, a party will not be suffered to abuse this authority or influence by extracting any advantage to himself. A transaction between persons so situated is watched with extreme jealousy and solicitude, and if there be found the slightest trace of undue influence or unfair advantage redress will be given to the injured party. Owing to the near connection between the parties in many relations, the transaction in itself is considered so suspicious as to cast the burden of proof upon the person who seeks to support it, to show that he has taken no advantage of his influence or knowledge, and that the arrangement is fair and conscientious.

For instance, the relation between attorney and client gives rise to great confidence and to very strong influence by the attorney over the actions, rights, and interests of his client. The attorney is presumed to have the power to gain by the necessities, good nature, liberality, and credulity of his client, and to obtain undue advantages, bargains, and gratuities. Hence the law often interposes to declare transactions between them void, which, between other persons would be unobjectionable. This doctrine is said to rest upon the importance of preventing a general public mischief which may be brought about by means secret and inaccessible to judicial scrutiny, from the dangerous influence arising from the confidential relation of the parties. The principle, that while the relation of client and attorney subsists in its full vigor, the latter shall derive no benefit to himself from the contracts or bounty, or other negotiations of the former, supersedes the necessity of any inquiry into the particular means, extent, and exertion of influence in a given case, a task often difficult and ill-supported by evidence which can be drawn from any satisfactory sources. On the one hand, it is not necessary to establish that there has been fraud or imposition upon the client; and, on the other hand, it is not necessarily void throughout *ipso facto*. But the burden of establishing its perfect fairness, adequacy, and equity is thrown upon the attorney. If no such proof is established, courts of equity treat the case as one of constructive fraud. In dealings between principal and agent, or guardian and ward, or trustee and *cestui que trust* the same principles prevail, with a larger and more comprehensive efficiency; and the burden of proof is upon the agent, the guardian or the trustee, who claims a benefit arising from the transaction to show the utmost good faith on his part, that he took no advantage of his influence or knowledge, and that he brought everything to the knowledge of the other party which he himself knew.

The foregoing principles are too familiar for citation of text-book or report. It is equally unnecessary to show by authority that the most dominant influence of all relations is that of the husband over his wife. From the proud and untutored savage to the cultured and refined Anglo-American, the wife is affectionately anxious to please her husband. This is first in her heart, whether she be in the menial service of a rude hut, or in daily toil for support for her family, or in charge of an elegant mansion. When he commands she obeys; when he persuades she yields; when he gently hints a wish, she grants; when treated almost as a servant, when governed and corrected as a child, as did our sturdy ancestors, or when confided in as a companion and equal, her will is subdued to that of her lord. True, there are exceptional women, whose nature is unaffected by marriage, who cannot yield or bend, and as wives, would not be happy save with effeminate

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husbands, but these are not so numerous as to cloud perception of the mental and moral differences of the sexes. The common law rights and disabilities consequent on marriage grew out of these differences, and the husband's power and influence distinctly appear. "By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs everything; and is therefore called in our law French *feme covert, femina viro cooperta;* is said to be *covert-baron*, or under the protection and influence of her husband, her baron or lord, and her condition during her marriage is called her coverture." One of the reasons for suspension of her legal existence is said to be "for her own security in guarding her against her husband's influence over her by disabling her from disposing of her own property." The disability to dispose of her own property of course, related to her land, which she or her heir could hold and enjoy after the end of her husband's estate therein. By marriage he became entitled to all the wife's personalty and the use of her lands. Under advancing culture and civilization, modern legislation has materially changed the common law respecting the rights and disabilities incident to the marriage relation. In Pennsylvania, the wife may hold and enjoy her own property, and easy modes are provided for her disposal of it. But the unity of person remains, resting on a foundation older than the common law, and the husband's influence over his wife so strongly expressed by the common law writers will end only with the marriage relation itself. The unfeeling greed, that in a less refined age transferred all the wife's personal property and the use of her real estate to her husband, is not entirely extinct. Many a husband in all sincerity believes the common law rule better than the statute, for the former accords with his avarice. Such an one as well as one who cares not for right is inclined to get control of his wife's property; and to that end, if she does not readily and quickly yield, will subject her to like importunities as sent Martha Darlington weeping and asking advice, yet, in a little time, against the advice, compelled her to make a deed, acknowledged in due form, vesting her estate in her husband. Surely, if anywhere, the rule that he who bargains in a matter of advantage with a person placing a confidence in him is bound to show that a reasonable use has been made of that confidence, and the arrangement fair and conscientious, should be applied in a case where the wife conveyed her property to her husband.

In Weeks *v.* Haas (3 W. & S. 520), GIBSON, C. J., said, in speaking of husband and wife, "Her dependence on him is more entire than the dependence incident to any other of the domestic relations; and the law relaxes its grasp on no means within its power to prevent him from misusing it. When it is her purpose to give him her land, the accomplishment of it by means of a conveyance to a convenient friend, cannot be prevented, yet the step is so obviously the consequence of the husband's avarice that it is seldom to be commended."

When it is truly her purpose to give him the land, it ought not to be prevented. But in determining if that was her purpose, when the step is obviously the consequence of her husband's avarice, will a rule of proof be adopted less favorable to her than to a client who dealt with his attorney, or to a principal with his agent? Ought not the rule to be more strictly adhered to as the relation is closer and more confidential? Or as the one party is stronger and the other weaker?

The same great Judge said in Watson *v.* Mercer (6 S. & R. 49), "The subordinate and dependent condition of the wife, opens to the husband such an unbounded field to practise on her natural timidity, or to abuse a confidence, never sparingly reposed in return for even occasional and insidious kindness, that there is nothing, however unreasonable or unjust to which he cannot procure her consent. The policy of the law should be as far as possible to narrow, rather than to widen the field of this controlling influence."

Where the conveyance is to a trustee, for the purpose of an immediate reconveyance to the husband, what honest mind would feel regret, that in the hurry of accomplishment some circumstance merely formal was omitted, by which the wife and her family were rescued from his rapacity? The very circumstances of a reconveyance ought to be satisfactory evidence of fraud, by undue influence; and although I do not know that a chancellor would set aside the wife's deed on the same ground on which he interferes to defeat an advantage gained by a parent or guardian while this influence over the child or ward is supposed to continue, still it ought to induce a Court to lay hold of the slightest extrinsic circumstances to effect the same purpose." This dictum, uttered half a century ago in an ejectment, where the parties stood in like relation as in the pending case, and where the deed was held void for defective certificate of the wife's acknowledgment, shows that the judicial mind, observing the fruits of the Act of 1770, was aroused to the importance of applying the rules relative to persons holding confidential relations, to transactions between husband and wife. So long as their common law rights and disabilities were unaffected by statute, there could hardly have been occasion for application of those rules to them; but when statutes secure

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to married women their property, with right of its enjoyment and disposal, occasions arise when they need and ought to have the full benefit of rules established for the protection of persons whose relations to others give the latter the power and means of exerting an undue influence over the former. The conveyance of a wife's estate for a husband's use will be held void, unless it affirmatively appears, from the attending circumstances or otherwise, that it was her voluntary act, and not induced by his undue influence.

Coming to the facts of this case: In 1841, Joshua Darlington, aged forty-four years, a widower with five children, married Martha T. Haines, aged thirty-six years. Her father died in 1811, leaving no widow and no other child. From him she inherited the lands described in the bill, except a small lot she purchased before her marriage. She had considerable personalty when married, and her husband lost no time in reducing it into his possession, making it absolutely his own. In about two months after their marriage, by procurement of the husband, deeds were prepared, one of which he and his wife executed for a nominal consideration, conveying all her land to John H. Brinton, reserving to her a life estate; and immediately Brinton conveyed the same land to Joshua Darlington. These deeds he kept secret from her friends till 1868. He sold a lot in 1863 for $1000, which he received, and at that time took counsel to enable him and his wife to convey without revealing the deeds executed in 1841. It is probable as a fact, as well as a legal presumption, that she knew the contents of the deed to Brinton. No act was done or omitted to vitiate the acknowledgment. It seems she was not too imbecile to make a contract, but was dull of hearing, defective in speech, of infirm health, and mentally weak. Her husband rarely permitted her to make purchases, which act is excused by his having absorbed all her personal estate, and from the day of his marriage doing nothing but practising economy, so as to live on the income of the property derived from his wife. The Master says that there is no evidence that he exerted undue influence over his wife to induce her to convey the land. The Master thinks that in going to her neighbors crying, complaining that her husband had got all her money and wanted her to give him the land, and asking advice, and saying that she would never give it to him, "only proves that the subject was fully considered by her, and that she had opportunity of consulting with her friends, that she had solicited their advice, and that she had resolved at that time not to yield to her husband." Without specially noting the inferences of the Master, it is enough that there is no affirmative evidence that it was the purpose of that woman, free from her husband's undue influence, to give him the land, nor that his conduct was fair and conscionable. On the contrary, a weak-minded woman, having no near relations, soon after her marriage is brought into the presence of her husband's attorney, and of his convenient friend, and of a magistrate; was there a very short time, but long enough to reluctantly convey the legal title of her land to her husband, and there is not a word in support of its fairness but the magistrate's certificate. What is that certificate worth under the circumstances? As evidence it has just the value of a declaration made in presence of her husband's friend, and also of his attorney, at the time of the execution of the deed. That deed, acknowledged in due form by the wife, is as open to avoidance, for actual or constructive fraud of her husband, as would be the deed of a client, duly acknowledged, for like cause done by his attorney. This is too plain for question.

Here there are no innocent purchasers. The plaintiff is the heir of Martha T. Darlington. The defendants stand in the shoes of their ancestor. They have the bare legal title, but the equitable title is in the plaintiff.

The plaintiff claims the award is valid; and all the defendants, except Samuel Dixon and wife, say, though believing it defective, they have determined to abide by it. Hence as between them the award will be treated as valid. The arbitrators say the farm "equitably belongs to the said Jacob H. Darlington, and they did award the same to him, or eighteen thousand dollars of the estate of said Joshua in lieu thereof."

The Court was right in holding that the plaintiff was entitled to the farm, unless the defendants elected to pay the money.

Samuel Dixon and Hannah J. his wife, are parties to the bill. They repudiate the award, as is their right. They objected to inquiry into such matters of dispute as were left unsettled by reason of the invalidity of the award as to her. The Master took the testimony, and the parties were fully heard upon the merits. The learned Judge was of opinion that the case as presented by the bill is on the award alone. In this we think there was error. The bill is not so artistic and complete as is desirable, yet has substance by which to amend, and if need be amendment would be allowed here. The learned counsel for defendants waived that formality if the Court were of opinion the bill has substance as against Dixon and wife. The second paragraph, after describing the lands, adds, "which two tracts of land the said Martha was induced by the persuasions and influence of her husband to convey to him." And the fourth avers, "That the said Martha was of weak mind, easily influenced, unacquainted with the forms of business, had little

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intercourse with society, and little knowledge of her rights of property, and during her whole life infirm in health." In case of refusal to decree a specific performance of the award, there is a prayer for decree that the judgment including Dixon and wife convey to the plaintiff the said farm, and pay the said $1000 received by Joshua Darlington for the lot he sold, with interest. And prayer for further relief. The plaintiff is entitled to a decree against all the defendants.

This cause having been argued by counsel upon consideration, the judgment is reversed, and it is adjudged and decreed as follows:—

1. That the defendants, Job Darlington, Franklin Darlington, Hoopes Darlington, Sidney D. Pennock, and Samuel Dixon and Hannah J. his wife, within thirty days after notice of this decree, release and convey unto Jacob H. Darlington and his heirs all their title and estate in the tract of land, containing about seventy-eight acres, described in the bill, free from incumbrance created by them or any of them.

2. That the said defendants assign and transfer to said plaintiff their respective claims of and in the estate of Joshua Darlington, deceased, to the amount of one thousand dollars and interest thereon from October 1, 1872, being amount of money received by said Joshua on sale of wood lot described in the bill, in such manner that the administrators of the estate of said Joshua may pay said $1000 and interest as if a debt owing to said plaintiff, and so that sum, with interest, shall be first paid to said plaintiff before distribution of the estate to the heirs.

3. That the said plaintiff retain for his own use, and shall in no manner be required to account for or pay for any moneys, securities, or other things given or handed to him by said Joshua in his lifetime, as respects the said Job, Franklin, Hoopes, and Sidney D., and as against them the plaintiff's right and title thereto shall be absolute.

4. That said plaintiff, within thirty days after notice of this decree, assign and transfer all his legal and equitable title and interest of and in the four-fifths part of the other real and personal estate of said Joshua Darlington, deceased, to said Job, Franklin, Hoopes, and Sidney D. and their heirs.

5. That said Job, Franklin, Hoopes, and Sidney D., within thirty days, pay to the plaintiff four-fifths of one-half the rent of said farm, for the year ending April 1, 1873, with interest from that date; and, if the parties do not agree upon the amount, a Master be appointed to ascertain the same.

6. That the costs of this action, including costs of appeal, be paid by the defendants.

7. That the record be remitted for the execution of this decree.

Opinion by TRUNKEY, J.

Jan. '77, 64. Jan. 25, 1878.

O'Donnell's Estate. Sharkey's Appeal.

Decedents' estates—Trusts—Commissions of testamentary trustees who are also executors.

The fact that trustees under a will have already received commissions upon a fund as executors of the testator, does not preclude them from charging a commission upon the income as compensation for administering the trust estate.

A commission of 5 per cent. upon the income collected from $30,000 Philadelphia City loan is not excessive.

Appeal from the Orphans' Court of Philadelphia County.

This was an appeal from a decree confirming the adjudication of the account of Jas. Campbell, J. B. Austin, and James McCann, trustees under the will of Hugh O'Donnell, of that portion of his estate bequeathed to the use of James C. O'Donnell and his children. The accountants were named in the will of the testator as his executors as well as trustees, and in the former capacity filed an account, which was audited and confirmed absolutely February 21st, 1868. They were then awarded a commission of 5 per cent. upon the entire estate of $274,558.43, amounting to $13,727.98, and from the balance in their hands $28,281.46, consisting of $22,800 Philadelphia City loan and a $5000 mortgage, was awarded to them as trustees of Jas. C. O'Donnell and his children under the testator's will, to which amount was subsequently added $7200 city loan upon the death of testator's widow. In March, 1877, their account as trustees was audited, and the accountants claimed a commission of 5 per cent. upon the income, excepting that accruing from the mortgage, which had, in fact, been collected by Bernard Sharkey, Esq., guardian of the children of Jas. C. O'Donnell and his attorney in fact, who at the audit objected to the allowance of any commission whatever to the trustees. It appeared that the guardian had never assented to the deduction of the commission as income was collected, and that the Fidelity Insurance, Trust, and Safe Deposit Co. had offered to become trustees at a commission of 2½ per cent., and the Guarantee Trust and Safe Deposit Co. for 3 per cent. The auditing Judge allowed the commission claimed, and the exceptions to the adjudication having been dismissed and the adjudication confirmed, this appeal was taken by guardian of the minors.

B. Sharkey, for the appellant.

The accountants having already received a large commission on the whole estate, including that from which the present income is derived, ought not to be permitted to charge upon this also.

Solliday *v.* Bissey, 2 J. 347.

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If anything is due them it ought to be rated with reference to the nature of the security and the offers of others to perform the same service for much less compensation.

A. A. Hirst.

The commission received by the accountants as executors cannot affect their right to compensation for administering the trust. The amount to be allowed is discretionary with the Court, and it is not in this case excessive.

Pusey *v.* Clemson, 9 S. & R. 204.
Gyger's Appeal, 24 Sm. 48.
McCauseland's Appeal, 2 Wr. 466.

Feb. 4, 1878. THE COURT. This so-called writ of error to the Orphans' Court should be an appeal. But disregarding this in order to reach the merits of the case, we are of opinion there is no error on the record. The question of commissions to the executors of Hugh O'Donnell's will, has been long since closed by operation of law, and cannot enter into the controversy before us, which relates to commissions of the executors *qua trustees* upon the income collected and disbursed. We are unable to see that in this limited respect any injustice is done to the owners of the income. The sum is not large, and the labor and trouble the same as if the sum were much greater. Decree affirmed, with costs to be paid by the appellant, and the appeal dismissed.

PER CURIAM. SHARSWOOD, J., absent.

Jan. '77, No. 165. Jan. 25, 1878.

Loughery and Gillin v. Dobson.

Contracts—Agreement to accept in payment real estate not specified—What is a sufficient conveyance and acceptance thereunder—Mortgages—How far the duty of an expectant vendee in possession without title to pay interest.

Where one of the parties to a contract has agreed to accept in lieu of payment in cash one of a number of houses subject to mortgages not particularly designated, at an estimated value, there is no sufficient payment and no title passes until the conveyance of some particular house has been completed.

Although entry into possession is *prima facie* evidence of the acceptance of property so occupied as payment, the presumption may be rebutted.

Where in pursuance of such a contract one enters into possession of one of the properties named, but has never accepted title thereto, he is not estopped by his failure to pay the interest on the mortgage, which resulted in a sale of the property by the mortgagee, from suing on the contract for the balance due thereunder.

A. contracted with B. to do certain work for $6000, "two houses on Fitzwater Street to be taken in payment by the party of the second part for the price or sum of $3000 on each, subject to a mortgage of $2500 on each house." A. entered into possession of two of the said houses, but never received title thereto, and subsequently they were sold by the mortgagee upon failure by both parties to pay the interest. In a suit upon the contract by A. against B.:

Held, that A. was entitled to recover the balance due in cash.

Error to the Common Pleas No. 2, of Philadelphia County.

Covenant, by Christopher L. Dobson against Jas. J. Loughery and Edward Gillin. The pleas were *non est factum*, covenants performed *absque hoc*, etc. The following facts appeared:—

In 1870 Dobson contracted with the defendants to do all of the plastering upon thirty-two houses about to be built by them. The agreement contained the following clause:—

"All work to be done in the best workmanlike manner for the price or sum of one hundred and eighty-seven dollars and fifty cents ($187.50) per house, or six thousand dollars for all. Two houses on Fitzwater Street to be taken in payment by the party of the second part for the price or sum of $3000 on each, subject to a mortgage of $2500 on each house, having ten years to run from the 12th of May, 1870."

On the trial, before HARE, P. J., the evidence showed that in April, 1872, defendants signed and acknowledged a deed to the plaintiff for No. 2243 Fitzwater Street, but did not deliver it. In the following June plaintiff entered into possession, and lived there until July, 1873, when he removed to No. 2209 Fitzwater, for which another deed to him had been made in the previous October, but not delivered. In December, 1875, both houses were sold at sheriff's sale under the mortgages, and there was no evidence that either plaintiff or defendants had received any part of the purchase-money. There was some conflicting testimony as to whether the houses had actually been accepted in payment of the debt. Loughery, one of the defendants, testified: "He (the plaintiff) saw the deed; he signed sixteen releases of liens. . . . . About March 1st, 1873, he called on me and wanted me to change those deeds to his son's name. He said he was unable to go on. I refused to give him any further help. He said he could not take them because he had borrowed from M. Cook $1000 on the representation that he was to get these houses from Loughery and Gillin. I refused." The defendant Gillin also testified: "There was a deed drawn, and exhibited then. Dobson looked at it; . . . . . was present when Dobson saw the deed, at about the time releases were signed. . . . . Dobson examined deed; laid it down on table; left it there; he was to have it any time." Dobson, the plaintiff, testified: "I asked repeatedly for deeds during two or three years. He never showed me deeds until after work was done. When releases were

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signed, there was no deed shown to me, but I was told that I should have them when they were ready. He never delivered or offered to deliver the deed to me. He told me that there were liens and some smaller judgments against the houses." "I signed releases of liens on promise that I should have property in a few days. Saw no deed then. I supposed I should get the deed in about a week. Loughery, one of his sons or apprentices, and myself were present. When I saw him after in a short time, I told him that I was going to borrow money from a building association, and wanted my deeds. Then he said he couldn't let me have them then, but would let me have small sums of money till I could get the deeds. I had full faith that I should get my deed." There was some evidence also upon the question of performance of his contract by plaintiff.

HARE, P. J., charged: "Some stress has been laid by counsel on the duty of the plaintiff as a vendee in possession to keep down the interest on the mortgages, and, if pressed, to pay the principal. [It seems to me that it would be incumbent on one thus situated to appropriate the rents and profits to that purpose, but I do not think he would be bound beyond this, and to discharge the mortgage out of his own estate.] I have not been requested, and do not profess, to instruct you on the point as one of law, and I leave the circumstances to you to be considered in connection with the other facts in evidence."

Verdict for plaintiff for $4425, and judgment thereon. Defendants took this writ of error, assigning for error that portion of the charge contained in brackets, and the refusal of the Court to charge, as matter of law, that it was the plaintiff's duty to pay the interest.

Lewis Stover, for plaintiffs in error.

A vendee in possession under articles of agreement, who has paid the consideration money, has an estate in the land (Russell's Appeal, 3 H. 319), and is the owner of the land, so that an injury to it is his loss, and a gain his profit.

Richter *v.* Selin, 8 S. & R. 440.
Robb *v.* Mann, 1 J. 304.

It was clearly the duty of this plaintiff to have paid the interest on the mortgage, subject to which he bought the land. The defendants would have had no right to interfere, and any balance resulting from the sale would have belonged to Dobson or his creditors.

Pipher *v.* Lodge, 4 S. & R. 310, 570.
Russell's Appeal, *supra*.

If plaintiff sued for cash instead of the houses, which he agreed to take, then he ought first to restore to us the houses. This cannot be done, because they have been sold on account of his default; and he is therefore estopped from maintaining his claim for the cash.

Edw. F. Pugh and *Chas C. Lister*, contra.

The plaintiff was not a vendee in possession, the original contract was to pay money, not to sell land; any two houses might have been given; they were not specified, or the $6000 in cash might hav been paid if defendants desired it. Dobson could not have compelled specific performance of the conveyance. Until the deeds should have been delivered Dobson had no title which might not have b en divested by a sale to some one else by Loughery. But had the deeds been tendered he could not have been compelled to take the houses subject to other liens and incumbrances.

Att'y Gen'l *v.* Day, 1 Vesey, 218.
R. R. Co. *v.* Navigation Co., 12 C. 204.
Blackburn *v.* Ormsby, 5 Wr. 101.

The damages were properly assessed for the contract price, and not in the value of the land.

Hertzog *v.* Hertzog's Admr., 10 C. 425.

The argument that Dobson was bound to discharge the mortgages out of his own estate is, in effect, to carry the doctrine of personal liability to an unlimited extent. The mortgages were mentioned in the contract in order to fix the value of the houses, but their payment was not assumed. The theory of the plaintiffs in error is based upon articles of agreement for the sale of specific real estate, but here the only question was one of *payment* under the contract, and this was properly left to the jury.

February 4, 1878. THE COURT. We perceive no substantial error in this record. The testimony of both parties is that the deeds for the lots to be taken as payment were not delivered in pursuance of the contract. It appears that other liens existed as incumbrances than the mortgages which were to be accepted by the purchaser as liens to which he should be subject.

Now the contract designated no particular houses to be conveyed, so that no title legally or equitably passed into the purchaser under the agreement until the houses were not only designated but title completed by a conveyance. He was not bound to accept these otherwise incumbered houses, and the evidence is clear he did not. It is true he went into possession of the houses intended to be conveyed, and in the absence of other evidence this might have been *prima facie* evidence of acceptance, but the evidence rebuts this presumption, so that no liability under the agreement had fallen on the purchaser.

Under these facts we cannot discover any error against the plaintiff in error committed by the Court below. Indeed, the charge, looking at the evidence, was quite favorable to him.

Judgment affirmed.

PER CURIAM. SHARSWOOD, J., absent.

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Jan. '77, 229. Jan. 25, 1878.

Kahn v. Pickard.

Contracts—Dissolution of partnership—Agreement to pay a sum certain—Construction of.

J. K. and H. P., the latter a *feme covert*, having been copartners, entered into the following agreement: "The said parties hereby agree to dissolve the partnership heretofore subsisting between them in the hotel business at No. 310 Race Street, in the city of Philadelphia. J. K. is to assume the business, sell it out at the earliest opportunity, apply the proceeds to the settlement of all claims against the late firm, and pay to the said H. P. the sum of six hundred dollars." In a suit by H. P. upon this contract, J. K. filed an affidavit of defence, alleging the coverture of the plaintiff, and that the assets of the firm were insufficient to pay all its liabilities, and that the assets in his hands had been appropriated for that purpose:

Held, that plaintiff was entitled to judgment for want of a sufficient affidavit of defence.

Error to the Common Pleas No. 2, of Philadelphia County.

Debt, by Simon Pickard and Henrietta his wife, in right of his wife, against Jacob Kahn upon an instrument in writing, of which the following is a copy:—

"This agreement made the 25th day of January, 1870, between Jacob Kahn and Henrietta Picard, witnesses that the said parties hereby agree to dissolve the partnership heretofore subsisting between them in the hotel business at No. 310 Race Street, in the city of Philadelphia. Jacob Kahn is to assume the business, sell it out at the earliest opportunity, apply the proceeds to the settlement of all claims against the late firm, and pay to the said Henrietta Picard the sum of six hundred dollars. Witness our hands and seals.

Witnessed by } JACOB KAHN [L. S.]
ABRAHAM BLOCK. } HENRIETTA PICARD [L. S.]."

Defendant filed an affidavit of defence, averring "that, at the time of the execution of the instrument of writing sued on, Henrietta Pickard, one of the contracting parties therein, was under coverture with Simon Pickard," and averring further that the true intent of the agreement sued on was to pay the plaintiff $600 out of the surplus, if any; and that upon winding up the affairs of the firm, it was ascertained that the assets were insufficient to pay the liabilities, and that the balance had been appropriated to the payment due the servants of the partnership.

On motion, the Court entered judgment for want of a sufficient affidavit of defence (reported 2 WEEKLY NOTES, 95), from which the defendant took this writ of error, assigning for error the entry of the judgment.

Robert J. Arundel, for plaintiff in error.

The construction of the agreement claimed by the affidavit is only fair; it is most inequitable to suppose that Mrs. Pickard could, by reason of her coverture, escape all liability for the firm debts, and yet have an absolute right to $600, whether or not the assets were sufficient to pay it. The affidavit alleges a failure of consideration which the defendant was entitled to show to exonerate him from liability.

A. A. Hirst, contra. There was no failure of consideration. All that the plaintiff below had agreed to give the defendant he had received, and he is bound to show some meritorious defence.

February 4, 1878. THE COURT. The real question here is whether the sum of $600 agreed by Kahn to be paid to Mrs. Pickard is an absolute or a conditional debt dependent on there being assets remaining to pay it.

The interpretation of the agreement is not free from difficulty, the language being somewhat vague. But upon the whole we are of opinion the agreement constitutes a sale by her to Kahn of the partnership assets, an assumption by him of the partnership debts, and an agreement to pay her $600 absolutely. In the absence of fraud or gross mistake in making up this estimate of her interest in the partnership, we think she can recover this sum absolutely. Judgment affirmed.

PER CURIAM. SHARSWOOD, J., absent.

Common Pleas—Law.

C. P. No. 4. June 8, 1878.

Johnson v. Dobbins.

Suit on foreign judgment—Affidavit of defence averring fraud—Insufficiency of—Constitutional law—Constitution of the United States, Art. IV., and Acts of Congress in pursuance thereof—When judgment recovered in another State is conclusive in this State.

Rule for judgment for want of a sufficient affidavit of defence.

The plaintiff, having obtained judgment against the defendant in the Supreme Court of the District of Columbia, brought an action upon that judgment in this Court, and filed a copy of the record of the judgment named, duly certified according to the Act of Congress. The record showed that the defendant had appeared by attorney to the action and had entered into an agreement of reference with the plaintiff's attorney, that the cause had been accordingly referred,

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that the referee had made the award in favor of the plaintiff for $2209.49, to which award the defendant's attorney had filed exceptions, which exceptions upon being heard by the Court were overruled, and final judgment was thereupon entered for the plaintiff. The record also showed that subsequently the defendant's attorney had moved the Court to set aside this judgment, which motion upon argument was overruled by the Court.

In the action upon this judgment in this Court the defendant filed an affidavit of defence, in which he alleged that the judgment had been obtained by fraud and misrepresentation in this, that neither he nor any attorney authorized to act for him had ever agreed that the cause should be referred to a referee. The affidavit also contains an averment that the declaration set forth in the copy of the record filed is not the original and true declaration filed in the cause then pending in the Supreme Court of the District of Columbia, but that the same is a paper substituted therefor without authority of any kind.

G. T. Bispham, for the rule.

The allegation of fraud in obtaining a judgment is no defence to a suit on that judgment in another State. To obtain a judgment on the record of another Court, it is only necessary to show: (1) that judgment was obtained in that other Court; and (2) that such Court had jurisdiction of the parties and of the subject matter. The record shows the first requisite; the second, in the absence of denial, is to be presumed upon the record.

An order made in the progress of a cause in a court of another State will not be revised here. Though an order be obtained by fraud, the fraud cannot be questioned here; the party must resort to the tribunal where he has been defrauded.

Benton *v.* Burgot, 10 S. & R. 240.
Guthrie *v.* Lowry, 3 N. 537.
Maxwell *v.* Stewart, 22 Wallace, 79.
Browning *v.* Lynch, 1 WEEKLY NOTES, 5.
Belding *v.* Lowe, Ibid. 265.

A foreign judgment stands on even a higher plane than a judgment of our own Courts; it is absolutely conclusive where there is jurisdiction of parties and subject matter.

R. P. White, contra.

C. A. V.

June 11, 1878. THE COURT, after reciting the facts (*ut supra*). By the IVth Article of the Constitution of the United States and the Act of Congress of 1790 made in pursuance of it, a judgment recovered in any State of the Union before a court of competent jurisdiction is entitled to the same faith and credit in every court within the United States as it has by law or usage in the Courts of the State where it was entered. By the Act of 27th of March, 1804, sec. 2, the provisions of the Act of 1790 were extended to the records and judicial proceedings of all courts of the territories or countries subject to the jurisdiction of the United States, and this has been held to be a constitutional exercise of the legislative powers of Congress. A judgment recovered in the Supreme Court of the District of Columbia is therefore clearly within the provisions of these acts. If the concurrent authority of the Constitution of the United States, of Acts o Congress, of the decisions of the Supreme Court of the United States, and of the judgments of the Courts of last resort in almost every one of the several States, is sufficient to establish a rule of law, then it must be regarded as certain that in an action in one State upon a judgment recovered in another, the record of the judgment recovered in the latter is absolutely conclusive in the former, provided the Court in which the judgment was rendered had jurisdiction of the subject matter and jurisdiction of the parties. The conclusiveness of such a judgment is so complete and final that nothing whatever can be averred against it. It cannot be impeached for fraud or irregularity, nor can any other vice or defect whatever be alleged against it. The only place in which redress can be sought for any supposed injustice inflicted by such a judgment is the forum in which it was rendered. The defendant may show that the Court which rendered the judgment had not jurisdiction of the controversy, or that he was not amenable to its process or subject to its jurisdiction. Beyond this he can show nothing except a subsequent and lawful discharge of his liability. However reluctantly and tardily some of the States may at first have consented to comply with this mandate of the Constitution, it would be difficult, I apprehend, to point out one in which the rule is not now accepted with all the stringency with which it has been stated. It seems to be now everywhere loyally recognized and inexorably enforced. It is one of those impressive principles of the Constitution which, like that contained in the 2d section of the same Article, indubitably stamps the political system of the United States with the seal of unity and nationality. The bead roll of cases which fix the interpretation of the Constitution and establish this rule of American law is so long that it would be a useless labor and a mere affectation of learning to go over them. Any one who desires to consider them may find them in great array in the learned opinion of Mr. Justice LEWIS in Baxley *v.* Linah (4 Harris, 242). Among the more recent cases may be mentioned Christmas *v.* Russell (5 Wall. 305); Cheever *v.* Wilson (9 Wallace, 123); Maxwell *v.* Stewart (22 Wall. 79); Luckenbach *v.* Anderson (11 Wright, 123); Wetherill *v.* Stillman (15 P. F. Smith, 105); Reber *v.* Wright (18 Ib. 476); Guthrie *v.* Lowry (3 Norris, 533).

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Pennsylvania is among the States which at an early day announced her intention to adhere rigidly to the literal interpretation of the IVth Article of the Constitution, and in the case of Benton *v.* Burgot (10 S. & R. 240), the very point raised in the present case was definitely determined, for it was there held that a plea of *per fraudem* to an action brought here on a judgment obtained in a court of the State of New York was a bad plea, and judgment was given for the plaintiff on a demurrer to such plea.

It is clear therefore that the affidavit of defence in the present case is altogether insufficient.

Rule absolute.

Opinion by THAYER, P. J.

C. P. No. 4. June 4, 1878.

Donahue v. Helme.

Devise—Life estate with power of disposition—General intent of will—Act Jan. 24, 1849.

Rule to set aside levy and condemnation.

In this case judgment had been entered against the defendant on a bond and warrant. Execution had been issued and returned "No goods."

On an *alias* execution, certain real estate had been seized in which defendant alleged she had only a life estate, and that therefore the sheriff should have appraised the yearly value thereof under the Act of January 24, 1849, her interest in said real estate being by virtue of the residuary clause of the will of Hugh Helme (her husband), devising said residue—

"To my wife, Georgiana Helme, to enjoy the same and the proceeds and income thereof during her natural life with full power to use and expend so much of the principal of the same as she may judge necessary for her comfortable support and maintenance, and at her death," remainder to her children.

Notice to appraise was given under the Act, and counsel on both sides appeared before the sheriff's jury; but the sheriff refused to appraise on the ground that the jury was not competent to pass upon the question whether defendant's interest was a fee simple or a life estate; and made return "Levied and condemned." This rule was then taken.

R. P. White, for the rule.

The Act of Assembly is imperative that if defendant holds only a life estate in the land the sheriff and jury *shall* appraise it; they cannot defeat the provisions of the Act by declaring themselves incompetent to perform their duty; but are bound to act on their best judgment and with such light as they can obtain.

That defendant had but a life estate is plain. The devise was in express words "for her natural life," and although there was added a power *in case of need*, to sell and use the proceeds for her maintenance and support, this was but a power depending on the happening of a contingency which never occurred.

It is analogous to a devise with remainder over and a power of revocation and appointment in the first taker. The power to use the corpus, to sell the property and use the proceeds *should the necessity arise* does not enlarge the estate.

1 Jarman on Wills, 321.
Finch's Prec. 71 and cases cited.
Surman *v.* Surman, 5 Mad. 23.
Blight *v.* Wright, 1 Philada. 549.
Church *v.* Disbrow, 2 Sm. 219.

Dillin *v.* Wright (23 Sm. 177), is not in point. The opinion contains some reasoning on the other side; but this is a mere dictum and contrary to the current of authority.

E. P. Smithers, contra, did not appear at the argument of the case, but submitted in his paper book: That Georgiana Helme had a fee simple in this property.

Church *v.* Disbrow, 2 Sm. 219.
Dillin *v.* Wright, 23 Id. 177.

That the Act of January 24, 1849, applies where the defendant has a "life estate only;" here defendant has a life estate with powers annexed. That the Act does not apply when there is a question of doubt whether the estate be for life or in fee.

Gordon *v.* Ingraham, 8 Casey, 214.

June 29, 1878. THE COURT. The defendant alleges that in part of the property condemned she has only a life estate, and complains that the sheriff in contravention of her written request and notice has not proceeded, in accordance with the provisions of the 4th section of the Act of 1849 (Purdon, 652), to make an appraisement of the yearly value of that portion of the land, and to return the same as part of the inquisition and condemnation. The plaintiff maintains that the defendant has a fee in the land referred to, and that the proceeding of the sheriff is therefore in all respects regular. Whether the defendant has a fee or a life estate only depends upon the construction to be given to the will of her deceased husband, Hugh Helme, who devised the property in question, being a part of his "residuary estate, real and personal," to his wife Georgiana "to enjoy the same and the proceeds and income thereof *during her natural life*, with full power to use and expend so much of the principal of the same as she may judge necessary for her comfortable support and maintenance, and at her death the remaining portion of the said real and personal estate, or the proceeds of the same, to go to her children who are now living in equal portions, or to their heirs or assigns respectively. And I do hereby authorize and empower my wife, the said Georgiana Helme, to sell, dispose of, and convey in fee simple or otherwise at public or private sale any portion of my said real or

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personal estate, . . . *but the said Georgiana Helme to appropriate or use the proceeds in the manner hereinbefore directed.*"

The plaintiff maintains that as the life estate was coupled with a power of sale and a right to use the proceeds if they became necessary for her maintenance, this amounts to such an unlimited control of the estate and its proceeds as to constitute in fact a fee simple.

A devise of an estate *generally* or *indefinitely* with a power of disposition over it carries a fee. But when the estate is given *for life only* the devisee takes only a life estate, though a power of disposition or to appoint the fee by deed or will be annexed, unless there should be some manifest general intent of the testator which would be defeated by adhering to the particular intent. Words of implication do not merge or destroy an express estate for life unless it becomes absolutely necessary to uphold some manifest general intent. The cases establishing this doctrine are collected by Chancellor KENT (4 Com. 319; Ib. 526). The Pennsylvania cases affirm the same doctrine. Morris *v.* Phaler (1 Watts, 389) is not inconsistent with it, but affirms the general rule. In Hess's Executor *v.* Hess (5 Watts, 187) there was a devise of a life estate in land to a son, charged with the sum of 1000 pounds, to be paid to whomever the son should bequeath the same by his last will, and it was held that the ownership of the money did not merge in the ownership of the land. "Where there is no express bequest of the *absolute* property," says GIBSON, C. J., "a contrary implication of equal force is sufficient to hinder the implication from the general disposing power." In Walker *v.* Quigg (6 Watts, 87) there was a devise to a wife, "she or her attorney *to act with it according to their discretion* as far as is consistent with the children's welfare, and in case she should get married, then she shall claim no greater right than my surviving children," and this was held to be a devise to the widow during widowhood as a trustee for herself and children. In Fisher *v.* Herbell (7 W. & S. 63) an unlimited power of disposition expressly given was restrained and limited by previous words showing plainly the testator's intent to confine the devisee to a life estate. This case, and Culbertson *v.* Duly (in the same book, p. 195), illustrate very strikingly the rule already stated that a devise of an estate generally with a power of disposition over it carries a fee, but when the estate is given for life only the devisee will only take a life estate, notwithstanding a general power of disposition is annexed. In Culbertson *v.* Duly the devise being general the power of disposition added was held to plainly indicate a fee simple. In Fisher *v.* Herbell a life estate being expressly devised a power of disposition, in the very words used in Culbertson *v.* Duly, was not permitted to enlarge the life estate into a fee. In Musselman's Estate (3 Wright, 469) a testator devised all his real and personal estate to his widow "so long as she lives, for her maintenance," adding, "she shall have her choice to sell it or not as she believes best for her." This was followed by a power to dispose of one-third of the estate by will, and it was not doubted that she was limited to a life estate in the whole and could only dispose of one-third by will, notwithstanding the power of sale added to her life estate. The Second Reformed Presbyterian Church *v.* Disbrow (2 Smith, 219) affirms the general rule of construction already stated. But in that case the devise was in the alternative "to hold during her lifetime, *or* dispose of the same as shall seem best unto her," and this peculiar phraseology was held to carry a fee. In Cowles *v.* Cowles (3 Smith, 175) a testator devises to his wife all his property during her natural life, and at her death "all the property so devised to her, *or so much thereof as should then remain unexpended*," to go to the testator's son and daughter, their heirs and assigns. It was held that the express gift for life was not enlarged into a fee by implication founded on the words "or so much thereof as may remain unexpended," and that the heir was not to be disinherited by anything less than a clearly apparent intention. Nor is Dillin *v.* Wright (23 Smith, 177), which is relied on by the plaintiff, opposed in any sense to the general current of the cases, which, as may be seen from those already cited, always make the testator's intention the pole star of the construction, and labor to give effect to his just expectations and to prevent their being defeated by merely artificial rules and strangled by subtle implications. In Dillin *v.* Wright there was a devise to trustees for the testator's brother "*to be used, principal and interest, if needed, and if any remains after his death* it is to become the property of E. and S.," and this was held to be only a life estate in the brother, and not to be enlarged into a fee by the subsequent words.

Now it is impossible to read the will of Hugh Helme without being convinced that his object was in the first place to provide for the maintenance of his widow during her natural life, and in the next place to make the best possible provision in his power for the children after her death. For this purpose he gives her expressly a life estate, both in the realty and personalty, and no more, and the residue to the children. But foreseeing the possibility that his widow might not be able to subsist upon the income and profits of the estate, he adds a clause empowering her to encroach upon the principal for her support. A provision which, as was said in Cowles *v.* Cowles, might perhaps be satisfied

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by applying it to the personal estate. He then superadds to her life estate a power of sale, reiterating, however, the same restriction as to the use of the proceeds which he had already affixed to the real estate. If the words in Walker *v.* Quigg, "to act with it according to her discretion as far as is consistent with the children's welfare," were strong enough to make the widow a trustee for the children, they are much stronger for that purpose in this case, for here he begins by dividing the estate into two parts, a life estate for the widow and the remainder for the children, and although he gives her power to encroach upon the corpus of the gift if her necessities require it, he secures the residue, if any, to the children, and when he engrafts upon her life estate a power of sale he takes care to give to the children precisely the same interest in the proceeds which before they had in the land. The power of sale is therefore a power which Mrs. Helme holds in trust for herself and her children. Peradventure she may never execute it. Perhaps no contingency requiring its execution may ever arise. She cannot be compelled by creditors to execute that power against her wishes, nor would she be justified in executing it if the necessary result would be to enable her creditors to sweep away a provision which was intended by her husband for her children as well as herself. Equity will never decree the execution of a power in order to deprive a man of the estate for the benefit of creditors, especially at the expense of remaindermen whose estate is contingent upon its non-execution. An unexecuted power depending for its execution upon the volition of the party to whom it is given is never in equity deemed assets in favor of creditors. For what equity is there for the creditor to have money raised out of the estate of a third person in a case in which it was never agreed that it should be raised? Equity will not even aid the defective execution of a power if the effect of it is to prejudice heirs.

What then, in this aspect of it, is the case before us but an effort on the part of the plaintiff to turn an estate dependent, according to his own argument, upon the discretionary execution of a power into an absolute estate, and that in a case where the donee of the power refuses to execute it, and where, if she did execute it, the benefit of its execution must inure to the benefit of the testator's children quite as much as to her own benefit. Could anything be more repugnant to the expectations of this testator than that the estate intended for the maintenance of his children as well as his widow should be diverted from their support and the whole grasped by his widow's creditors. It was in the contemplation doubtless of such possibilities that he resolved to give his widow but a life estate and to preserve the remainder for her children. That he also saw fit to give her a power of sale, to be executed or not, as the pressure of necessity might or might not require, but always at her own discretion, and in trust for her children as well as for herself, does not overthrow the prior limitation and give her an absolute estate. The limitation of a particular estate for life by apt and express words shows conclusively that the testator did not intend that the power which he engrafted upon it should be construed as an implication of an absolute estate No such implication can be made in the face of his clearly expressed intention to the contrary. This is not therefore the case of a devise of an estate generally or indefinitely, with a power of disposition superadded, but a limitation of a life estate and remainder over, supplemented by a power of sale, which, if it were executed, must be executed as a trust for others as well as for the tenant for life. All confusion of ideas would instantly disappear from it if we suppose the gift to have been to a trustee for the widow and children, upon precisely the same limitation, and with precisely the same power of sale superadded. Yet it can make no substantial difference that the testator chose to dispense with a trustee, and to carry his intention into effect by a direct devise of a life estate to his widow with a power of sale, which, if it were executed, must be executed as a trust for her children as well as herself. Nor are the children to be deprived of the benefit of the limitation in their favor, because the widow, if she should execute the power of sale, might, if her necessities required it, appropriate a part of the *corpus* of the gift to her own support. They are entitled nevertheless to the benefit of the contingency, that this may not happen. Nor is it to be supposed that their mother would make any use of the power, which would be detrimental to their interests.

It was urged on behalf of the plaintiff that when it is doubtful whether the debtor's interest is a life estate or a fee the sheriff ought not to be compelled to have an appraisement made of the yearly value of the lands, as required by the Act of 1849, and Gordon *v.* Inghram (8 Casey, 214) was cited in support of this practice; but in Gordon *v.* Inghram the debtor himself claimed a fee under a parol gift from his father, in pursuance of which he had entered and improved the estate. Here only a life estate is claimed by the debtor, and she has recognized the rights of the remaindermen in the fullest manner, permitting them to make valuable improvements at their own cost. Where the fact is in doubt whether the debtor has a life estate or a fee there is an obvious reason why the sale should be allowed to proceed and the parties relegated to their subsequent remedies, but no such doubt exists in the present case, where the whole question depends upon the construction to be put upon the words

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of a will. The facts are not in dispute, as they were in Gordon *v.* Inghram. Either the one construction or the other must prevail, and that cannot be said to be in doubt which depends solely upon the judgment which the law pronounces upon the words of a written instrument. When it is made to appear to the Court that the defendant has only a life estate in the lands levied on, the defendant, by the Act of 1849, is entitled of right to have the appraisement made of the yearly value of the lands, and to pay the plaintiff the annual valuation in half-yearly payments. The sheriff cannot, under such circumstances, proceed to sell the property without depriving the debtor of the right secured to him by the Act of 1849. It would be very injurious, moreover, not only to the tenant for life, but to the remaindermen also, to proceed with the sale in violation of the provisions of the Act. The point made by the plaintiff, that the defendant is not entitled to have the appraisement made because she did not give notice to the plaintiff of her application, is without substance or merit, inasmuch as the record shows that the plaintiff appeared before the sheriff's inquest, and that his counsel then argued the very question now determined by the Court.

The rule to set aside the levy and condemnation must be discharged, but it is ordered that the sheriff cause an appraisement to be made by an inquest of the yearly value of the lot of ground in which the defendant has only a life estate, and particularly described in the notice and demand of the defendant to the sheriff, annexed to the depositions in this case, and that the sheriff return the said appraisement as part of the inquisition and condemnation heretofore made, in accordance with the provisions of the Act approved January 24, 1849.

Opinion by THAYER, P. J.

C. P. No. 3. June 8, 1878.

Marcus v. Boling.

Practice—Bill of particulars may be demanded after issue joined.

Rule to furnish bill of particulars.

Declaration filed in common counts. At the time of plea filed, defendant made no call for a bill of particulars. The case then proceeded to issue, whereupon defendant made his call.

F. W. Shain, for rule.

W. P. Bowman, contra.

THE COURT. It is not too late.

Rule absolute.

Orphans' Court.

May 20, 1878.

Palmer's Estate.

Testamentary incapacity—What constitutes—Evidence necessary to prove—Medical experts—Opinion of, when unaccompanied by the facts upon which it is based, of no avail.

Sur appeal from the Register, and demand for an issue.

Henry Palmer died December 20, 1875, leaving instruments in writing purporting to be a will and codicil, dated respectively the 19th day of April, A. D. 1875, and the 14th day of December, A. D., 1875. These papers were, on January 24, 1876, admitted to probate as the will and codicil of the decedent.

Thomas Clarke, a nephew of the decedent, took an appeal from this decision of the Register, upon the ground of want of testamentary capacity on the part of the decedent on the dates the said alleged will and codicil were respectively executed. The cause was referred to an examiner, and testimony taken.

Wm. W. Wiltbank, for petitioner, offered the testimony of Drs. Müller and Leedom to prove, as medical experts, that the decedent, owing to long-continued intemperance, was not of testamentary capacity at the dates the above mentioned papers were executed.

W. Howard Baker, for devisees.

The opinion of a medical expert must be accompanied by the facts upon which it is based.

1 Jarman on Wills, 79.
Ex parte Springer, 4 Clarke, 188.
Pidcock *v.* Potter, 18 Sm. 342.

Habitual drunkenness will not constitute incapacity to execute a will, though the testator was thereby frequently unfit for business, without proof that he was under the influence of liquor when the will was executed.

1 Jarman on Wills, 56.
Thompson *v.* Kyner, 15 Sm. 368.
Starrett *v.* Douglass, 2 Yeates, 48.
Hight *v.* Willson, 1 Dall. 102.

Testamentary capacity is always presumed until the contrary is shown by the clearest and most satisfactory proofs.

Williams on Executors, § 18.
Grabill *v.* Barr, 5 Barr, 441.
Barker *v.* McFerran, 2 Casey, 211.
Hoshauer *v.* Hoshauer, 2 Ib. 404.
McMasters *v.* Blair, 5 Ib. 298.
Werstler *v.* Custer, 10 Wr. 502.
Landis *v.* Landis, 1 Grant, 248.
Thompson *v.* Kyner, 15 Sm. 368.
Egbert *v.* Egbert, 28 Ib. 326.

If a verdict against the will would not be sus-

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tained by the evidence, the Court should refuse to award an issue.

Will of Ellen Shaw, 1 WEEKLY NOTES, 332.
De Puy's Est., 1 Ib. 212.
Graham's App., 11 Sm. 43.
DeHaven's App., 32 Leg. Int. 92.
Sartwell *v.* Wilcox, 8 Harris, 117.
Lower *v.* Clement, 1 Casey, 63.
Silveus *v.* Porter, 24 Sm. 448.
Dean *v.* Fuller, 4 Wr. 474.
McMasters *v.* Blair, *supra.*
Collins' Est., 3 WEEKLY NOTES, 434.
Colgate's Est., 5 Ib. 170.

Wm. Gordon, for widow.

June 1, 1878. THE COURT. Irrespective of the very strong affirmative testimony in favor of the will, the evidence on behalf of the contestants falls far short of what is required to overcome the presumption in favor of testamentary capacity. Indeed, it can scarcely be said to be evidence at all, consisting, as it does, of simply the opinion of two witnesses, without the facts upon which the opinion is based, or based upon facts manifestly insufficient to warrant the inference drawn. No finding against the will upon such evidence could be sustained; and this is the test by which to determine whether an issue should be granted.

It is stated in Swinburne (p. 72) that it is a hard and difficult point to prove a man not to have the use of his understanding or reason; and therefore it is not sufficient for a witness to depose that the testator "was mad, or beside his wits, unless a sufficient reason can be given to prove this deposition—as that he saw him do such acts or heard him speak such words as a person having reason would not have done or spoken."

It is true that in the present case the two witnesses were physicians, and that on questions of sanity, physicians may be asked whether, from the circumstances of a testator and the symptoms they observed, they can form an opinion of the soundness of his mind, and if so what their conclusion is. But in such cases they must state the circumstances or symptoms from which they draw their conclusions. (Jarman on Wills, p. 79.) "Juries," said the Court, in Dickinson *v.* Barber (9 Mass. 227), "are to judge of the facts, and although the opinion of professional gentlemen on facts submitted to them have justly great weight attached to them, yet they *are not to be received as evidence* unless predicated *upon facts testified either by them or by others.*"

Still more is this the case when the physician undertakes to express an opinion not simply on the question of unsoundness of mind, but of *testamentary capacity*, and in stating his opinion uses the latter term and not the former. Testamentary capacity is a mixed question of law and fact, and may well exist though the mind be weak or considerably impaired. Hence it is not enough to state that the disease from which the testator suffered was one which "more or less affected his mind," without stating how and to what degree it so affected it; and what facts existed to show that in this particular case the mind was affected to such an extent as to destroy the capacity to make a will?

One of the witnesses thus testified: "I knew the decedent professionally in his lifetime. He died in January, 1876. *I was not attending him at that time.* In my opinion he was not of testamentary capacity in April, 1875. He was very vacillating. His habits were very intemperate at that time, and had been so before then. They had a decidedly diseased condition *which affected his brain more or less. So far as I know*, his testamentary capacity in December, 1875, is the same as it had been in April, 1875, *which means he had no testamentary capacity.*" On cross-examination he said: "I attended him professionally about ten years ago. I cannot recollect his disease at that time. I know of my own knowledge the disease he died of. It was cirrhosis of the liver. *I know his condition by meeting him in the street two or three* times in April, 1875. I had *no professional knowledge of him at that time.* I never had any business transaction with him since my professional visits. *When I met him in the street he was between drunk and sober.* I speak of his condition as a professional expert, although this time I did not professionally visit him. The two or three times I had conversation with him were on the occasion of his stopping my carriage in the street and talking to me a long while. These are the times I referred to above."

This is the only witness who undertakes to assert that there was a want of testamentary capacity when the will was made (April 19, 1875), and this is the whole of his testimony. The codicil is dated December 14, 1875. Conceding, for the sake of argument, that a want of testamentary capacity was proved by the other witness at the latter date, the only effect would be to leave the will as it originally stood, and the contestant was not named in it. His application, unless it can be supported upon the testimony already stated, must therefore fail for want of interest. It is clear that it cannot be so supported.

The only remaining witness against the will testified as follows: "I attended Henry Palmer during his last illness. I had attended him before. I first had professional knowledge of him four or five years before his last illness—from that time until the time of his death. I had personal and professional knowledge of him at intervals. I think I first attended him for a dislocation of the shoulder. I had professional knowledge of him about the 14th of December,

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1875. He was then sick—cirrhosis of the liver. He had indicated symptoms of it some months. It is a disease of slow growth and owing to a man's habits. The habit which led to the disease was that of drinking. The disease at its culmination *more or less affects the brain.* His brain, on the 14th day of December, 1875, was affected. It was *so* affected *at that time,* that in my opinion *he was not of testamentary capacity.* I had incidentally personal knowledge of his physical condition on or about the 19th of April. This knowledge was incidental to my professional duties to his wife. He was in the house at the time I saw him there. I have no doubt at that time some of the conditions of the disease were there. I referred to the cirrhosis of the liver. *If he was sober,* he *was* at that time of testamentary capacity. *If he was not* sober, he was *not* of testamentary capacity. I thought at the time his habit of drinking was excessive. He was drunk at times. He was drunk at oftentimes."

This is the whole of contestant's case.

There are few if any diseases which do not "more or less affect the brain." In a case reported in 62 Missouri Rep. 275 (Thomas *v.* Stump), a sore leg was one of the grounds for attacking testator's testamentary capacity.

If all that is required to upset a will is the bare opinion of a medical man that there was a want of testamentary capacity at the time it was made, and the fact that his disease was one "which more or less," etc. etc., is sufficient to support that opinion, no will which does not give equal benefits to all of the testator's next of kin will be allowed to stand without a contest.

The evidence of unsoundness of mind in Cauffman *v.* Long (1 Norris, 72), which the Supreme Court held to be insufficient to sustain a verdict against the will, was at least as strong as that relied upon here. The will itself in that case furnished some indication of insanity which here is wholly wanting.

The demand for an issue is refused, and the petition dismissed at the cost of the petitioner.

Opinion by PENROSE, J.

June, 1878.

Downing's Estate.

Attachment execution—Garnishees—Claim for exemption—Orphans' Court practice.

Sur petition for order to pay, and answer.

James Downing died October 23, 1876, intestate, leaving a wife and six children. Upon the audit of the account of his administratrix, Lorenzo M. Keiffer, assignee in bankruptcy of John Ryan, presented a claim for $13.06, the amount of a judgment obtained by him against one Charles King, defendant, and the administratrix as garnishee. An attachment execution issued on this judgment on January 18, 1877. To the plaintiff's interrogatories the garnishees answered, *inter alia,* that she believed the estate of her husband was indebted to the defendant in the sum of $150. Keiffer & Brother also presented a claim for $63.60 in the same manner and form against the same defendant and garnishee. The Court allowed the claims and directed their payment with costs.

On March 16, 1878, the plaintiff in the above attachment executions petitioned the Court for an order on the administratrix to pay; the Court granted the petition, and the administratrix made answer that at the time the attachment execution issued the defendant gave notice of his claim of exemption and elected to retain his claim against the estate of James Downing as part; that therefore she must pay the said amounts so attached to Charles King, the defendant, and not to the petitioners, the plaintiff.

Luse, for the petitioner.

McIntyre, contra. The attachment was issued out of an Alderman's Court, but the fund is in the Orphans' Court. The claim of exemption must be made on the writ under which the fund is raised.

Dodson's Appeal, 1 Casey, 232.
McAfoose's Appeal, 8 Ibid. 276.
Shelly's Appeal, 12 Ibid. 373.
Line's Appeal, 2 Grant, 197.
Bechtel, Appeal, 2 Grant, 375.

An order of this Court to the administratrix to pay comes within the Act.

As to the rights of the defendant against the garnishee being excluded from participation in the trial of an attachment suit, see Ruff *v.* Ruff (5 WEEKLY NOTES, 181).

June 29th. THE COURT. The rights of the respective parties affected by the order to pay were fixed by the adjudication which awarded to the claimant the amount of his judgments against the administratrix as garnishee of King, and to the latter the balance only of his debt.

There was no exception to this, and it is now too late to raise the question whether under his claim of exemption King was not entitled to be paid the whole to the exclusion of his attaching creditor.

The answer shows no sufficient reason for not complying with the order to pay.

Decree accordingly.

Opinion by PENROSE, J.

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WEEKLY NOTES OF CASES.

VOL. V.] *THURSDAY, AUG.* 1, 1878. [No. 27.

Supreme Court.

May, '78, 149. May 29, 1878.

Pennsylvania R. R. Co. v. Fries.

Negligence—Common carriers—Measure of diligence required—Extraordinary circumstances—Sufficiency of evidence.

Negligence is the absence of care according to the circumstances.

Common carriers are not bound to take precautions against extraordinary circumstances which there is no reason to anticipate.

The jury should not be allowed to pass upon the question of negligence when the evidence is insufficient to establis'i it.

Error to the Common Pleas of Blair County.

Case, by Thomas Fries against the Pennsylvania Railroad Company, to recover the value of three car-loads of household goods burned at Osceola, while in transit over the defendant's road. Plea, not guilty.

The plaintiff shipped the goods in question from Altoona to Houtzdale under a special contract with the defendants, whereby he released them from all liability for loss, and assumed all the risks of conveyance. While the cars were waiting at Osceola, as was customary, to be taken over the branch road to Houtzdale, a fire in the woods was communicated by a sudden wind to the town, which was entirely destroyed, the citizens scarcely escaping. The cars containing the plaintiff's goods were destroyed, although some effort was made to save them. The facts are fully detailed in the opinion of this Court (*infra*). The defendants asked the Court to instruct the jury that there was no evidence of negligence on their part. This the Court refused to do, but submitted the question of negligence to the jury under all the facts of the case.

Verdict for the plaintiff and judgment. The defendants took a writ of error, assigning for error, *inter alia*, the refusal of the Court to charge as requested, and the submission of the case to the jury upon the whole evidence.

L. W. Hall and *D. J. Neff* for the plaintiffs in error.

By the contract between the parties the defendants were relieved from all liability for loss, except that which should be sustained through their own negligence. The burden of proof to show negligence was on the plaintiff below. The facts of the case are undisputed. There was no want of ordinary care. The extraordinary circumstances leading to the loss were unforeseen, and the defendants were not bound to provide against them.

R. R. Co. *v.* Gilleland, 6 Sm. 445.

Whether a given state of facts constitutes negligence is a question of law.

R. R. Co. *v.* Armstrong, 2 Sm. 282.
R. R. Co. *v.* Stout, 17 Wallace, 657.
R. R. Co. *v.* Feller, 4 WEEKLY NOTES, 160.

It is error to submit to the jury a question about which there is no sufficient evidence.

Silveus's Ex'rs. *v.* Porter, 24 Sm. 448.
Express Co. *v.* Sharpless, 27 Id. 516.

S. S. Blair (with him *Alexander & Herr*) contra.

The point of the defendants assumed that there was no negligence in not removing the cars. The jury was properly allowed to pass upon this question.

June 17, 1878. THE COURT. The assignments of error in this case are so framed that their affirmance would have withdrawn the case from the jury. They were intended to have that effect. They all bear upon the question whether the company were guilty of such negligence as to make them responsible for the loss of plaintiff's property. The defendants in their seventh point (sixth assignment) asked the Court to instruct the jury that upon the whole evidence in the case the defendants were entitled to a verdict. The Court declined the instruction prayed for, and allowed the jury to pass upon the question of negligence. The jury having found the negligence, the defendants would be concluded if there was sufficient evidence to submit to them. This is the question we are now called upon to determine.

The facts of the case are exceptional in their character. On the 19th of May, 1875, the plaintiff below shipped three car-loads of goods from Altoona to Houtzdale. The cars arrived at Osceola, a point on the Tyrone and Clearfield Railroad, at half past eleven o'clock on the morning of May 20th. As the train over the branch road to Houtzdale did not leave until the afternoon, the cars were run on the siding where it was usual to place the freight for Houtzdale, preparatory to being drawn by another locomotive over the Moshannon Branch Railroad to that point. For several days previous to this a fire had been burning in the woods in the vicinity of Osceola, but it had been so far subdued that no especial anxiety was felt by the citizens of the town for its safety.

Between 12 o'clock noon and 1 P. M. of that day a high wind sprang up which increased

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rapidly to a tornado, and drove the fire towards the town. It soon reached the outskirts, and spread with such rapidity that all efforts to check it were fruitless. In about two hours the town was practically destroyed, some three hundred houses having been consumed by the flames. The property of the citizens was nearly all burned, very few saved anything, and many had to fly for their lives. The railroad company lost nearly all their property, including the depot and a large number of cars. The three cars of the plaintiff were burned upon the siding where they had been placed. An effort was made by the employés of the company to get these cars out, but it was not successful. The heat and smoke prevented the men from coupling them. The attempt to do so was accompanied with no inconsiderable amount of danger, as the density of the smoke made it difficult to see the locomotive backing in and out.

It is very clear that the company were not responsible for the fire. The high wind by which it was carried into the town was the act of God. The cars were placed on the siding where it was customary to place cars destined for Houtzdale. That the switch was contiguous to large piles of lumber was not material. The cars were placed on the switch in the usual and proper course of business. The company had no reason to apprehend loss from that cause. The only point seriously pressed was that the company were guilty of negligence in not getting the cars off after the fire commenced.

Upon this point there was at most but a scintilla of proof. Negligence is the absence of care according to the circumstances. The circumstances here, as has already been said, were unusual. The company were not bound to have an extraordinary force on hand, for they had no reason to anticipate such a disaster. It is too much to expect every man to act with coolness and judgment in the midst of such an appalling scene. It is clear, however, that the employés of the company did all that could be reasonably expected of them to save life and property. A portion of their time was employed in aiding women and children to escape. A large number were taken in the cars to a place of safety. Had they turned their entire attention to plaintiff's property, neglected all other duties, and left helpless women and children to their fate, it is just possible they might have succeeded in getting the three cars off the siding. They were not obliged, however, to sacrifice every feeling of humanity to the preservation of plaintiff's property. And had they done so the evidence did not show that it would have been successful.

Had the company preserved its own property at the expense of plaintiff's, there would have more reason to charge them with negligence.

The release which the plaintiff below gave the company relieved the latter from all liability except for negligence. Of this there was not sufficient evidence to have been submitted to the jury, and they should have had a binding instruction to find for the defendants.

Judgment reversed.

Opinion by PAXSON, J. SHARSWOOD, J., absent.

Jan. '76, 103. Feb. 8, 1878.

McCall's Appeal.

Will—Remainder—Vested or contingent.

M. bequeathed a fund to trustees to pay the income thereof to G. for life, and after his decease to pay the income to W. until he arrived at the age of twenty-five years, and on his arriving at twenty-five years of age to pay to him the principal of the fund; but if W. should die before arriving at the age of twenty-five years without issue surviving, then the principal of the fund was given to the eldest child of P. W. died at the age of thirty-seven, in the lifetime of G.

Held, that the remainder interest in the fund had vested in W. when he reached the age of twenty-five years, and that the fund was payable to his executors.

Appeal from the Orphans' Court of Philadelphia County.

This was an appeal from a decree confirming the report of the auditor appointed to audit the account of George Read and Harry McCall, trustees under the will of Margaret A. McCall, deceased.

Margaret A. McCall by her will, which was admitted to probate January 6, 1860, provided, *inter alia*, as follows:—

"To my executors and to the survivor of them, I give the sum of two thousand dollars in trust to invest and keep the same invested, and pay the interest and income thereof to my nephew George C. McCall during his life, and after his decease to pay interest and income thereof to his nephew William C. McCall, until he arrives at the age of twenty-five years; and on his arriving at twenty-five years of age, to pay over to him the principal sum of two thousand dollars, with any accumulation thereon; but if the said William C. McCall shall die before arriving at twenty-five years of age without marrying or leaving child or children him surviving, then I give the said sum of money to the eldest child of my nephew Peter McCall, and in the event of his not having any child then living, I give the same to the children of his late brother John G. McCall, if more than one, in equal shares. But if the said William C. McCall shall die under the age of twenty-five years leaving a child or children, I give the said sum of money to his child or children him surviving, in equal shares."

William C. McCall died April, 1868, thirty-seven years of age, unmarried, and without issue, in the lifetime of George C. McCall, who died in May, 1873. Before the auditor, the fund was claimed by Edward Green, executor of William C. McCall, and by Edith McCall, the eldest child

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of Peter McCall living at the death of George C. McCall.

The auditor (Jas. V. McDonough) reported that the legacy was vested in William C. McCall at the time of his death and awarded the fund with interest from the date of George C. McCall's death to his executor, Edward Green. In his report the auditor said:—

Now it is clear, that if William C. McCall took a vested estate under the will, then the fund before your audito. should be awarded his executor, and Miss Edith McCall has no interest now in said fund; neither has she any interest now in said fund, if the bequest to her under the said will was contingent upon William C. McCall dying under the age of twenty-five years.

The words of the will are "But if the said William C. McCall shall die before arriving at twenty-five years of age, &c., then I give the said sum of money to the eldest child of my nephew, Peter McCall." Your auditor finds, that the contingency of William C. McCall's dying before arriving at the age of twenty-five is attached to the substance of the gift to Miss Edith McCall, and as that contingency never occurred, no interest in the said legacy ever vested in her. (Lamb *v.* Lamb, 8 W. 184; Donohue *v.* McNichol, 11 P. F. S. 73; 2 Redfield on Wills, 593; Seibert's Appeal, 1 Harris, 501.)

Passing now to the main question of contention, whether or not the interest of William C. McCall was vested, your auditor finds from said clause, that the prevailing idea in the mind of the testator was to provide for George C. McCall, and for William C. McCall and his children, by making a provision for the former during his life, with a remainder after his decease to William C. McCall. The only contingency mentioned by the testatrix, upon the happening of which the said fund was to go to any other person than said William C. McCall or his children, is "if he shall die before arriving at twenty-five years of age, without marrying or leaving child or children him surviving," and, as in construing this will we must endeavor to effect the intention of the testatrix, is it not fair to presume that the testatrix intended, if that contingency did not occur, the estate was to vest in William C. McCall? As William C. McCall did not die till after he had arrived at twenty-five years of age, the contingency named by the testatrix can never occur, so that the estate is vested in William C. McCall, or else as to that the testatrix died intestate.

It was contended before your auditor that the estate was not vested in William C. McCall:—

(1) Because there is no separate and independent gift to him, but an implication arising solely from a direction to pay.

(2) That the direction is to pay the interest and income to him until his arrival at twenty-five years of age, then to pay him the principal.

(3) That the direction is to pay over to *himself*.

I. If we look at the words of the will, we find that the bequest is: "I give the um of two thousand dollars in trust, &c., to pay the interest and income to my nephew, George C. McCall, during his life; and after his decease to William C. McCall until he arrives at the age of twenty-five years, and on his arriving at twenty-five years of age to pay over to himself the principal sum." This is not merely a direction to pay—it is a direct gift to trustees upon certain trusts; and the words "to pay" are the usual words defining the duty of a trustee, and created an estate in George C. McCall for life and a vested remainder in William C. McCall, subject to be divested upon his death before arriving at the age of twenty-five years. The mere fact that one estate under a will is provided to take effect after the termination of an intervening one, will not have the effect to prevent both estates becoming vested at the moment of the decease of the testator, the one in possession, the other in prospect or remainder. (2 Redfield on Wills, 593.) In King *v.* King (1 W. & S. 205) C. J. GIBSON says, on page 207, "When the enjoyment of an entire fund is given in fractional parts at successive periods which must eventually arrive, the distinction betwixt time annexed to payment and time annexed to the gift becomes unimportant. In such a case it is well settled that all the interests vest together. Thus a legacy to one for life and to another at his death, goes to the legal representatives of the latter, should he not live to take it himself." To the same effect is McGill's Appeal (11 P. F. S. 46). But Provenchere's Appeal (17 P. F. S. 463) is in effect our very case. A testator gave a fund in trust to pay the income to his daughter-in-law "during her widowhood, and after her decease or marriage, to hold the same for the use of my grandchildren, A., L., F. and M., share and share alike, the income to be applied to their maintenance and education, and the capital to be paid to them as they respectively attain the age of twenty-one years." Two of the said grandchildren, having attained their majority, intermarried and died before the death of the daughter-in-law, the first-named legatee for life: Held, that the legacies vested in the grandchildren at the death of the testator, and the administrators of the deceased grandchildren were awarded their proportion of the fund at the death of the legatee for life. In this connection it may be well to notice that the only devises over are, first, if William C. McCall shall die before arriving at twenty-five years of age, without marrying or leaving child or children him surviving, then to the eldest child of Peter McCall, Esq.; and second, "if William C. McCall shall die under the age of twenty-five

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years, leaving a child or children, then to said child or children." These bequests over are by all the authorities conclusive as to the interest having absolutely vested in William C. McCall, upon his attaining the age of twenty-five years, and only the time of enjoyment being postponed to the death of the legatee for life. Where the devise is to a person when or if he shall live to attain a certain age or at a certain age, this standing alone would be contingent; yet if it be followed by a limitation over, if he shall die before a certain age, this is regarded as explanatory of the nature of the estate which it was intended the devisee should take, upon arriving at the age named, *i. e.*, that it should then become absolute and indefeasible. The interest, therefore, in such cases, is held to vest upon the decease of the testator. Where the devise over is made dependant upon the first devisee dying before he comes of age, or without issue, or any similar event, it is considered that the devise is equivalent to a provision that the first donor shall take an immediate vested interest, liable to be defeated by the happening of the contingency named: or, if it do not happen, the estate then to become absolute and indefeasible. (2 Redfield on Wills, 603.) "The devise of the legal estate vesting the inheritance in trustees, who are required to convey the estate according to the directions of the will, can make no possible difference from one where the interest is provided to take effect directly, without the intervention of trustees." (Id. 604.) "The fact that the testator makes no provision in regard to the disposition of the estate, provided the event named for the devisee coming into full possession never occurs, shows very satisfactorily that it was not in the mind of the testator to create a contingent estate, since the very fact of doing so would suggest the propriety of some provision for the disposition of the estate, in the event of that contingency not happening, as no one making a will would purposely leave property undisposed of." (Id. 606 and 607.) This same doctrine is the basis of the decision in Mutter's Estate (2 Wr. 314), and in Burd *v.* Burd (4 Wr. 182). In the latter case, LOWRIE, C. J., says, page 185, "The relevant clauses are very evidently intended to effect an entire disposition of the residue of his personal estate, and yet he leaves a part of it undisposed of, if this legacy was not from the first vested. This is a very influential consideration."

The recently published case of McClure's Appeal (22 P. F. S. 414), leaves us without any doubt that this legacy should be considered vested. That was a devise to the testator's wife for her life, of his real estate, and "At my wife's decease, my real estate to be sold and equally divided amongst my nephews and nieces," naming them. One of the nieces married and died intestate without issue, leaving surviving her her husband, anterior to the decease of the testator's widow. It was held the real estate was converted by the will to personalty, the interests of the nephews and nieces vested at the decease of the testator, and that the husband of the deceased niece was entitled to her share. WILLIAMS, J., in delivering the opinion of the Court, says, on page 418, "When the fund, which is the subject of the legacy, is given to another person beneficially for life, or until the legatee arrives at a particular age, or until certain debts are paid, the legatee will take an immediate vested interest in the subject, since such bequests are in the nature of remainders; the rule as to which is, that the interests of the first and subsequent takers vest together. Though there be no other gift than in the direction to pay or distribute *in futuro*, yet if such gift or distribution appears to be postponed for the convenience of the fund or property, or where the gift is only postponed to let in some other interest, the vesting will not be deferred till the period in question." (See also Biddle's Appeal, 19 P. F. S. 190; Stehman's Appeal, 9 Wr. 398; McGill's Appeal, 11 P. F. S. 46.)

II. As to the second objection, "that the direction is to pay the interest and income to William C. McCall, until his arrival at twenty-five years of age, then to pay him the principal," it need only be said that this evidences an intention in the testatrix to provide for the maintenance of William C. McCall, and, in the words of Robert's Appeal (9 P. F. S. 72), "is an indication of an intent to make him the beneficiary of the *corpus* of the legacy." And since he did attain twenty five years, the estate became absolutely vested, as abundantly appears by the authorities previously cited, to which may be added Schriver *v.* Cobeau (4 Watts, 130).

III. As to the third objection, "That the direction is to pay over to *himself*." The absolute estate in personal property will always vest by a gift to a person, without using the words heirs, executors or assigns. In the case of King *v.* King (1 W. & S. 205), it is true the words "or their heirs" were used, but it is clear from a careful perusal of the decision, as Judge SHARSWOOD says in Provenchere's Appeal, that the decision was made irrespective of those words, and their only effect was to rather embarrass. The doctrine is announced, on page 207: "A legacy to one for life and to another at his death, goes to the legal representatives of the latter should he not live to take it himself." The same objection made here was also made in Provenchere's Appeal (17 P. F. S. 463), but the fund was awarded to the administrator of the beneficiary; SHARSWOOD, J., in his opinion, disposing of it on page 469. The same objection could have been made in McClure's Appeal (22 P. F. S. 414), as

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the interests were given merely to the beneficiaries by name, and was necessarily passed upon, as the husband of a deceased beneficiary was awarded her proportion of the fund.

Your auditor therefore finds that the interest of William C. McCall was vested in him at the time of his decease, and awards the principal fund, together with the interest thereon since the date of the death of George C. McCall, after the accountant's commissions are deducted and the expenses of the audit, to Edward Green, executor of William C. McCall, deceased.

The report was confirmed by the Orphans' Court, and exceptions thereto on behalf of Edith McCall dismissed. From this decree confirming the report and dismissing the exceptions, Edith McCall appealed.

John Cadwalader, Jr., for the appellant.

It is a well established rule that a legacy is contingent when there is no express gift of it previously to the time appointed for its payment. (Cooper *v.* Scott, 12 Sm. 139.) The direction to the trustees is to pay the *income* to George C. McCall, and after his death to William; this is not an express gift of the corpus, and this case cannot come within the exception that when the intermediate interest is given to another for life the person to whom the absolute property is limited will take an immediate vested interest, on the ground that legacies in remainder vest at the same time as the particular estates previously given, for this exception does not apply where the *interest* and *dividends* only are bequeathed for life, and the context of the will shows that no interest in the principal was intended to pass until after the determination of the life estate.

Billingsley *v.* Wills, 3 Ark. 219.
Pope *v.* Whitcombe, 3 Russ. 124.
Thicknesse *v.* Liege, 3 Brown Par. Cas. 373, 8vo. ed.
King *v.* King, 1 W. & S. 207.

There is here great uncertainty as to the ultimate objects of testator's bounty, and this is always regarded as indicative of an intention that the ulterior limitations shall be contingent. In the cases supposed to govern this the ultimate objects of the bounty are all certain. The whole will reveals an intention that the respective persons to be benefited should be living at the time designated for payment of the capital. It is not to be supposed that the testatrix desired to give a vested interest to William C. McCall whether he survived the period at which it was payable or not, when she was unwilling to give such an interest to his children, or to the eldest child of Peter McCall, or to the children of John G. McCall, in all of which cases the interest was contingent. Strict rules of construction must yield to the plain intent of the testator.

Stover's Appeal, 1 WEEKLY NOTES, 209.

W. Wynne Wister, Jr. (with him *Cadwalader Biddle*), contra.

The English cases relied on by appellant were controlled by particular circumstances. Under the cases relied on it is clearly laid down that the mere bequest of the interest of a fund to a legatee for life will not prevent the vesting of the legacy in remainder, unless there is also a clear controlling intent to that effect, to be gathered from the context of the will.

Roper on Legacies, 589.

The limitation over on the death of William C. McCall before attaining the age of twenty-five is to his children *then* surviving, or in case he has none to the eldest child of Peter McCall *then* living. There is not the slightest indication that the testatrix intended the death of the tenant for life to be the period for determining survivorship. The Pennsylvania cases are conclusive.

February 18, 1878. THE COURT. We think the legacy vested in William C. McCall, for the reasons so well set forth by the auditor.

Decree affirmed with costs to be paid by the appellant and her appeal dismissed.

PER CURIAM. WOODWARD, J., absent.

July, '76, 70. March 11, 1878.

Collins v. Benedict.

Land Law—Statute of limitations—How applied to uninclosed woodland— What constitutes ouster—Presumptive possession of woodland.

When owners of adjoining tracts of land are in *actual* possession, each of his own tract, using his woodland as farmers usually do, neither acquires title under the statute of limitations to his neighbor's land, beyond that which he actually enters upon, clears, and cultivates, or incloses by fences, and holds adversely, notoriously, and peaceably for twenty-one years.

In such a case the running of a line is itself a trespass, and no ouster *ipso facto*.

As a general rule, when an owner is in *actual* possession of his tract, the doctrine of presumptive possession of the woodland prevails, unless met and overcome by ouster, either actual or permissive, on the part of the owner.

O'Hara *v.* Richardson (10 Wr. 385), and Arthur *v.* Kitchen (27 Sm. 62) followed.

Error to the Common Pleas of Luzerne County.

Ejectment, by Sally Ann Collins against Truxton Benedict, for forty-eight acres of woodland, part of a large tract in the warrantee name of Jesse Fell, situate in Pittston Township. Plea, not guilty.

At the trial the plaintiff showed that about the year 1826 she was put in possession by her father, John Sheppard, of a tract of land known as the "Jesse Fell tract," containing, with the wood-

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land here in controversy, about four hundred acres. Numerous witnesses were called to show that from that time to the day of trial, the plaintiff, and William Collins, her husband, had been in uninterrupted and notorious possession of the tract.

The defendant showed title out of the Commonwealth in 1794, and thence a regular record title down to himself in 1873. He further offered the record of ejectment, C. S. Wurts against William Collins and Truxton Benedict, No. 115, August Term, 1853, for the whole of the "Jesse Fell" tract of land, showing confession of judgment by Benedict and verdict against William Collins, the defendant in possession, to be followed by evidence in the same case that in 1827 William Collins made an arrangement to purchase fifty acres of land of Henry W. Drinker, agent of the Bank of North America; that in 1840 or 1842 E. W. Sturdevant, as attorney for Bank of North America, went on the lands where William Collins was living; that at that time William Collins claimed to hold the same under contract with Drinker, agent of the said bank, and did not hold adversely to the bank; that when the above-mentioned case was tried Collins agreed to purchase the fifty acres, or to take contract for one hundred acres, so as to cover his improvements; that Major John Sturdevant went on the ground to run same out, and that Collins did not then, in 1859 or 1860, claim adversely to the Wurts title; that it was because of the arrangement with Collins to purchase that judgment was not entered on the verdict, and Collins turned out of possession; and in connection with this testimony to show that there was an agreement to convey the part claimed by Benedict to him, and the fifty or one hundred acres to Collins, and that in pursuance of that arrangement, the lands were run out by Major Sturdevant as the agent of the Wurts title, both Wurts and the Bank of North America being predecessors of the defendant in the line of title to him.

Objected to; admitted; exception.

The defendant further offered in evidence Docket Entry 441, November Term, 1861, an ejectment by Sally Ann Collins against Truxton Benedict, for the purpose of showing that Benedict was then in possession of the lands in dispute, and also to show that after the jury was sworn the plaintiff suffered a nonsuit; also record of suit, Sally Ann Collins *v.* William Collins, to April Term, 1864, No. 49, for piece of land, part of the "Jesse Fell" tract, in which one of the boundaries given is, "on the west by lands in possession of Truxton Benedict," and that a nonsuit was taken in that case.

Objected to; admitted; exception.

It was also in evidence that the father of the defendant made an improvement on this tract in 1835, though having no legal title thereto; that he sold his claim of one hundred acres, including the land in controversy, to the defendant, who moved on to the tract in 1841; that the defendant cleared forty acres, and exercised the ordinary acts of ownership over the remainder; and that he so continued in possession until his purchase of the legal title from Wurts in 1873. It was also shown that the one hundred acres were regularly assessed to him from 1845.

The Court (HANDLEY, J.) charged the jury, *inter alia*, as follows:—

"Under this showing the defendant has shown a regular record title to this land. The plaintiff cannot controvert the regularity of this chain of title from the Commonwealth down to the present defendant.

"Sally Ann Collins, the plaintiff here, claims under the statute of limitations, and by a purchase made from her father, John Sheppard. . . . . The first question for you to pass upon in this case is: did the plaintiff, Sally Ann Collins, in her own right purchase of John Sheppard, her father, this land fifty years ago; and if she did not, then has she been in the actual, visible, notorious and hostile possession of this land, continued and uninterrupted, for a period of twenty-one years? If you find this question, from all the evidence in the case, in the negative, then you need go no further with this case, and you may return a verdict for the defendant without making any other inquiry into any other branch of this case. If the land was not hers, but her husband's, we say to you as a matter of law, that the ejectment commenced by Wurts, in 1853, against William Collins and Truxton Benedict did suspend the running of the statute, or, as it is termed, tolls the statute, and your verdict will be for the defendant. If you find that Sally Ann Collins was the owner of this land, and it was not the land of William Collins, her husband, then you will take up the second question in this case, namely:—

["Did Truxton Benedict for a period of twenty-one years before the commencement of this action, and for all of that period of time, occupy and lease this forty-nine acres of land to tenants as his own; or was he in the open, notorious, hostile, and uninterrupted possession thereof?

"In order to acquire title under the statute of limitations, as I have already stated to you, the possession must not be broken; an entry by the owner, or an action of ejectment successfully prosecuted, will toll the statute.

"Whether Truxton Benedict had the uninterrupted possession of this forty-nine acres of land is for you to ascertain from all the evidence in this case. If you find this question in the affirm-

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ative, then Sally Ann Collins lost her title to this particular piece of the 'Jesse Fell' tract, and your verdict will be for the defendant."]

The plaintiff presented, *inter alia*, the following point:—

(3) That, under the undisputed testimony in the case, the defendant has shown no title to the land in dispute by possession, there having been neither residence, nor cultivation, nor inclosure of any part thereof by him. *Answer.* This point we cannot affirm. It is for you to say, from all the evidence in this case, how the fact is involved in this point.

Verdict for defendant and judgment thereon.

The plaintiff took this writ, assigning as error the admission of the testimony objected to, the answer, to the third point, and that portion of the charge quoted in brackets.

A. Ricketts for the plaintiff in error.

There was no evidence of *possessio pedis* of a defined extent of land on the part of the defendant. The law fixes the extent of what may be claimed by possession to that which is actually cultivated and inclosed.

Miller *et al. v.* Shaw, 7 S. & R. 129.
Hughs *v.* Pickering, 2 H. 297, 302.
Huffman *et al. v.* McCrea, 6 Sm. 95.

The Court below submitted to the jury a question of fact as to which there was no evidence. The right to the land was in the plaintiff; the acts of her husband, without her knowledge and consent, could not bind.

Andrew T. McClintock (*David S. Koon* with him), contra.

This is not a case in which an owner, under a valid title, seeks to restrain one in possession, and claiming under the statute of limitations, to that part of his tract actually cultivated and inclosed. The plaintiff sets up her claim of title under the statute, and any rule in this case as to actual cultivation and inclosure that would affect the defendant, applies with even greater force to the alleged claim of the plaintiff. She must recover on the strength of her own title. She does not show either cultivation or inclosure of the land in controversy. The adverse claim of the defendant, and his acts of ownership over that part of his claim in controversy, are a conclusive answer to the allegation of title by plaintiff under an adverse, hostile, visible, notorious, and continued possession of the land in controversy for twenty-one years.

The charge of the Court upon the effect of the possession on the Jesse Fell tract, of the plaintiff, Sally Ann Collins, in her own right, as distinct from and uninfluenced by the acts of her husband, were even more favorable to the plaintiff than, under the evidence, she was entitled to.

The records of the various ejectments were properly admitted in evidence. William Collins and Truxton Benedict were in possession, each of them, of portions of the Jesse Fell tract in 1853. The defendant claimed that William Collins was in possession under the Bank of North America title, and, in connection with the other evidence offered, was competent to show that William Collins was in under and did not claim adversely to said title, and the Court distinguished in their charge, most favorably to the plaintiff, the effect of this evidence if they found the possession was in the plaintiff, Sally Ann Collins, and not in her husband, William Collins. The Court could not, under the evidence in the case, assume that the plaintiff's view of the case was conclusively in favor of plaintiff, and the evidence under the offer excepted to, was properly admitted and referred to the jury.

The ejectment No. 441, November Term, 1861, Sally Ann Collins *v.* Truxton Benedict, for the same land now in controversy, was certainly competent evidence to show that at the bringing of said suit Truxton Benedict was in possession of said land. It is record evidence of the plaintiff's admission of that fact.

March 18, 1878. THE COURT. The well-settled doctrine of the statute of limitations is, that when the owners of adjoining tracts of land are in *actual* possession, each of his own tract, using his woodland as farmers usually do, neither acquires title under the statute to his neighbor's land, beyond that which he actually enters upon, clears, and cultivates, or incloses by fences, and holds adversely, notoriously, and peaceably for twenty-one years. In such a case the running of a line is itself a trespass and no ouster *ipso facto*, the possession, in law, of the uninclosed woodland being presumptively in him who has the title; unless exclusive adverse possession of the woodland be taken within the lines run, by the use of the timber in the manner farmers usually use their woodland, and permitted by the owner for twenty-one years, thus creating a presumptive ouster. As a general rule, where an owner is in *actual* possession of his tract the doctrine of presumptive possession of the woodland prevails, unless met and overcome by ouster, either actual or permissive, on part of the owner. This aspect of the statute is discussed and decided in O'Hara *v.* Richardson (10 Wright, 385), and Arthur *v.* Kitchen (27 P. F. Smith, 62). In this case the plaintiff was not an owner of the Jesse Fell tract, and consequently had no presumptive possession beyond her cultivation and inclosure. Nor had she acquired title to the Jesse Fell tract under the statute of limitations. The owners of this tract having entered before the expiration of the twenty-one years, no presumptive possession of the woodland (the *locus in quo* in this case) existed in her. There seems to be no ground upon

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which an exclusive presumptive possession of the uninclosed woodland can be attributed to her, to confer title under the statute.

Judgment affirmed.

PER CURIAM.

Jan. '77, 461. Feb. 26, 1878.

Louchheim Brothers v. Henzey, Adm'r.

Bankrupt act—Failure to make defence to an action—When not a fraudulent preference—Bringing goods within reach of execution.

When a sale is made under two judgments, though one of the judgments may have been obtained in fraud of the bankrupt act, the sale is not necessarily invalid.

A debtor's passive non-resistance to an action, though he may be insolvent in contemplation of the bankrupt act, is not *per se* a fraud on the act.

A sale under an execution is not invalidated by the mere fact that some of the goods sold were brought within reach of the execution a short time before the sale, which was closely followed by the filing of a petition in bankruptcy.

Error to the Common Pleas No. 3, of Philadelphia County.

Trespass for the illegal seizure of goods, brought originally in the Supreme Court at Nisi Prius, by H. S. Louchheim and Joseph Louchheim, trading as Louchheim Brothers, against Gregory. Plea, not guilty.

At the trial it appeared that H. S. Louchheim, individually and the said Louchheim Brothers in December, 1869, each brought suit against Nathan Kahn, the former upon a promissory note, the latter upon a book account for money loaned. Judgments for want of affidavits of defence were obtained in these cases for $3677.83, and $2675.30 respectively on Dec. 27, 1869, though no affidavit of the loan was filed in the case of the Louchheim Brothers. Execution was issued on these judgments. Kahn's stock of goods was levied on and sold by the sheriff, and was bought by the plaintiffs for $567.58, who employed Kahn's son to carry on the business for them. H. S. Louchheim was Kahn's son-in-law, but there was evidence that they were not on good terms. It appeared that in Nov. 1869, Kahn had brought on certain of his goods from Ohio to Philadelphia, where some of them were accidentally burnt and the remainder transferred to his store, where they were sold by the sheriff among the goods previously mentioned.

On Jan. 7, 1870, other creditors of Kahn filed a petition in involuntary bankruptcy against him, and on Jan. 25 he was adjudged a bankrupt. These creditors then required the United States Marshal Gregory to seize the goods at Kahn's store. This he did, and he delivered the goods to the assignee, who sold them for $1853.70. This action was then brought against the Marshal, who died before the trial, whereupon his name was replaced on the record by that of his administrator.

The Judge directed the jury that if the plaintiffs were the active parties in procuring a preference by judgments and executions, knowing or having reason to know that Kahn was insolvent, the preference was in fraud of the bankrupt law, and as against it no title passed by the sheriff's sale. Verdict and judgment for the defendant. The Supreme Court reversed this judgment and ordered a new trial. (Reported 27 Sm. 305; 1 WEEKLY NOTES 176.)

At the second trial the defendant requested the Court to charge, *inter alia:* If the jury believe that Nathan Kahn, with a desire to prefer Louchheim Brothers or Henry S. Louchheim, failed to make a defence to the plaintiffs' suit which by law he was entitled to make, *or* caused goods to be brought within the reach of the executions, then there was sufficient under the bankrupt act to invalidate the whole transaction. *Answer.* This point is affirmed; with the qualification that the jury must be satisfied from the evidence of such desire and such acts.

Verdict and judgment for the defendant. The plaintiffs took this writ, assigning the answer to the above point for error.

Geo. L. Crawford, for the plaintiffs in error

A preference is not necessarily a fraud.

In re John Riorden, 14 N. B. R. 332.

That the bankrupt act should invalidate a preference, the debtor must have done some positive act, not merely have omitted to act, with a desire and intention to prefer.

Wright *v.* Filley, 1 Dillon, 172.
Wilson *v.* City Bank, 17 Wallace, 473.
Clark *v.* Iselin, 21 Wallace, 360.
Kemmerer, *v.* Tool, 28 Sm. 151.

S. Dickson (with him *Bullitt* and *Diehl*), contra.

When this case was here before, judgment was reversed on the ground that the question of fraud and collusion on the part of Kahn should have gone to the jury. At the last trial this question was in effect left to the jury, who found the fact of fraud in finding for the defendant. The Judge's direction was entirely in accordance with Wilson *v.* The Bank, *supra.*

May 6, 1878. THE COURT. This was an action of trespass brought by the plaintiffs in error for the wrongful taking and selling of their personal property. They claimed title to the same through a purchase made at sheriff's sale on the 5th of January, 1870, as the property of one Nathan Kahn. Two days after the sheriff's sale, a creditor of Kahn filed a petition in bankruptcy against him, and on the 25th of January, 1870,

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he was adjudged a bankrupt. The defendant, who was the United States Marshal, seized and sold the same property by virtue of the proceedings in bankruptcy. The rights of the parties depend on the effect to be given to the sheriff's sale.

The plaintiff in error relies on the third assignment only. This covers the answer of the Court to the 5th point submitted by the defendant. The Court charged that if the jury was satisfied from the evidence that Kahn, with a desire to prefer the plaintiff, in either of the judgments on which the sale was made, failed to make a defence to the plaintiffs' suit which by law he was entitled to make, or caused goods to be brought within the reach of the executions, then there was sufficient under the Bankrupt Act to invalidate the whole transaction and the sheriff's sale; and the verdict must be for the defendant. When this case was here before (27 P. F. Smith, 305), it was held that the proceedings under the judgments and executions were not, *per se*, in fraud of the bankrupt law, but were questions of fact for the jury. This 5th point presents two distinct propositions stated disjunctively, each of which was affirmed. Neither one presents the question of Kahn's intending to defraud any of his creditors, nor of any collusion of the plaintiffs in the judgment, with him; but in effect the answer declares, that either of the facts stated constitutes an implied fraud on the bankrupt law. The sale was made by virtue of executions issued on two judgments, yet the jury was told if Kahn, with a desire to prefer either plaintiff, failed to make a defence to the plaintiffs' suit which by law he was entitled to make, they should find for the defendant. The failure to make defence in either one "invalidated the whole transaction." As a legal proposition we think this is not correct. In contemplation of law, each judgment stands on its own merits. The fact that one of the plaintiffs was interested in both judgments, does not change the rule of law as to their separate effect, although it may increase the probability as to the facts alleged. It is not clear to our mind exactly what idea the Court intended to convey to the jury when he refers to the defence which by law Kahn was entitled to make. It appears the judgments were taken for want of affidavits of defence. Did the Court mean that if Kahn had no other defence than one purely technical, he was bound to interpose it; or was it intended to limit the requirements to defending against a debt not honestly and justly due? If the debt was justly due, I know of no law requiring him to actively resist a recovery. His passive non-resistance is not necessarily a fraud on the bankrupt law, although he may be insolvent in contemplation of that Act. (Wilson *v.* City Bank, 17 Wallace, 473; Sleek *v.* Turner, 26 P. F. S. 142; Kemmerer *v.* Tool, 28 Id. 147.)

The other objectionable part of the answer is, "or caused goods to be brought within the reach of the execution" is "sufficient to invalidate the whole transaction and the sheriff's sale." Thus this one act is by itself alone declared to be sufficient to taint and corrupt the whole transaction. The validity of the debts may have been unquestionable. The judgments may have been recovered in undoubted good faith. The executions may have issued with the most pure intentions. Kahn may not only have honestly owed the debts, but may have been under the highest legal and moral obligation to pay them, yet, according to this answer, if he "caused goods to be brought" within reach of the executions, it invalidated all the plaintiffs' rights in the property purchased at sheriff's sale. He need not have caused all the goods sold by the sheriff, nor all taken by the defendant, "to be brought within reach of the execution," but any part of them, to vitiate the whole sale.

It is an important fact in this case that the sheriff's sale was made before any proceedings in bankruptcy were instituted against Kahn. The mere existence on the statute book of the bankrupt law did not prevent a levy and sale.

If neither the judgments nor the sales were fraudulent in fact, the latter gave a good title to the purchaser. In that case the assignee in bankruptcy could not follow the property, but must resort to the fund produced by the sale. (Rohrer's Appeal, 12 P. F. Smith, 498.)

Judgment reversed, and venire facias de novo awarded.

Opinion by MERCUR, J.

Jan. '78, 86. Feb. 25, 1878.

Hall et al. v. Bardsley.

Landlord and tenant—Liability of lessee for rent accrued, after assignment of lease, when sued in covenant.

Error to the Common Pleas No. 2, of Philadelphia County.

Covenant on a lease, by Bardsley against J. D. Hall and Wm. H. Kern, surviving partners of Hall, Kern & Co., to recover five quarterly payments of rent of $250 each, due respectively on the 13th of September and December, 1875, and March, June, and September, 1876. On January 25 and February 8, 1875, some of the provisions of the lease were so altered as to reduce the estate of the lessees and the rent to be paid by

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them. The affidavit of defence set forth that the leasehold interest of the defendants was in 1874 sold at public auction, and assigned by instrument under seal to one Harvey; that Harvey on March 15, 1874, transferred the said leasehold interest to one Howard R. Kern, the plaintiff having due notice thereof, and afterwards the said Kern was recognized by Bardsley, the plaintiff, as terre-tenant, and accounted to him for the rent; that in January, 1877, Bardsley entered into a parol agreement with the said Kern, whereby the latter surrendered possession of said premises to the said Bardsley several months before he was entitled to the same in order that he might rent them to one Morris, and that the liability of the defendants is released by the acceptance of the said Howard R. Kern, as tenant, and the subsequent modification of the agreements aforesaid, the plaintiff thereby substituting the liability of the said Howard R. Kern for that of the defendants.

The Court below having entered judgment for want of a sufficient affidavit of defence, the defendants took this writ, assigning for error the entry of the judgment.

Charles Gilpin (with whom was *Hood Gilpin*), for plaintiffs in error.

A contract in writing for the occupation of land may be abandoned, and the abandonment may be proven by the acts of the parties to the contract.

Colt *v.* Seldon, 5 W. 525.
Grove *v.* Donaldson, 3 H. 128.

The averment of such an abandonment in the affidavit of defence is sufficient to carry the case to the jury.

The Court below has virtually decided that a landlord may obtain and hold possession of his leased premises, may relet them and receive rent for them from his new tenant, may be largely indebted to the assignee of his lessees, who is liable to him for the rent, may have rescinded the original contract with the original lessees, and transferred the liability for the rent under said contract to the occupant of the premises, and yet may recover from the original lessees the rent for which he has agreed they shall not be liable.

John M. Thomas, for the defendant in error.

The liability of Hall and Kern was upon privity of contract. No assignment of part, or of the whole of the estate could exonerate them, even though the lessor assented to the assignment, and received rent from the assignee.

Fisher *v.* Milliken, 8 B. 111.
Ghegan *v.* Young, 11 H. 20.
Frank *v.* Maguire, 6 Wr. 82.

he surrender of Kern in January, 1877, could not release the lessees, because the rent for which judgment was entered had all accrued prior to that time.

March 4, 1878. THE COURT. If the affidavit of defence in this case had alleged that the agreement of surrender and substitution of Howard R. Kern's liability for the rent declared upon was made before the unpaid rent fell due, there might be a plausible ground of defence. But these things occurred in 1877, while the rent fell due in 1875. Now the original tenant was clearly bound for this rent under the terms of his covenant, while nothing in the affidavit avers a release or discharge of the rent thus previously accrued.

Judgment affirmed.

PER CURIAM. WOODWARD, J., absent.

Orphans' Court.

October 18, 1876.

Poulson's Estate.

Bequest to charity—Revocation—Act of April 26, 1855.

Sur exceptions to adjudication.

Upon the adjudication of the account of the decedent's executors the following facts appeared: The decedent by his will gave $1000 to the "Old Men's Colored Home." By a codicil he changed this legacy to $500, and used the following language: "I also revoke the gift of $1000 to the Old Men's Home and reduce it to $500." The testator died March 13, 1873. His will was dated August 20, 1870, and the codicil March 11, 1873. It was admitted that by the "Old Men's Colored Home," the testator intended the "Home for Aged and Infirm Colored Persons." The auditing judge was of the opinion that the intention of the testator was not absolutely to revoke the gift of $1000, but simply to modify, or reduce the amount, and although the codicil was made less than thirty days before the testator's death, the legacy was not void under the terms of the Act of April 26, 1855 (Purd. Dig. 1477, pl. 22), and should be accordingly paid. To this finding exceptions were filed on behalf of certain legatees.

Henry M. Dechert, L. W. Doty, and *Thomas H. Speakman*, for the exceptants.

Chas. Fry, J. Parker Norris, Joseph Parrish, and *John J. Ridgway*, contra.

Nov. 11, 1876. THE COURT (after stating the facts) held that: While it is true, that the testator intended to reduce the amount of the legacy originally bequeathed, yet he expressly revoked and annulled the bequest, and in lieu thereof bequeathed the sum of $500. This was in effect a new legacy, and as the legatee can only claim by virtue of the codicil executed

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within the statutory period before the death of testator, the intention of the testator must succumb to the emphatic declarations of the Act of Assembly. The statute positively declares that a bequest for religious or charitable uses, made within one month of the testator's death, shall be absolutely void. The codicil, therefore, can have no other effect than to revoke the prior legacy and cause the substituted bequest to fall into the residuary estate. The exceptions are therefore sustained.

Opinion by HANNA, J.

[This case was removed to the Supreme Court, upon exceptions to other points. See 3 WEEKLY NOTES, 471.]

March 19, 1878.

Rank's Estate.

Widow's exemption—When allowed out of proceeds of real estate—Requisites of petition for—Petition in time even if filed after an order of sale of real estate has been granted—Quære, Whether widow can claim her exemption out of decedent's real estate, when the personalty is sufficient to cover the amount

Sur exceptions to widow's claim.

From the adjudication it appeared that the decedent died in September, 1876, having by will appointed his wife his executrix, who, on the 13th of October, 1877, presented a petition for a sale of real estate for the payment of debts. An order of sale was made and the land sold the following December. On the 24th of November she also petitioned for an allowance of $300 out of the proceeds of the sale, under the Act April 14, 1851 (Purd. Dig. 529, pl. 3), which the auditing Judge allowed; to which finding exceptions were filed.

Geo. W. Thorn, for exceptant.

ere was sufficient personal property in the widow's hands as executrix to pay this claim, so she cannot elect to take out of the realty now.

Lyman *v.* Byram, 2 Wr. 475.

The petition was not in time, expenses having been incurred by the petition for a sale of the realty.

Davis's Appeal, 10 Casey, 256, and cases there cited.

James A. Bonham and *B. F. Moore*, contra.

March 30. THE COURT (after stating the facts). It was not denied that the personal estate was insufficient to pay debts; the order of Court authorizing the sale of the real estate for that purpose being conclusive of the fact. But it was maintained that the real estate of a decedent can in no case be set apart or sold for the widow's claim, as long as there are personal assets out of which it may be paid.

It is not necessary to decide whether, where the personal estate is ample for the payment of all debts, including the widow's claim, the widow may still elect to take out of the realty. Scott's Appeal (2 Phil. R. 135) would seem to indicate that she may not. THOMPSON, P. J., says: "The 5th section of the Act of April 14, 1851, which requires the administrator of a decedent to have personal or real property, to the value of $300, appraised, so that the same shall not be sold, but permitted to remain with the widow, was not designed to interfere with the descent of the real estate of an intestate, or to authorize his administrator to interfere with it, unless such real property was to be sold for the purpose of settling the affairs of the decedent. It was not designed to give authority to the widow, or to the administrator, to make a selection from among the real estate of an intestate of such premises as either of them might deem most suitable to answer the demand of the widow, and by such selection to render it liable to be sold. This can only be effected where there is a deficiency of personal property to answer the demands against the estate, including the widow's claim."

The present case meets the two requirements which were wanting in that. There is not only a failure of personal assets, but the real estate has been made subject to administration under the order to sell. The widow's claim for an allowance out of the proceeds of that sale in no way interferes with the course of descent. And she prejudices no right. Had she chosen to assert her priority over creditors by claiming out of the personalty, the further deficiency thereby created would still have been made up out of the sale of the real estate.

But did she make her claim to the realty in time? The petition for the allowance was filed a few days after the order to sell was issued, and seventeen days before the sale was made. The return of the appraisers set forth that the real estate could not be divided without spoiling the whole.

It is probable that some expenses had been incurred by the estate in the application for the sale before the widow's claim was filed. But those expenses were neither more nor less than they would have been if the claim had never been presented; and the claim itself did not in the least retard the granting of the petition for a sale. The cases, therefore, which hold that the widow's claim is too late when filed after expenses have been incurred in preparing for a sale, do not apply. That of Davis's Appeal (10 Cas. 256), which was cited by the exceptant, is especially wide of the mark. There the widow had elected to retain some personal property and a small tract of land, together of less value than $300. The inventory and appraisement of the property so taken had been filed and approved by

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the Court. The administrator, relying upon the faith of her first election, incurred expenses in obtaining an order of sale of the remaining real estate; but before the day of sale she came in and demanded to have the balance of the realty set apart to her. In Neff's Appeal (9 Har. 243), the widow's election was not exercised until after the sale, and she claimed against creditors whose liens had attached before the passage of the Act of 1849, under which her application was made, and as to which the Act was held not to be retroactive. And in Lyman *v.* Byram (2 Wr. 475), also cited, the widow, after appropriating to her own use $300 worth of the personal property of her deceased husband, made a claim upon the proceeds of sale of the realty, without asking an appraisement, and then sued the administrator for not setting out her property.

Objection was made to the petition that it did not comply with the rule of Court requiring that the facts and circumstances upon which the right of the claimant is founded shall be set forth, and also that it did not allege that the claimant and decedent were living together at the time of the death of the latter. In the absence of any set form of application, it cannot be said that the petition has violated the terms of the rule; and unless proof is made to the contrary, the legal presumption is always that the claimant is in all respects the lawful widow of the decedent.

It was alleged by the exceptant, and not denied by the counsel for the widow, that the latter had retained furniture of the decedent to the value of $179.61, and had not charged it to herself in the account. In dismissing the exceptions and allowing the petition, this amount is deducted from the claim, leaving as the sum awarded to the widow out of the proceeds of sale $120.39.

Opinion by ASHMAN, J.

February, 1878.

Dougherty's Estate.

Devise — Charitable use — Precatory words — Absolute devise of residue of estate with request that masses be said for the repose of decedent's soul, held not to be within the Act of April 26, 1855.

Sur exceptions to adjudication on executor's account.

At the audit the following facts appeared: Ann Dougherty died, Sept. 14, 1876, leaving a will dated August 24, 1876, the residuary clause of which devised the property to her executor, in trust to sell and convert it into money, and—

"to divide the same into two equal parts, and to pay one of the said equal parts to the Rev. Edward McNelis, of St. Theresa's Church, South Broad Street, in the city of Philadelphia; upon which payment I earnestly request and desire that he, the said Rev. Edward McNelis, will say, or procure to be said, three masses a week for the repose of my soul, for one year after such payment shall be made.

"And I request my executor to pay over the remaining equal half part of the proceeds of sale, and rents, if any, to the Rev. Hugh McLaughlin, of the said Church of St. Theresa, upon which payment, I earnestly request and desire, that he, the said Rev. Hugh McLaughlin, will say, or procure to be said, three masses a week for the repose of the souls of my brothers and sister Margaret, for one year after such payment shall be made.

The auditing judge decided that the residuary clause of the will created a trust for religious uses, and, having been executed within one calendar month of the death of the decedent was void under the 11th section of the Act of April 26, 1855 (Purd. Dig. 208, § 23), and awarded the balance in the hands of the accountant to the heirs or next of kin of the decedent.

Exceptions were filed on behalf of the residuary legatees, alleging for error the decision and award.

A. A. Hirst, for exceptants.

George W. Morris, contra.

April 6, 1878. THE COURT (after stating the facts.) It was decided by this court in Power's Estate (5 WEEKLY NOTES, 59), that a bequest of money to be expended in masses for the repose of the soul of the testator, was not a gift to a charitable or religious use within the meaning of the Act of 26th April, 1855. It is not necessary to inquire whether the reasoning of that decision will cover the bequest for the benefit of the brothers and sister of the testator. It is certain that no trust was created by the clause in question, and that none can be gathered from any other portion of the will. The words of the will are precatory, and clearly imply that the justice and discretion of the donee are alone relied on. (Pennock's Estate, 8 Har. 268.) The absolute gift to the legatee, preceding the words of desire, distinguishes this case from Burt *v.* Herron (16 P. F. Smith, 400), where SHARSWOOD, J., uses this language: "A will, in its very nature, is the disposition which the testator desires to have made of his estate after his death. All the expressions in it indicative of his wish or will are commands. It is different, when *having made a disposition*, he expresses a desire that the legatee or devisee should make a certain use of his bounty." The words of the present bequest are here so directly characterized that it is only necessary to quote them: "I request my executor to *pay over* the remaining equal half part to Rev. H. McLaughlin, *upon which payment*, I earnestly request and desire the said McLaughlin," etc.

The exceptions are sustained, and the executor is directed to pay over the residue of the estate in accordance with the provisions of the will as indicated by this decision.

Opinion by ASHMAN, J.

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WEEKLY NOTES OF CASES.

VOL. V.] *THURSDAY, AUG.* 8, 1878. [No. 28.

Supreme Court.

May, '78, 4. May 10, 1878.

Magraw, Adm'r v. Irwin.

Executors and administrators—Foreign Administrator—Conflict of laws—Jurisdiction of the Courts of this State in actions against foreign administrators—Assets.

The Courts of this State have no jurisdiction in an action by a non-resident against a foreign administrator having no assets in the State.

Where a foreign administratrix *c. t. a.* received assets belonging to the estate of the testator, consisting of stocks and bonds of corporations incorporated and domiciled in this State, and the same were awarded to her, as legatee under the will, by a Court of competent jurisdiction, they do not constitute assets in the hands of her successor, a foreign administrator *d. b. n.* so as to render him liable to suit in the Courts of this State by a non-resident.

Swearingen *v.* Pendleton (4 S. & R. 389), and Evans *v.* Tatem (9 Ib. 252) not followed.

Moore *v.* Fields (6 Wr. 467) explained.

Error to the Common Pleas of Lancaster County.

Assumpsit, by Joseph C. Irwin against Adam R. Magraw, administrator *d. b. n. c. t. a.* of Henry S. Magraw, deceased.

The facts in the case are fully set forth in the opinion of the Supreme Court by MERCUR, J., as follows: "Henry S. Magraw, a resident of Cecil County, Maryland, died testate in February, 1867. By his will he devised and bequeathed his entire estate to his wife Emily, and appointed his brother Robert his executor. The latter died before the death of the testator. The will was duly proved, and letters of administration with the will annexed were granted to his widow, Emily, by the Orphans' Court of Cecil County on the 16th of March, 1867. She afterwards filed an inventory and appraisement of the goods and chattels of the decedent. It was examined and passed, and the Court ordered that she take the same at the appraisement. A portion of the assets contained in the inventory were certain bonds and stocks of divers corporations incorporated under the laws of the State of Pennsylvania and having their *situs* therein.

In March, 1870, Emily died and letters of administration *de bonis non cum testamento annexo* were granted by the Orphans' Court of Cecil County to the plaintiff in error, then and now a resident of that county. He did not take out any letters of administration in Pennsylvania, but being temporarily here, this suit was commenced against him as administrator of Henry S. Magraw, by the defendant in error, a resident of the State of Missouri. Thus it appears both parties were non-residents of this State. The plaintiff in error plead specially that he "is and was before and at the time of the commencement of this suit a resident of the State of Maryland, and that he has not at any time assumed possession or control, or administered or disposed of any goods or chattels, rights or credits, which were of the said Henry S. Magraw, deceased, in the State of Pennsylvania, and that he has not at any time had or received authority so to do." On the trial of the cause no evidence was given to contradict the averments in his plea, other than the inventory filed by the preceding administratrix. The only assets belonging to the estate of Henry S. Magraw that were proved to have come into his hands, were the proceeds of a judgment collected in California. It was not shown that any assets, belonging to said estate, had been in the State of Pennsylvania, after the appointment of the plaintiff in error as administrator. He therefore had not exercised authority over any within this State, nor had he removed any therefrom."

At the trial, before LIVINGSTON, P. J., the defendants requested the Court to charge the jury: (1) "That under the law and the evidence the plaintiff is not entitled to recover;" (2) "That the plaintiff has not shown that letters of administration on the estate of Henry S. Magraw, deceased, have been granted to the defendant in the State of Pennsylvania, nor any act of administration by him in that State, and the verdict must be for the defendant." The Court, on the authority of Swearingen *v.* Pendleton (4 S. & R. 389); Evans' Adm'r *v.* Tatem (9 Ib. 252), and Dowdale's Case (6 Co. 46), negatived both points, and charged the jury *inter alia:* "We can but say to you, that under the law and under the evidence admitted by the Court and read to you, the plaintiff can recover; that a suit may be maintained in this State for a debt due from a decedent's estate against his administrator who has taken out letters of administration in another State in which the decedent died, and of which the administrator is a resident, when the administrator comes into this State and service of summons can be had upon him, and therefore, the facts that A. R. Magraw is a resident of another State and obtained letters of administration in that State, constitute no bar to a recovery against him as administrator in the present action."

Verdict for plaintiff for $1854.26, and judg-

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ment thereon. Defendant took this writ, assigning for error *inter alia* the answers of the Court to the above points and the portion of the charge quoted.

Samuel H. Reynolds, for plaintiff in error.

The dictum in Dowdale's Case, *supra*, has not been followed in England, and the doctrine is now well settled there, that a foreign administrator cannot sue or be sued in the English Courts upon the contract of his decedent.

Williams on Exs., vol i. p. 204–5, and vol. ii. p. 1414.
Story's Confl. of Laws, § 514.

In Pennsylvania the early legislation was favorable to the recognition of foreign probates of wills and grants of letters of administration. The Act of 1705 (1 Sm. Laws, 33) gave to foreign executors and administrators the right to sue in the Courts of the Province without taking out letters here, and the Courts subsequently extended the principle so as to render foreign executors liable to be sued here.

Swearingen's Exrs. *v.* Pendleton, 4 S. & R. 389.

In Mothland *v.* Wireman (3 Pa. Rep. 187), GIBSON, C. J., draws a distinction between an executor and an administrator. In Evans *v.* Tatem (9 S. & R. 252), cited on the other side and relied upon by the Court below, the administratrix had voluntarily appeared in the Tennessee Court, and the question was whether a judgment rendered under such circumstances could be enforced here.

But the Act of 15th March, 1832 (P. L. 136), changed the whole policy of the State on this subject, and took away from foreign executors and administrators the right to sue in the Courts of this State.

Sayre *v.* Helme, 11 Sm. 299.

And the converse must follow, viz., that being deprived of the right to sue they are also relieved from liability to suit, at least where they have no assets in the State. Even if judgment were obtained under such circumstances it would be of no avail, as the Courts of other States would not recognize it as binding.

A. Slaymaker and *H. M. North*, for defendant in error.

The general rule laid down by Judge STORY, that an executor or administrator appointed in one State is not liable to be sued in his official capacity in any other State or country, has never been accepted in Pennsylvania.

Swearingen's Exrs. *v.* Pendleton, 4 S. & R. 389.
Evans *v.* Tatem, 9 S. & R. 252.
Bryan *v.* McGee, 2 Wash. C. C. Rep. 337.

That a foreign administrator may sue in Pennsylvania has been held since the passage of the Act of 1832.

Moore *v.* Fields, 6 Wr. 467.

[AGNEW, C. J. But there the property had vested in the administrator in the State of New York].

It is true that by the Act of 15th March, 1832, Sect. 6, it is provided that "no letters testamentary, or of administration, or otherwise purporting to authorize any person to intermeddle with the estate of a decedent, which may be granted out of this Commonwealth, shall confer upon such person any of the powers and authorities possessed by an executor or administrator under letters granted within this State." But now by a series of subsequent acts, the powers of executors and administrators under letters issued in other States, with regard to assets in this State, of the character of those specified in the inventory of the estate of H. S. Magraw, deceased, are put upon the precise footing of those powers, as exercised under the Act of 1705.

Act of 14th April, 1835, § 3.
Act of 16th June, 1836, § 3.
Act of 12th March, 1842, § 5.
Act of 15th May, 1850, § 8.
Act of 8th April, 1872, § 1.

But even if the general rule has been accepted, still an executor or administrator *who has assets in this State*, is liable to be sued in the Courts of this State by any creditor here.

Story's Confl. L., § 514.
Williams on Exrs., p. 1641.
Mothland *v.* Wiseman, *supra*.
Dent's Appeal, 10 H. 514.
Parker's Appeal, 11 Sm. 478.
Campbell *v.* Tousey, 7 Cow. 64.
Gulick *v.* Gulick, 33 Barb. 92.

And it makes no difference whether such creditor is a resident of the State or a non-resident.

Dent's Appeal, *supra*.
Alfonso's Appeal, 20 Sm. 347.
Morgan *v.* Neville, 24 Sm. 52.
Paine *v.* Lester, 44 Conn.; S. C. 17 Am. L. Reg. (N. S.) 132.

[AGNEW, C. J. There is no difficulty about our Courts being able to control assets in this State, but in this case the assets were taken out of the State by another].

If Henry S. Magraw's representative, Emily, carried out of this State assets of Henry S. Magraw's estate into Maryland and put them into another representative's hands, why can't we sue him? We are after Henry S. Magraw's estate. Administration *de bonis non* is but a continuation of the administration by another hand.

Eyster's Appeal, 5 W. 134.

[AGNEW, C. J. But it is not shown that the assets held by Emily Magraw passed into the hands of Adam Magraw].

The law passed them there, the administrator not having shown a full administration by Emily. The fact that she took possession of them and appropriated them to her own use as legatee—the settlement of the estate being as yet merely inchoate—does not relieve the administrator *d. b. n.* They were, if not actually, at least potentially, in his possession, and available if required in the discharge of his first and paramount duty of paying the testator's debts.

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Thomas E. Franklin, in reply.

The pleadings having denied assets, the *onus* was on the plaintiff to show them. The decree in Maryland, being a decree of a Court of competent jurisdiction, vested the property in Mrs. Magraw. Moore *v.* Fields is explained in Sayre *v.* Helme, *supra.*

June 10, 1878. THE COURT. The contention in this case is one of jurisdiction. The facts necessary to understand the case are these [here follows the statement of facts given above].

The general doctrine of the common law, now recognized both in England and in America, is, that no suit can be brought or maintained by any executor, or administrator, in his official capacity, in the courts of any other country than that from which he derives his authority to act in virtue of the probate and letters of administration there granted to him. (Story's Confl. of Laws, section 513.) Hence it is said in section 514 of same, "It is exceedingly clear that the probate grant of letters testamentary, or of letters of administration in one country, give authority to collect the assets of the testator or intestate in that country only, and do not extend to the collection of assets in foreign countries; for that would be to assume an extra-territorial jurisdiction or authority, and to usurp the functions of the foreign local tribunals in those matters."

It must be conceded that this doctrine is in conflict with Swearingen *v.* Pendleton (4 S. & R. 389), and Evans' Adm'r *v.* Tatem (9 Id. 252), the former decided in 1818, the latter in 1823.

In Brodie *v.* Bickley (2 Rawle 431), Mr. Chief Justice GIBSON was constrained to characterize the authority of an administrator, under letters granted in a sister State, to meddle with the assets here, as an anomaly produced by an unexampled spirit of comity in the courts of this State, which would probably be attended with perplexity and confusion. This was followed by Mothland *v.* Wireman (3 Pa. Rep. 185), decided in 1831, in which it was held that an administrator was not chargeable with assets of the intestate in another State of which he may have obtained possession; and that administration conferred on the administrator rights, and created liabilities co-extensive only with the jurisdiction which conferred it. In order to give legislative sanction to this view, the sixth section of the Act of 15th March, 1832, declaring "no letters testamentary, or of administration or otherwise, purporting to authorize any person to intermeddle with the estate of a decedent, which may be granted out of this Commonwealth, shall confer upon such person any of the powers and authorities possessed by an executor or administrator, under letters granted within this State."

It was however declared by the 3d section of the Act of 16th of June, 1836 (Pur. Dig. 420, pl. 80), that this prohibition should not apply to shares of stock in any incorporated company within this Commonwealth; and by the 8th section of the Act of 15th May, 1850 (Id. 421, pl. 82), tnat it should not apply to any loan or loans of any incorporated company within the same.

Hence, by virtue of the appointment of Emily Magraw as administratrix in Maryland, she had a right, under the laws of Pennsylvania, to withdraw from the latter the stocks and bonds in question.

Such withdrawal worked no injury to any of our citizens, for no one was a creditor of the estate. Nor did it deny any right or privilege to the citizen of another State, for none such was then here, holding any claim against the estate. Having put the stock and bonds in the inventory, filed in the Register's Court of Cecil County, she thereby subjected them to the jurisdiction of that Court. That Court then, having examined and passed the same, and allotted the property to her, as devisee and legatee, it was a final administration of that portion of the estate.

By a regular and valid decree those assets were taken out of her hands as administratrix, and given to her as legatee.

That decree stands unappealed from and unrevoked. Its conclusive effect cannot be questioned in this collateral proceeding. It therefore follows that the succeeding administrator, the plaintiff in error, cannot be chargeable, either here or elsewhere, with the assets thus administered and distributed. He is no more chargeable therewith than if the same had been paid to a creditor of the estate under a decree of the proper court before his appointment.

It is true in Moore *v.* Fields (6 Wright 467), decided in 1862, it was held that one appointed administrator in New York might, by virtue thereof, maintain an action, in this State, to recover assets which his preceding administrator in the same State had received in New York and brought into Pennsylvania. The right to recover was put on the ground that the assets had not been subject to administration in this State. Hence in Sayre *v.* Helme (11 P. F. Smith, 299), it was held that executors, acting under letters from another State, could not maintain an action in this State. It was there said the recovery in Moore *v.* Fields "was sustained in its own peculiar circumstances."

The right to maintain the action in this case was urged by reason of the testator having left assets in this State. That view fails to give due effect to the disposition that had been made of them prior to the appointment of the plaintiff in error as administrator.

The learned Judge, therefore, erred in not

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affirming the points covered by the first, second, and fifth assignments.

This is decisive of the case.

Judgment reversed.

Opinion by MERCUR, J. SHARSWOOD, J., absent.

Jan. '77, No. 97. March 22, 1878.

Mine Hill and Schuylkill Haven R. R. Co. v. Lippincott et al.

Contracts—Covenant running with land—Right of tenant to sue in name of landlord—Equitable plaintiff—Railroads—Right to re-locate when power of eminent domain has not been exercised—Right to contract with land-owner for removal—Measure of damages for breach of covenant to permit the mining of subjacent coal—Tenant's right under such a covenant—Specific performance—Apportionment of verdict.

When the lessee of a right of way over mining lands covenants with the land-owner to remove upon notice, or otherwise permit the mining of the subjacent coal, a tenant to whom has been demised all of the coal within the tract is entitled to sue in the name of the landlord for breach of the covenant.

The measure of damages in such a case is the value of the coal necessarily left standing at the time of the breach, and a verdict so rendered *in solido* may be apportioned between the landlord and the tenant by the jury.

A tenant who sells all of his "right, title, and interest" in the colliery does not thereby part with his right to damages for a breach of covenant by a superincumbent lessee, whereby he was prevented from mining as much coal as he otherwise would have done.

A railroad company entering upon land by special contract with the land-owner may covenant to re-locate its road, and is liable in damages for a breach of such condition.

The M. H. & S. H. R. R. Co. by agreement located its road upon the land of D. and R., covenanting that all of the coal under the land so occupied might be mined, and that upon due notice from the tenants or other authorized agents of D. and R., they would either take measures to support the road, or remove it to other suitable land of D. and R. The land-owner subsequently leased to V., he paying a yearly rental upon all coal mined, and covenanting to mine as much coal as could be obtained by diligent working, "with the least possible waste." The railroad company having failed to perform their part of the agreement, although duly notified by V., he brought suit in the name of D. and R. to his use V., after the breach of covenant but before suit brought, had assigned all of his "right, title, and interest" in the colliery to P.

Held, that the suit was properly brought, and that V. might recover the value of the coal which he was unable to mine as of the date of the breach.

Held, further, that a release of all rights under the agreement by the landlords after suit commenced by the tenant could not affect the right of the tenant, but would reduce the verdict to the loss sustained by him alone.

PER CURIAM. A covenant by a railroad company to permit the removal of the subjacent support cannot be enforced by a bill for specific performance.

Error to the Common Pleas of Schuylkill County.

Covenant, by Joshua Lippincott and James Dundas Lippincott, executors of James Dundas, deceased, and the Philadelphia Trust, Safe Deposit and Insurance Company, administrator *d. b. n. c. t. a.* of William Richardson for the use of William Verner, against The Mine Hill and Schuylkill Haven Railroad Company: the writ issued August 29, 1865, to September Term, 1865. (The deaths of several of the original executors having been suggested, the record finally stood as stated.)

By Act of Assembly of March 18, 1852 (P. L. p. 166), the Mine Hill and Schuylkill Haven R. R. Co. was authorized to extend its road from its then terminus across Broad Mountain, and, in accordance with this authority, built what is known as the "Ashland extension" across the Catharine Groh tract of land in Cass Township, Schuylkill County, about four hundred acres of which was owned by James Dundas and William Richardson. No damages for occupying the land were paid to these owners, but on February 20, 1855, the following agreement was entered into:—

"It is agreed between the Mine Hill and Schuylkill Haven Railroad Company of the first part, and James Dundas and William Richardson, of the second part, owners of all that tract of land situate in Cass Township, Schuylkill County, containing upwards of 400 acres, warranted in the name of Catharine Groh, conveyed by sundry conveyances to the parties of the second part.

I. The party of the second part, owners of the real estate, hereby release the party of the first part of and from all claims and demands for damages, now recoverable by reason of the use and occupation of the surface of the ground by the party of the first part, for the construction of their extended railroad as now built across the Broad Mountain to Ashland; and the right of way over and upon the said premises along the line thereof, not exceeding in width two and one-half rods on each side, measuring from the centre of the graded surface of the road. And the said party of the second part further agree, that the said party of the first part may, at convenient water stations, to be by them erected, use so much of the water for locomotive engines as may not be required for mining, steam engines, or domestic purposes, by the tenants or occupants of the land of the said party of the second part.

II. The party of the first part agree that all the coal in the land over which the said railroad passes may be mined by the tenants of the party of the second part, as though the said railroad had not been constructed thereon.

III. Then when, or so soon as, the tenants of the said party of the second part are about to mine coal under, or so near to the said railroad that the mining may reasonably be expected to affect the surface of the ground, then the said party of the second part, or their agents, or the said tenants, shall give notice thereof in writing to the said party of the first part, or their agents; and the party of the first part, upon receipt of such written notice by the tenant or any other person authorized by the party of the second part, will take such measures as to the said party

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of the first part may seem proper to protect their road from all damages by reason of the mining by the tenants of the party of the second part, and so adjust, secure, and maintain the same that the said party of the second part may by their tenants be at liberty to mine and remove the coal to the same extent to which it could be done if the said railroad had not been built.

IV. That upon receiving such notice, all the measures necessary for the protection of the said railroad as above stated, and so that the liberty to mine said coal shall not be interfered with, shall be taken at the expense of the party of the first part, and they shall have the right to enter the mines with the view to examine the condition thereof from time to time, not interfering with the mining thereof.

V. That if, upon such mining or removal it shall not be found reasonably convenient to protect or preserve the said railroad in its present position and location, then it shall be lawful for the parties of the first part, and they shall have the right to place or re-lay the same upon the nearest adjacent lands of the party of the second part suitable for such purposes, not affecting thereby any improvements made at the time of such removal; and the party of the first part shall enjoy upon the route so taken, and without claim for right of way, the same rights and privileges and under the same restrictions as are herein contained with respect to the line now occupied by them.

VI. The party of the first part hereby indemnify the party of the second part, their agents and servants, from all loss or damage of any nature whatsoever which can or may happen to said railroad, or to any person or property whatsoever, using or being conveyed thereupon, by reason of any defect or imperfection in said railroad occasioned by the mining and removing of said coal; but the same shall be wholly borne by the party of the first part. For the faithful performance of the covenants and agreements herein contained the said parties do bind themselves each to the other, their respective successors and assigns."

At the time of the execution of this agreement there were tenants in possession of this land, who subsequently were sold out at sheriff's sale, and the vendee, after holding possession for about nine months, surrendered to the landlords. On September 11, 1858, Dundas and Richardson leased the land to William Verner. The lease recited:—

"Whereas, the said parties of the first part are owners of a tract of coal land, known as the Catharine Groh tract, of the county of Schuylkill, and that part of the said tract and veins of coal thereon constituting the Glen Carbon Colliery, had been by them leased to Andrew McFarland and Thomas Verner, brother of the said William, whose rights and term were subsequently sold to a certain William Morton, who failed to conduct the same in accordance with the terms of their lease; the same was sold to and surrendered to them, the said parties of the first part; and it is now proposed to lease the same colliery to the said William Verner, subject to the payment by him of the back rents and debts due from the said William Morton to them, the said parties of the first part. It is therefore covenanted and agreed that the said parties of the first part hereby lease to the party of the second the said colliery and the right to mine coal from the South vein, in which the slope now is, the Daniel and Jugular veins north, and the three veins next south of the said South vein of coal, for the full end and term of five years, from and after the first day of September, inst."

"And the said party of the first part hereby leases, with the said veins of coal and colliery aforesaid, the use of all the railroads and fixtures," and also a large amount of personal colliery property, mentioned in the lease.

The lessee agreed to pay a rent equivalent to a rent on 30,000 tons of coal at 32 cents per ton for all sizes larger than chestnut, and 12 cents for chestnut coal mined by him, and also on as much more as could reasonably be mined by diligent working of the colliery; the rent being payable monthly. He also covenanted to pay certain back rents and debts due by William Morton. It was agreed "between the parties that the relation of landlord and tenant shall exist between them. . . . And the party of the second part shall at all times work the said mines, timber and support the gangways, and do all other acts appertaining to the working of the same, in the most approved manner, so as to facilitate the taking out of all the coal in the different veins with the least possible waste; and to see and detect any imperfect workings of the same, the parties of the first part, by their agents or mine inspectors, shall have at all times the right to go into every part of the said colliery. And it is further agreed between the parties that the working of the said veins of coal here leased are not to be worked in such manner as to interfere with the working of any other colliery now leased by the parties of the first part to any other parties on the same tract of land; but is expressly granted subject to the rights of all other parties as they now exist on the same tract of land. And it is further agreed between the said parties that this term, or any interest therein, is not to be assigned or transferred by the said party of the second part without the written consent of the parties of the first part."

Verner entered upon the land and mined the coal in the usual manner, and on November 25, 1859, served the following notice upon the superintendent of the railroad company:—

"GLEN CARBON, 25th Nov., 1859.

"R. A. WILDER, Esq.:—

"Dear Sir: I intend to commence to mine coal in the Back or Daniel vein of my colliery, on Monday, 28th inst., and as the mining of the coal may interfere with your railroad, you will please keep a watch on it, as the road is on the crop of the vein.

"Yours, respectfully,

"WILLIAM VERNER."

Subsequently other notices, both written and verbal, were given to the company's agents or superintendent. The railroad company never made any attempt to work for the purpose of changing the road, but instituted an examination to see whether it would be practicable to re-locate it, which apparently satisfied the officers that it would be undesirable, and that the cost of bridging would be worth more than the value of the coal.

After a notice given, June 6, 1864, the Philadelphia and Reading Railroad Co., which had subsequently become the lessee of the company defendant, through its counsel, obtained an in-

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junction restraining Verner from taking out the pillars of coal under and necessary for the support of the road. This injunction had never been dissolved.

On April 25, 1870, a rule upon plaintiffs' counsel to file their warrant of attorney, proceedings to stay meanwhile was granted, and in compliance therewith a power of attorney from William Verner alone was filed. On June 4, 1870, an affidavit of Geo. J. Richardson, at that time one of the executors of William Richardson, asserting that no authority was ever given to Verner by himself or his co-executors to bring the suit was filed. On September 9th, the rule was discharged.

At the trial, before WALKER, J., on January 19, 1874, it appeared that on September 21, 1864, Verner had sold "his right, title, and interest in the Glen Carbon Colliery" (by which name this property was known) "to George S. Patterson & Brother for sixty thousand dollars," and the following bill of sale and receipt were offered in evidence:—

"I have this day sold my right, title, and interest in the Glen Carbon Colliery to Geo. S. Patterson & Brother for sixty thousand dollars—two thousand dollars which I have this day received; four thousand more to be paid on Monday, the 26th of September; twenty six thousand to be paid on the 1st of October, 1864, and the balance in 30 days from the first of October, 1864. It is agreed that if the payments are not made as above the money paid will be forfeited.

WM. VERNER,
GEO. S. PATTERSON & BRO.

Philadelphia, September 21, 1864."

"PHILADELPHIA, September 21, 1864.

Received of George S. Patterson & Brother two thousand dollars on account of my interest in the Glen Carbon Colliery, together with the following personal property and real estate. . . . .

WM. VERNER."

In the following October Patterson & Brother took possession. George S. Patterson testified: "We thought we had purchased all Mr. Verner's personal property and interest in the colliery, but we knew that we did not purchase any lease from Verner; we thought we had acquired all Mr. Verner's rights; I don't remember whether those pillars were mentioned in that lease or not; we did not buy any claim that Mr. Verner had against the Mine Hill and Schuylkill Haven Railroad Company for damages; at the time we purchased it was not impossible, but it would not have paid us to take out the pillars in the Crosby vein, if we had the right." He further said that some time after the sale, on hearing of a suit with the Railroad Company, he had said that "they didn't want to buy a law suit."

The defendants offered in evidence an assignment from the executors of Richardson (to whom had been conveyed all of Lippincott's interest in this tract) to the Philadelphia and Reading Coal and Iron Company of all their rights and claims under the original agreement with the company defendant, dated Jan'y 1, 1872.

The defendants' counsel requested the Court to charge:—

(1) That the Railroad Company, having located the road across the Catharine Groh tract before the execution of the agreement of 20th February, 1855, the power to locate was exhausted and could not be exercised by the company, even with the consent of Dundas and Richardson. The agreement to change the location and track of the road, to avoid the outcrop of the coal veins, was an agreement to do what the company had no right to do. It was in violation of law, and void. *Answer.* After a railroad is located its power in this respect under its charter is exhausted, unless the change becomes necessary for the public safety and travel. By consent of the landlords in such case, since the passage of the act of 1862, this can be done for a short distance.*

(2) That the covenants in the agreement of 20th February, 1855, between Dundas and Richardson and the Mine Hill and Schuylkill Haven Railroad Company, were personal covenants, and no action for a breach of them by the Railroad Company can be sustained by the lessee of Dundas and Richardson, and as Verner has shown no other right of action than his lease, which expired in the fall of 1863, and was granted subject expressly to the rights of all other parties, as they existed at the granting thereof upon the Catharine Groh tract of land, the verdict should be for the defendant. *Answer.* Whether the covenants in the agreement referred to, be personal or not, is immaterial, as Dundas and Richardson's executors are on record as plaintiff in this suit. Verner can only recover for such interest as he can show was conveyed to him, or that he sustained.

(3) That the plaintiffs have proved by Thomas Verner that he was a tenant and worked the water level gangways in the Crosby and Daniel veins, and gave written notice as such lessee of his intentions to remove the pillars of coal under the railroad in said gangways. That if such evidence is believed, the plaintiff, William Verner, would have no right of action for the pillars of coal in the upper level of said veins, and had no right to interfere with them, and if he has failed to show any other right to damages for any other coal the verdict must be for the defendant. *Answer.* We affirm this point, subject to our general charge. That part of the general charge referred to was as follows: "Nor can he (Verner) recover damages sustained by Stanton, Thomas Verner, or Morton, under the evidence in this case."

* Act of 11 April, 1862, Purdon's Dig. 1221, pl. 45.

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(4) That William Verner gave no notice, under the evidence in this case, which was in compliance with the agreement of 20th February, 1855, of his intention to mine coal that would interfere with defendant's railroad until he gave the notice in evidence of the 6th day of June, 1864, and there is no evidence in this case that the defendant or any of their agents interfered with his mining thereafter, or that he was in anywise prevented from mining coal before his sale to Patterson & Brother, in September thereafter, and the verdict of the jury must be for the defendant. *Answer.* The facts contained in this point are questions for the jury to determine under the evidence.

(5) That William Verner, the use party plaintiff, having sold all his right, title, and interest to the Glen Carbon Colliery, and personal property connected with the same to George S. Patterson & Brother, as per agreement of 21st September, 1864 (such having been made before this suit was brought), without any reservation of the pillars of coal under the railroad, his rights, whatever they were in respect to said coal, passed to his vendees, and he cannot maintain this action. *Answer.* So far as the defendants are concerned this is immaterial, so long as they have the legal plaintiff, on the record.

(6) That under the contract of 20th February, 1855, there could not be a recovery for a breach of said contract beyond the injury done thereby to Dundas and Richardson (the parties of the first part), and their damages could not exceed the amount of rent which they would have received from the coal, if taken out by their tenants. *Answer.* We think if Verner can recover at all, he can recover damages sustained by him independent of the rent of the landlords, if they follow a breach of the agreement and if they are the proximate consequence of the injury, not remote or speculative. The damages of the landlords could not exceed the rent of the coal if taken out by the tenant.

(7) That upon all the evidence in the cause, the verdict should be for the defendant. *Answer.* We decline to instruct you as requested.

The plaintiffs requested the Court to charge:—

(1) That under the agreement of 20th February, 1855, and the demise of Dundas and Richardson to William Verner, he became entitled to compensation for any damage that he might sustain as tenant by reason of any pillars that he was obliged to leave unmined to support the Ashland extension of defendants' road, and the refusal or neglect or failure of the defendants, after written notice of the said Verner to take measures to protect their road or remove the same, so that the said Verner might mine out his coal as if the railroad had not been built thereon. *Answer.* We think this is so.

(2) That if the jury find that written notice was given by William Verner to the Mine Hill Company, or that said company, by their acts or declarations, waived notice in writing that the said Verner was about to mine out the coal from under their road, and that he, the said Verner, desired the defendants to protect their road so that he could mine out his coal under the same, and the defendants refused to support or remove their road so that such coal could be so mined, the plaintiffs are entitled to recover the value of said coal to Verner as a tenant, as well as themselves as landlords, as it was in the pillars at the time of such refusal, together with the interest thereon from the time of such refusal to the present. *Answer.* The landlords can only recover the rent. Verner can recover such damages for breach of covenant as are direct and proximate, and are not remote and speculative.

(3) That the plaintiffs are entitled to recover, not only the loss to Verner, the tenant, but also the damage or loss to them in the rents, which would have been payable upon the coal, which the tenants were obliged to leave unmined to support the road of the defendants. *Answer.* We answer this point as we have the third one, with this addition, that if you find anything due Verner, he would be entitled to interest on it from the time the injury was committed.

The Court charged *inter alia*: [William Verner is the real plaintiff in interest in this action . . . . this action is in the names of the legal plaintiffs for the use of Verner; he must bring his suit in this way . . . . If you find in favor of the plaintiffs you will determine how much is due to the landlords, and how much is due to William Verner, and state the same in the nature of a special verdict.] . . . . [The notice required by the agreement must be in writing, but the defendants may waive the written notice and accept of a verbal notice, but under the terms of the agreement there must be some notice, and that of a nature to inform the defendants of the plaintiffs' intention to mine the coal in the pillars under the road bed. A notice to let down the road in case the defendants would not pay, such as John D. Brennan testified to, is insufficient unless the defendants understood it as a notice under the terms of their agreement. If they did not so understand it, it would not be notice as required. The first question, then for the jury to determine is, whether the defendants have broken any of their covenants with Dundas and Richardson. If they have not that ends the case, and your verdict should be for the defendants. If you find differently, then you will inquire whether the plaintiffs have given the defendants the proper notice as required by the agreement.] If they have, then the defendants would be entitled to a reasonable time to perform

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their covenants, and reasonable time depends upon the work to be done. If there has been a failure or refusal on the part of the defendants to comply with their agreement, then you will determine if Mr. Verner or plaintiffs have sustained injury, and, if so, how much. The measure of damages would be the coal in place at the time of the injury. This you will have to determine from the evidence in the case. If you find in favor of the plaintiffs, you will determine how much is due to the landlord, and how much is due to Wm. Verner, and state the same in the nature of a special verdict.

Verdict for the plaintiffs for $52,088, "of which eight thousand three hundred and thirty-four dollars and twenty-three cents ($8334.23) is for rent." Judgment thereon.

A rule granted to show cause why judgment should not be entered for the defendant, *non obstante veredicto*, was subsequently discharged. The defendant took this writ of error, assigning for error, *inter alia*, (1) the refusal to make absolute the rule upon plaintiffs' counsel to file their warrant of attorney. (2) The discharge of the rule for judgment, *non obstante veredicto*. (3) The answers of the Court to the above points of plaintiffs and defendant. (4) Those portions of the charge quoted in brackets.

John W. Ryon (with whom was *William B. Wells*), for the plaintiff in error.

These proceedings ought to have been stayed until the counsel showed authority from the legal plaintiffs.

Miss. R. R. Co. *v.* Southern R. R. Ass., 28 Leg. Int. 309.

Meyer *v.* Littell, 2 B. 177.

[SHARSWOOD, J. Was a copy of the lease filed with the power of attorney?] No.

Verner was not a tenant at the time this agreement was made; the right of action vested then in the land-owners, and he accepted the lease subject to the rights of all other parties as they then existed. If the profits that might accrue to the tenants were intended to be protected, then every tenant of these landlords would have a right of action, and the railroad company would be subjected to as many suits as there should be tenants. It is clear that this was merely intended to secure to the land-owners the value *to them* of the coal in place, and that this cannot exceed the rent which they could have obtained for mining it. Where the interest of the plaintiff was not intended to be protected, he cannot recover, notwithstanding the terms of the covenant may include him.

DeBolle *v.* Penna. Ins. Co., 4 Wharton, 74

Maule *v.* Weaver, 7 B. 329.

Granting that this was a covenant running with the land, still as the executors had released all of their rights before the trial to the Phila. & Reading Coal and Iron Co., no action could any longer be maintained in their name.

The contract is that the company shall maintain the road "*so that the said party of the second part may by their tenants be at liberty to mine and remove the coal.*" It is plain that the parties to be benefited are the landlord, and the word "tenants" merely expresses the agency by which they shall do the work. The rule that a stranger to a contract cannot at law sue in his own name is inflexible (1 Chitty's Plead. 3); and if he is inserted as an equitable plaintiff, it is manifest that he can recover no more than the legal plaintiffs could.

But it is impossible that this contract could be fulfilled; it was *ultra vires*. The Act of April 11, 1862, was not passed at the date of this agreement, and that which was unlawful cannot be made valid by a subsequent Act.

2 Parsons on Contracts, 186.

Further, the "ordinary method of mining" would not permit the surface to be disturbed, and, the Act only permitting a change of location in such a case, the exigency contemplated by the Act has not arisen, even if the Act were operative; and without an Act the location could not be changed.

Pierce Am. R. R. Law, 218.

Cleveland & Pitts. R. R. Co. *v.* Speer, 6 Sm. 334.

Horner *v.* Watson, 29 Sm. 242.

Coleman *v.* Chadwick, 30 Sm. 81.

If the State by her charter gave no such right, the land-owners certainly could not by any agreement they might make. It must be remembered that even if this agreement was void, the land-owners are not without remedy; they have still a right to damages for use and occupation.

Western Penn. R. R. Co. *v.* Johnson, 9 Sm. 290.

The right of Verner, if he had any, grew out of a covenant running with the land, and when he had sold all his "right, title, and interest" to Patterson, the latter was the person entitled to sue, if any one was.

[AGNEW, C. J. Who was the party injured at the time the right to damages accrued?]

That is the very point of the case. The right must pass to the successive lessees.

Spencer's Case, 1 Sm. Lead. Cases, 146.

Penna. R. R. Co. *v.* Sly, 15 Sm. 205.

The measure of damages was incorrectly stated, and the evidence showing the profits that might have been made in 1864 ought not to have been admitted.

Sedgwick on Damages, 78.

Fleming *v.* Beck, 12 Wr. 309.

Edw. Owen Parry and *F. W. Hughes* (with whom was *G. E. Farquhar*), contra. The direct consequence of the refusal of the railroad company to comply with the agreement was that the coal required for subjacent support could not be mined, and the measure of damage to the land-owners was the value of that coal. It is immaterial whether the land-owners intended to mine the coal themselves, or whether for com-

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pensation they permitted their tenants to do it; the contract under which it might be done was a matter with which the railroad company have no concern. The jury found as a fact that this value was $52,088, and for the sake of convenience divided this amount into two items, but this did not increase the amount found due. The landlords demised to Verner all the coal in these veins for a compensation—the rent—and *he* was therefore entitled to the value of the coal, as found by the jury; and with the demise of the coal the landlords gave him all the rights that they possessed for its removal, while at the same time he bound himself to take all the coal possible. If his name had not been mentioned in the suit, he would still be entitled to claim his share of the verdict from the legal plaintiffs.

Verner, having paid a valuable consideration for the right belonging to the landlords under the agreement, was entitled to use their names, just as the equitable assignee of a bond may use the name of the mortgagee as legal plaintiff in a *scire facias* upon the mortgage.

It is perfectly true that one who takes a conveyance or lease of the surface is entitled to subjacent support, *unless* it is expressly stipulated otherwise, and in this case such a stipulation was made and would be binding on an individual. A railroad is only a private corporation.

Angell & Ames on Cor. § 31.
Bonaparte *v.* Camden & Amboy R. R. Co., 1 Bald. 205.

The right to remove the coal under the bed of the road is provided for in England under the Act.

Godefroi & Short, Law of R. W. Co's, 387, § 78.

The right of the company to change its location is entirely misunderstood: this cannot be done, if it has once exercised the right of eminent domain, without the consent of the land-owner; but there is nothing to prevent it from doing so if the land-owner, as in this case, is willing, and here the right of eminent domain was never exercised at all; the occupation of the land was permissive under a special contract.

Benj. W. Cumming, in reply. The argument of the defendants in error concedes that the plaintiffs could only recover the value of the coal in place, and this value was to the landlords only the rent that they were entitled to. If it is granted that a railroad may change its location with the consent of the owners of the land, then the whole line of a road might be changed, and the public affected by such a change have no right to prevent it. A public highway may not be changed at random.

Morrow *v.* Com., 12 Wr. 307.
McMurtrie *v.* Stewart, 9 H. 322.
Furniss *v.* Furniss, 5 C. 15.

April 4, 1878. THE COURT. The effect of the agreement of 20th of February, 1855, between Dundas and Richardson, the land-owners, and the Mine Hill and Schuylkill Haven R. R. Co. was to enable the former and their tenants to mine all the coal and let down the surface, just as if no railroad lay upon this surface. The railroad company was bound on notice to take care of its railroad, or remove it to another location on the same land. This removal was merely contractual, involving no exercise of the power of eminent domain, and is not within the decisions holding the power, when once exercised, as gone. The ability of the company to perform either alternative was a matter wholly within its own knowledge, when for a valuable consideration it entered into the contract.

The contract yielded to the land-owners the right of subjacent support of the railroad, and the right to take all the coal underneath. But the railroad being a creation of law for a public purpose, the public right required the subjacent support to remain, if the railroad company refused to perform its contract. The contract thus concerning the public as well as the company, specific performance could not be compelled, and refusal of the company converted the right of the land-owners into a right of action for damages under the covenant. The damages necessarily extended to the value of the coal in place, for the whole was lost to them by the refusal of the company to protect or remove its railroad, and the necessity for the subjacent support. This loss is the same, for the whole of the coal in place, whether it arises from the necessity of leaving the pillars as a support of the railroad, or from a conversion of title by payment of the damages. The cause of action therefore arose when the company refused to perform its covenant.

As to Verner, the tenant, there is then no difficulty. He is entitled for his own use to that proportion of the damages, to be recovered by the owners of the land, which his lease conveyed under his right to mine, to wit, to remove, sell, convert and retain after payment of his rent.

The verdict is *in solido* for the entire damages, and not two verdicts, one for the lessors and the other for the tenant. The proportions found by the jury were but for convenient distribution—a thing often done where different rights in the same subject exist. The suit was by the covenantees against the covenantors, and the recovery for the entire value of the coal in place. The right of Verner as use plaintiff under his lease is also clear. His lease was of an old colliery, consisting of several veins, some of which were worked out leaving only the pillars. No reservation was made as to the extent of his right to mine; but, on the contrary, his lease bound him to work the mines, "and do all other acts appertaining to the working of the same in the

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most approved manner, so as to facilitate the taking out of *all* the coal in the *different* veins with the *least possible waste.*" This lease must be interpreted in view of the right of the owners under their contract of 20th February, 1855, to take out all the coal and let down the surface, the condition of the old workings where pillars only were left, different veins referred to covering old and new working, and the requirement to take out all the coal with the least possible waste. Verner therefore became entitled to the tenant's share of the pillars in the old workings, and was bound to remove them for the advantage of the lessors. He then was entitled to give the requisite notice to the railroad company to protect or remove its road. He was rightfully a use party, and had an interest his lessors could not revoke or transfer.

This answers also the alleged effect of the release of Richardson to the railroad company in 1872, during the pendency of this action, which was commenced in 1865 against the railroad company. The railroad company had notice of his lease, and could not take a release in the face of *lis pendens* for the breach of its covenant.

It is alleged, however, that William Verner sold his "right, title and interest in the Glen Carbon Colliery" to George S. Patterson and brother on the 21st September, 1864, which operated to transfer his right of action. But there is nothing in the writing purporting to convey a right of action for damages already accrued.

It purports to pass his title or interest in the colliery, and the other paper of September 21, 1864, passes also the personal property in use in and about the mines. George S. Patterson, the assignee, testifies also that he purchased only the interest of Verner in the colliery and his personal property. He does not remember that the pillars were mentioned, and did not purchase any claim that Verner had against the railroad company—did not want to buy a law-suit—and did not remember whether Verner stated he had a claim for damages against the company for the pillars. Neither the writing nor the testimony shows a sale of Verner's right of action. None therefore passed to Patterson & Brother. The right to take the pillars did not vest in them, for the same refusal of the railroad company, which converted the right to take the pillars into a claim for damages under the covenant, took from Verner the power to pass title to the pillars to his assignee. The pillars remained *ex necessitate* under the higher right of the State for the support of the railroad; the right to retain them being conclusively fixed by the refusal of the railroad company to permit their removal. This refusal converted the right to mine them into a right of action under the covenant, when Verner gave his notice in 1859, repeated in 1864, before his assignment.

The case has no analogy to a conversion of chattels by recovery of the value. The pillars are part of the realty, and were fixed in their condition by the exercise of the right of eminent domain by authority of the State, as a necessity for continued support beyond the power of the landlords or their tenant to remove them.

It was only the contract which conferred the right to mine them, and on the refusal to perform it, neither Verner nor his assignee could remove them. The right of action for the damages therefore vested immediately in the covenantees for the use of their tenant. This right of action did not pass by Verner's assignment of the colliery, and if the pillars cannot be mined by his assignee, as we have shown, the injury is remediless, unless Verner can maintain his action in the name of his lessors the covenantees. Hence to say that the right to pillars passed to the Pattersons, the assignees of Verner, which could be mined by no one, is illogical and unsound; and to say that possibly at some future day the railroad track may be removed and the pillars be mined, is to deny to Verner a right he clearly obtained under his lease, and the breach of the covenant on a pretext not only illusory, but dependent on the act of the very party whose breach of covenant is the cause of injury to Verner. This in effect would be a denial of justice on a theory of the merest shadow of a possibility.

But so far as the landlords Dundas and Richardson are beneficially interested in the verdict, it is clear that their interest is barred by the release. Hence the portion of the verdict given for *rent* cannot be recovered. The separation of the damages in the verdict enables us to modify instead of reversing the judgment. The sum of $8334.33 is therefore struck out of the verdict, and judgment is now entered for the residue, to wit, forty-three thousand seven hundred and fifty-three $\frac{67}{100}$ dollars, for the use of William Verner, at which sum the judgment is now affirmed.

PER CURIAM.

PAXSON and SHARSWOOD, JJ., dissent from the judgment, not from its modification.

Common Pleas—Law.

C. P. No. 3. June 8, 1878.

Thorne v. Noel.

Affidavit of defence law—Book entries—Conveyancer's charges—Striking off judgment—Practice.

Rule to show cause why judgment should not be stricken from the record and execution stayed.

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Judgment had been taken for want of an affidavit of defence on the following copy filed:—

Jos. Noel, 618 Chestnut Street,
To Samuel G. Thorne, Dr.

To com's on $1200 @ 2 per cent.	$24 00
" preparing assignment of mtge.	15 00
" " agreement and declaration of no offset	10 00
" preparing agreement	10 00
" examination of title	15 00
" 4 acknowledgments	2 00
" ½ collection fee for collection of mortgage of Thos. Bond	125 00
Total	$201 00

The depositions showed that the copy was not filed within ten days after the return day, and that no notice was given defendant or his attorney.

William H. Peace, for rule.

Conveyancers' charges like those of lawyers in their books of accounts, are not the subject of book entries under the affidavit of defence law.

The Court has power to strike off a judgment obtained thereon under cover of the Act.

Ronk *v.* Signal Holder Co., 2 WEEKLY NOTES, 536.

W. V. Harpur, contra.

Rule absolute.

C. P. No. 3. June 8, 1878.

Rudderon v. Hodges et al.

Covenant on ground rent deed—Judgment on two returns of nihil—Statement of arrears must refer to the record—Return of sheriff—Setting aside judgment—Practice.

Rule obtained at the instance of *terre tenant* to set aside judgment and execution.

Covenant sur ground rent. Judgment was obtained on two returns of *nihil*. The statement of arrears on which the suit was brought showed no reference to the record of the deed. The return of the sheriff to the *alias* writ of summons was as follows:—

"Served March 21, 1878, a true and attested copy of the within written writ upon a conspicuous part of the premises described in a certain paper hereto annexed, and by advertising the same once a week for two successive weeks in the *Philadelphia Chronicle-Herald*, a daily paper published in this city, agreeably to the Act of Assembly, and rule of the Court in such case made and provided, and an abstract in the *Legal Intelligencer*, and *nihil habet* as to defendants."

Judgment was entered as upon two returns of "*nihil*."

Thorn, for rule.

The sheriff's return to the *alias* writ shows that no legal service of that writ was made, no copy having been posted upon the premises, or served upon the tenant in possession. The judgment was irregular, no statement, as required by law, having been filed containing reference to the record of the deed upon which suit was brought.

A. P. Douglas, contra.

THE COURT. The service seems defective in not following the Act. It is not stated in the return, that the copy was served on the tenant, or that, there being no tenant, the copy was posted on the premises. The statement also should have referred to the book and page of record and assignments of the ground rent.

Rule absolute.

Per YERKES, J.

Orphans' Court.

May 2, 1878.

McFarland's Estate.

Construction of words "for value received"—Promise of administratrix when sufficient to bind estate—When widow of decedent a competent witness.

Sur exceptions to adjudication.

William McFarland died in March, 1875, leaving a widow and one child. Letters of administration were issued to his widow.

At the audit of the account of the administratrix, a claim was made by one Jane Orr, as a creditor of the deceased, for $1000—the value of a certificate for five shares of stock in the American Building and Savings Association, under the following circumstances: on September 30th, 1872, the claimant executed an assignment on the back of the said certificate to the decedent in the following words:—

For value received, we, the undersigned subscribers, do hereby assign, transfer and set over this certificate, together with all benefits and advantages to be derived therefrom.

JANE ORR.

The decedent subsequently used the certificate of stock as security for a loan made to him by the said Association, transferring it to them. It was alleged by the claimant that the shares were loaned by her to the decedent to enable him to borrow money on them for his own use, and that she was entitled to have either the stock or the value thereof returned to her. In support of her claim she offered in evidence the following acknowledgment by the widow and administratrix:

$1000. Philada., October 1, 1877.

This is to certify that I hereby acknowledge owing and promise to pay to Miss J. Orr, the sum of one thousand dollars, together with lawful interest thereon, the rate of said interest being six per cent. per annum, or five dollars per month. MATILDA MCFARLAND.

The auditing judge disallowed the claim on the ground that the words, "For value received," in the assignment, raise a presumption of valuable

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consideration, and that the above acknowledgment by the widow and administratrix is insufficient to rebut it, for, as widow, she is not competent as a witness to support a claim against the estate of her late husband, nor are her admissions, declarations, or promises competent evidence, and, as administratrix, even though a stranger, her admissions and promises would not be sufficient proof of the liability of the estate for the claim.

Exceptions to the above rulings were filed on behalf of the claimants.

Albert Peterson and *Wm. W. Wiltbank*, for claimant.

The words, "For value received," are but *prima facie* evidence of payment, and may be rebutted.

Hamilton *v.* McGuire's Executors, 3 S. & R. 354.
Jordan *v.* Cooper, Ibid. 564.
Weigley's Administrators *v.* Weir, 7 Ibid. 309.
Watson *v.* Blaine, 12 Ibid. 131.
Horton's Appeal, 2 Wr. 294.
Hamsher *v.* Kline, 7 Sm. 397.
Etting's Appeal, 5 WEEKLY NOTES, 277.

Evidence of the admissions and promises of an executor or administrator made after his appointment is admissible to charge the estate in a suit by or against him in his representative capacity.

Williams on Executors, vol. iii. p. *1895.
Smith *v.* Morgan, 2 M. & Rob. 257.
Lawson *v.* Powell, 31 Geo. 681.
Floyd *v.* Wallace, Ibid. 688.
Matoon *v.* Clapp, 8 Ohio, 248.
Emerson *v.* Thompson, 16 Mass. 429.
Atkins *v.* Sanger, 1 Pick. 192.
Heywood *v.* Heywood, 10 Allen, 105.
Faunce *v.* Gray, 21 Pick. 243.
Hill *v.* Buckminster, 5 Ibid. 391.
Allen *v.* Allen, 26 Mo. 327.
Halyburton *v.* Kershaw, 3 Desau. 105.
Anderson *v.* Washabaugh, 7 Wr. 119.
Hunt *v.* Devling, 8 Watts, 405.
Bennett *v.* Fulmer, 13 Wr. 160.

The rule of policy which protects a husband from the admissions of his wife, is inapplicable to such as are in the nature of facts, in respect to which the presumptions to which they give rise are not drawn from the credit of the party, but the facts that such admissions were actually made.

1 Greenleaf's Evidence, § 338.
Wells *v.* Tucker, 3 Binn. 366.
Cornell *v.* Vanartsdalen, 4 Barr, 364.
McFerren *v.* Mt. Alto. Co., 26 Sm. 188.
Steele *v.* Thompson, 14 S. & R. 84.
Jacob Hyneman's Estate, 2 WEEKLY NOTES, 571.
Peiffer *v.* Lytle, 8 Sm. 386.
Act of March 29, 1832, § 56, Purdon, 1109, pl. 48.

W. W. Montgomery (with him *Robert J. Huston*), contra.

June 1, 1878. THE COURT (after stating the facts). Whether this acknowledgment will rebut the presumption of a sale for valuable consideration arising from the words "for value," is the point for decision. If the writing signed by the widow be taken as a promise by her as administratrix, then its utmost effect would be to prove the mere existence of the claim, but it would be valueless in establishing the liability of the estate for its payment. (Lobb *v.* Lobb, 2 Cas. 331; Anderson *v.* Washabaugh, 7 Wr. 119.) If used to prove her admission as widow, it will be equally ineffective to bind the estate of the husband. It is possible that if the writing had contained any words to show that the debt referred to was a debt of the decedent, the admission of the widow being of a fact the knowledge of which may have come to her outside of the marital relation, might have been received in evidence, as in Steele *v.* Thompson (3 P. & W. 34), and Cornell *v.* Vanartsdalen (4 Barr, 364). But the writing imports only a personal debt and promise to pay on the part of the widow, and the claim resting upon no other testimony, was properly rejected as a claim against the estate of the decedent.

The exceptions are dismissed.

Opinion by ASHMAN, J.

Jan. 23, 1878.

Eddy's Estate.

Orphans' Court practice—Decedents' estates—Sale of real estate for payment of debts—Petition by administrator, requisites of—Schedule of debts and real estate—What particularity required—Act of March 29, 1832.

Sur petition of administrator for sale of real estate for payment of debts, and answer.

The petition was in the usual form, and averred, *inter alia*, that the personal estate of the decedent was insufficient to pay his debts.

The answer, filed by the guardian of the minor child of the decedent, denied the above averment of the petition, and alleged that certain real estate of the decedent was not included in the schedule attached to the petition. No replication was filed.

J. A. Burton, for the petitioner.

J. D. Lewis, contra, cited—

Weaver's App., 7 Harris, 416.
Thomas's Est., 3 WEEKLY NOTES, 96.

March 2, 1878. THE COURT held that, no replication having been filed, the material averments of the answer must, under the rules of equity practice, be taken to be true; and it appearing thereby that the petition was radically defective, under the Act of March 29, 1832, in failing to exhibit, among other things, "a full and correct statement of all the real estate of the decedent," the prayer of the petition must be refused, with leave, however, to file a replication, and to move for the appointment of an examiner to take testimony, and report the facts to the Court.

(Abstract of opinion by ASHMAN, J.)

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OF

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BY

RICHARD C. DALE, Esq.

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AFFIDAVIT OF DEFENCE LAW. Generally. The Acts of Assembly authorizing judgments to be entered for want of an affidavit of defence are not in conflict with the provision of the Constitution securing the right of trial by jury. Lawrance *v* Borm, 187.

The filing of a narr before the return day, without a rule to plead, does not prevent the plaintiff from taking judgment for want of an affidavit of defence. (C. P.) Brobston *v.* Campbell, 273.

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In an action on a note an affidavit of defence that the plaintiff had received from the defendant as collateral security mortgages of an equal face amount, which the plaintiff had foreclosed and bought in the mortgaged premises for less than the mortgages, whereas in fact the property was worth much more, is insufficient. Smith *v.* Bunting, 186.

In an action on a foreign judgment an affidavit of defence setting forth irregularities in the exemplification of record is insufficient. Hartman *v.* Manufacturing Co., 502.

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An affidavit that the defendant has paid to the plaintiff the debt sued for, and holds his receipt in full, is sufficient. (C. P.) Erlichen *v.* Lawson, 473.

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An affidavit of defence to a claim upon an affidavit of money loaned, denying the loans upon the days alleged, is sufficient. Raible *v.* Schail, 149.

The filing of an affidavit of defence does not prevent the defendant from taking advantage of any defects in the copy filed. In Crawford County under a rule of court unless the plaintiff files a copy of the mortgage or a reference to its record, judgment will not be entered for want of an affidavit of defence. Gottman *v.* Shoemaker, 381.

Five per cent. attorney's commission upon a mort-

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AFFIDAVIT OF DEFENCE LAW—*Continued.* gage may be assessed as part of the judgment for want of an affidavit of defence except where the principal of the mortgage is very large, in which case the court will reduce the commission at their discretion. The reasonableness of the commission is not such a question of fact as must in each case be submitted to the jury. (C. P.) Moller *v.* Ohse, 510.

AGENT. See PRINCIPAL AND AGENT.

AGREEMENT. See CONTRACT.

AMENDMENT. The Orphans' Court equally with every court of record has, irrespective of statute, a power of amendment which may be exercised after the expiration of the term. (O. C.) Beck's Estate, 274. See EQUITY. PRACTICE.

ANCILLARY ADMINISTRATION. See DECEDENTS' ESTATES. (O. C.) Cox's Estate, 474.

APPEAL FROM MAGISTRATE. See JUSTICE OF THE PEACE.

APPOINTMENT, POWER OF. See WILL.

APPRAISEMENT. See EXECUTION.

ARBITRATION, voluntary. Effect of reference. See INSURANCE.

Compulsory. An attorney of a resident defendant cannot waive the provisions of the Act of 16 June, 1836, relating to service of a copy of the record upon the defendant. (C. P. Tioga.) Navel *v.* Elliott, 35.

Although a married woman is not bound by an award of arbitrators appointed under a submission in which her husband did not join, if a bill in equity framed to enforce specific performance of the award shows substantial merit in the plaintiff's case appropriate relief will be given. Darlington's Appeal, 529.

ASSIGNMENT FOR BENEFIT OF CREDITORS. See DEBTOR AND CREDITOR.

ASSUMPSIT can be maintained by the joint owners of a vessel against the managing owner for dividends ascertained to be due. Steelman *v.* Doughty. 166.

ATTACHMENT EXECUTION. See EXECUTION.

ATTACHMENT, FOREIGN. See FOREIGN ATTACHMENT.

ATTACHMENT OF VESSELS. See SHIPS AND SHIPPING.

ATTORNEY AND CLIENT. Where an attorney seeks to derive any benefit from a bargain made with his client, the burden of proof is upon him to show the utmost good faith on his part, and to establish the perfect fairness, adequacy, and equity of the contract. Darlington's Appeal, 529.

Where by contract between an attorney and client, the attorney has agreed to do for a fixed sum all that is requisite in settling an estate, the client is entitled to a credit for whatever the attorney may receive under an order by the chancellor of a neighboring state granting a certain sum for solicitor's costs. Freeman *v.* Shreve, 246.

The unauthorized appearance of an attorney for a partnership is good ground for opening a judgment obtained against partners not served and having no knowledge of the suit. (C. P.) Percival *v.* Fuller, 273.

Authority of Attorney. See ARBITRATION. Navel *v.* Elliot, 35.

Attorney's commissions. See AFFIDAVIT OF DEFENCE LAW. (C. P.) Moller *v.* Ohse, 510.

AUDITOR'S REPORT, conclusiveness of. Where an auditor's findings of fact are deductions from other facts reported by him, such deductions will be subject to review by the Supreme Court, and corrected if error be discovered in them. Hindman's Appeal, 347.

AVERMENTS, effect of. See AFFIDAVIT OF DEFENCE LAW.

BAIL IN ERROR. New rule of Supreme Court concerning, 81.

Sureties in a recognizance upon a writ of error to a feigned issue upon a sheriff's interpleader are only bound for costs, and not for the amount of the judgment in the principal cause. Guyer *v.* Spotts, 226.

The words "condemnation money" in such a recognizance, construed. Ib.

BAILMENT. Innkeeper, liability of, for loss of goods. An innkeeper, in the absence of negligence, is not responsible as such for the loss of the goods of a permanent boarder; *aliter*, as to those of a transient guest. (C. P.) Jeffords *v.* Crump, 10.

Safe Deposit Co. The unaccounted for disappearance of securities of a safe renter from the vault of a safe deposit company, *ipso facto* creates a presumption of want of ordinary care on the part of the company, and puts the burden of proof upon them of giving some explanation of the loss. Safe Deposit Company *v.* Pollock, 193.

Lien. A tradesman's lien upon goods deposited with him in the course of trade is not waived by a special agreement for a fixed price for the labor bestowed on the goods; but a contract for the payment of a fixed sum, together with a special agreement as to the time and mode of payment is strong evidence of an intention to waive the right of lien. Mathias *v.* Sellers, 518.

See COMMON CARRIER. NEGLIGENCE.

BANKRUPTCY. An adjudication of bankruptcy, though upon the bankrupt's petition, bars all further proceedings in the State courts on provable debts. (C. P.) Platt *v.* Kelso, 57.

See DEBTOR AND CREDITOR. Brown's Appeal, 394. Louchheim *v.* Henzey, 552.

BANKS AND BANKING. A provision in the charter of a State bank incorporated prior to the adoption of the constitution of 1874, authorizing it to borrow money upon mortgage of its real estate is not affected by Art. XVI. § 7 of the constitution, and the Act of 18 April, 1874. Lewis *v.* Jeffries, 369.

A bank is not bound by the act of its cashier in marking "good" a check upon which are written the words "to hold as collateral for 1000 bbls. oil." A cashier has authority only to certify as good checks drawn for the payment of money without clog or condition. Dorsey *v.* Abrahams, 73.

A bank president who permits a customer to withdraw from the bank bills of lading held as collateral under the pretext of comparing them with his books, is responsible to the bank for any loss accruing from their withdrawal. (C. P.) Bank *v.* Wiegand, 12.

A bank which elects to pay the annual tax of one per cent. on the par value of its shares as provided by the Act of 31 March, 1870, § 4, is not liable to taxation under § 3 of the same Act. (C. P. Luzerne Co.) Allen *v.* Commissioners, 229.

For purposes of State taxation a national bank is not located within a State in which it carries on no business except that of receiving deposits. (U. S. C. C.) Nat. State Bank *v.* Pierce, 344.

See USURY.

BILLS AND NOTES. A note given by the trustees of a church corporation for money borrowed to pay a debt incurred in repairing the church building is admissible in evidence in an action against the church by the payee when coupled with proof that the money borrowed was actually expended in such repairs, even though the charter gave no authority to the trustees to borrow money. Church *v.* Caughey, 421.

A note drawn by the president of a railroad company in their name to his own order is binding upon the company in the hands of a bank discounting the same in good faith, even though under the by-laws of the

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BILLS AND NOTES—*Continued.*
company the president had no authority to issue the note, and the proceeds never found their way into the company's treasury. (C. P.) Mechanics' Bank *v.* West Phila. P. R. W. Co., 290.

A holder for value without notice of a promissory note is not affected by the act of 12 April, 1872, relating to promissory notes given for patent rights. Haskell *v.* Jones, 165.

It requires clear evidence of his knowledge of the fraud of the payee to impeach the title of a holder for value. Where there is no sufficient evidence to justify an inference of such knowledge it is the duty of the court to withhold the question from the jury. Battles *v.* Laudenslager, 339.

Although the plaintiff in opening his case affirmatively shows that he is a holder for value of the note in suit, it is error to exclude evidence offered by the defendant to show that the note has been fraudulently negotiated. (C. P.) Simes *v.* Blair, 235.

In an action by a third endorser against the second endorser an affidavit of defence upon information and belief with an averment of expectation of ability to prove that the name of the plaintiff is used on behalf of the first endorser who is the real owner of the note is sufficient. Oberle *v.* Schmidt, 225.

An affidavit of defence by the maker of a note showing a good defence as to the payee and averring that the plaintiff is not a holder for value is sufficient. Delp *v.* Sowers, 167. (C. P.) Gorman *v.* Gillen, 127.

One who takes a note as collateral for a pre-existing debt is not a holder for value. (U. S. C. C.) Mack *v.* Baker, 212.

Where a fraudulent negotiation of a note by one under whom the plaintiff claims title is alleged in an affidavit of defence, it throws the burden of proof on the plaintiff to show that he is a holder for value. (C. P.) Gordon *v.* Stilz, 169.

Where usurious interest has been charged upon a series of notes discounted by a national bank, the defendant is entitled to credit upon the principal of his debt for all the interest paid on the whole series. The question whether or not renewal notes have been accepted in payment of the notes in suit is a question of fact the evidence of which it is error to withhold from the jury. Cake *v.* Bank, 244.

The holder of accommodation paper who takes it with knowledge of an agreement that the defendant was not to be held liable as endorser is not entitled to judgment against him. (C. P.) Thompson *v.* Galloway, 384.

In an action upon a lost negotiable instrument, the defendant is entitled to indemnity before judgment will be entered against him. (C. P.) Jordan *v.* Keller, 341.

Parol evidence is admissible to show when a draft is actually payable when no time of payment is mentioned on its face. (C. P.) Leary *v.* Meredith, 37.

A hotel where a countryman, the endorser of a note, usually stops when in town is not the place where notice of protest and non-payment of a note should necessarily be left by the notary. In such a case a notice sent by mail to the post-office nearest to his house is sufficient. Kerr *v.* Roberts, 25.

The maker of a promissory note not indorsed cannot be made to pay the costs of a protest by the payee. (C. P.) Gibb *v.* Geisz, 148.

See Affidavit of Defence Law. Contract.

BILL OF PARTICULARS. See Practice.

BILL OF REVIEW. See Orphans' Court Practice.

BOND. The seal of a corporation to a bond is prima facie evidence of the authority of the corporation to execute it. Parkinson *v.* Parker City, 285.

BROKER. The failure to show a license to act as real-estate broker does not affect the right of one to compensation who under a special contract makes a sale of real estate. Shepler *v.* Scott, 223.

BUILDING ASSOCIATION. The assignee of shares in a building association which have been pledged to the association as collateral for a loan has no standing to except to the report of an auditor appointed to distribute a fund produced by a sheriff's sale of real estate upon which the association held a judgment as collateral for the loan. Weiss's Appeal, 423.

BUILDING LAWS. Any colorable evasion of the building laws relating to the city of Philadelphia will be strictly dealt with. What are new buildings within the meaning of the Act of April 21, 1835. (C. P.) Bowers *v.* Brice, 382.

BUILDING RESTRICTIONS. While a restriction against carrying on any objectionable business upon certain territory is not an unreasonable condition to be attached to a conveyance, an agreement not to erect any house of a less front than seventeen feet, or to open any street of a less width than fifty feet, is of a different character. (O. C.) Anders's Estate, 78.

BURGLARY. See Criminal Law. Johnston *v.* Com'th, 49. Rolland *v.* Com'th, 53.

CAPIAS. See Practice.

CERTIFICATE OF MAGISTRATE, conclusiveness of. See Husband and Wife. Darlington's Appeal, 529.

CHARITIES. What an Institution of Purely Public Charity. See Constitutional Law. Donahugh's Appeal, 196.

Where by a will duly executed the sum of $1000 is left to a charity, and the testator within one month of his decease by codicil revokes this bequest and gives $500 to the same charity, both bequests are inoperative. (O. C.) Poulson's Estate, 554.

A bequest to a church to be expended in masses for the repose of the testator's soul is not a gift to a charitable or religious use within the meaning of the act of 26 April, 1855. (O. C.) Powers's Estate, 59.

And a bequest to a church to be expended in masses for the repose of the souls of the testator's brothers stands on the same ground. (O. C.) Dougherty's Estate, 556.

CHARTER PARTY. A clause in a charter party that a vessel shall sail without delay and in ballast to enter upon the charter, is sufficiently performed if the vessel carry a cargo of salt, where no damage is shown to have resulted. (U. S. C. C.) The Bark Religione e Liberta, 211.

Construction of obscure charter party. (U. S. D. C.) Wright *v.* The Francesca Curro, 104.

CHECK. Power of cashier to certify. See Banks and Banking. Dorsey *v.* Abrams, 73.

CHURCH. Power of trustees. See Corporation.

CIRCUIT COURT. Jurisdiction of. See Courts.

COLLATERAL INHERITANCE TAX. See Decedents' Estates.

COMMISSIONS. See Decedents' Estates. Trustees. Mortgage.

COMMON CARRIER. Carriers of passengers have a right to establish reasonable regulations for the government of their passenger traffic and for the conduct of their business, and a passenger who persistently violates such regulations may be ejected from the train. But if a passenger be improperly ejected the company carrier is responsible for the illegal act of its servants. (C. P.) Levan *v.* Penna. R. R. Co., 293.

A street passenger railway company is responsible for an injury caused to a female passenger standing in a car thrown down by its sudden stoppage, and who

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COMMON CARRIER—*Continued.*
was unable to reach the straps suspended from the ceiling without risk of disarranging her dress. (C. P.) West Phila. P. R. W. Co. *v.* Whipple, 68.

A person not an employé travelling by a passenger train is presumably travelling as a passenger and for a consideration. The contrary presumption of being a trespasser is an affirmative proposition the proof of which rests with the party alleging it. Creed *v.* Penna. R. R. Co., 253.

A railroad company excluding colored persons from a train is liable to the penalty imposed by the act of March 22, 1867. Central R. R. of N. J. *v.* Green, 297.

But a recovery by one person thus excluded is a bar to any further proceeding by another person excluded at the same time. Central R. R. of N. J. *v.* Green, 300.

By Art. III. § 21, of the Constitution no limitation can be made by Act of Assembly in regard to the amount to be recovered for injuries to persons or property. (C. P.) Baker *v.* North Penna. R. R. Co., 292.

Common carriers transporting goods under a special contract whereby they are freed from all liability for injury except that caused by their own negligence, are not liable for the loss of goods through a great fire in the woods which extended to and consumed the town where they were resting in transitu. In such a case there is no evidence of negligence to be given to the jury. Penna. R. R. Co. *v.* Fries, 545.

A special contract for the transportation of cattle interpreted so as to relieve the carrier from his strict liability as a common carrier, but not from any consequences of actual negligence. Pittsburgh, etc., R. R. Co. *v.* McShane, 228.

A second carrier receiving goods at the end of a first company's line and transporting them to their destination is not chargeable with the omission of the first company to report the prepayment of freight and is entitled to retain possession of the goods for a length of time reasonably sufficient to inform themselves of the fact. Union Express Company *v.* Shoop, 26.

See NEGLIGENCE. RAILROADS.

CONFLICT OF LAWS.

The effect of a release, executed in Indiana, of one partner from liability for a firm debt contracted in Pennsylvania upon a judgment obtained in the latter State against another partner for the same debt, is to be governed by the law of Pennsylvania. Greenwald *v.* Kaster, 140.

CONSTITUTION OF PENNSYLVANIA.

Art. I. § 10. 324.
III. § 7. 61.
III. § 20. 153.
III. § 21. 293.
V. § 7. 203.
VIII. § 1. 249.
VIII. § 3. 416.
VIII. § 7. 444.
VIII. § 17. 350.
IX. § 1. 196.
XV. § 2. 153.

CONSTITUTIONAL LAW. Art. III. § 20, providing that the Legislature shall not delegate to any special commission any power to interfere with any municipal improvements, is prospective only, and does not affect a special commission existing before the adoption of the Constitution. Perkins *v.* Slack, 153.

Art. XV. § 2, is not in conflict with the Act of August 5, 1870, except in so far as it prevents the Commissioners from making any contracts after 1874, until an appropriation to pay for them has been made by the City Councils. Ib.

Art. V. § 7, of the Constitution, relating to the fees of the prothonotary in Philadelphia County, is not

CONSTITUTIONAL LAW—*Continued.*
effective until enforced by an Act of Assembly, and an Act which abolishes fees and provides a salary for that officer, to take effect upon the expiration of the current term, is constitutional. Perot's Appeal, 203.

Art. XVI. § 7, limiting the powers of corporations to borrow money, does not apply to corporations incorporated prior to the adoption of the Constitution. Lewis *v.* Jeffries, 369.

Art. III. § 7, of the Constitution, prohibiting local or special legislation, does not prevent the classification of cities according to their population, and the fact that some of the classes contain each but one city, does not invalidate such classification. Kilgore *v.* Magee, 61.

When a bill has been passed by the Legislature, approved and certified in due form, a Court cannot inquire whether the forms prescribed by the Constitution have been observed in its passage through the Legislature. Kilgore *v.* Magee, 61.

The Governor is exempt from the process of the Courts whenever engaged in any duty pertaining to his office, and he is the sole judge not only of what his official duties are, but also of the time when they should be performed. Hartranft's Appeal, 105.

He is also the absolute judge of what official communications to himself or his department may or may not be produced in a court of justice. Ib.

He cannot be attached for refusing to obey a subpœna to appear before a grand jury investigating the circumstances of a riot, in which numerous rioters were killed by the military called out to suppress it. Ib.

Art. III. § 21, invalidates all Acts of Assembly limiting the amount of damages to be recovered for injuries to persons or property. (C. P.) Baker *v.* North Penna. R. R. Co., 292.

Although the Acts of Assembly providing for the assessment of the cost of opening streets through the rural districts adjacent to the city of Pittsburg are unconstitutional, an owner of property who has actively aided in procuring the passage of the Act, is estopped from claiming the benefit of such unconstitutionality in a proceeding upon a municipal claim for the cost of the opening filed against his property. Bidwell *v.* Pittsburg, 41; Kaiser *v.* Weise, 45.

The affidavit of defence law is constitutional. Lawrance *v.* Born, 187.

The Act of 12 April, 1872, relating to promissory notes given for patent rights is not in conflict with Art. I. § 7 of the Constitution of the United States, giving Congress exclusive power to legislate concerning patents. Haskell *v.* Jones, 165.

Legislation authorizing an assessment of the cost of a local improvement upon the properties benefited, will not be sustained where, from the nature of the improvement, a fair and equal assessment is impossible. Nor can the cost of a public improvement be so assessed. It must be borne by the municipality. A bridge over a stream at the crossing of a public street is such a public improvement. Ballantine's Appeal, 321.

Farm lands within the boundaries of a city may be taxed for the general expenses of the city government. The fact that they are situated at a considerable distance from the built-up portions of the city and derive no direct benefit from the water, fire, and police departments does not render the tax unconstitutional, even though the amount of the tax exceed the annual productive value of the land. (AGNEW, C. J., and STERRET, J., dissenting.) Kelly *v.* Pittsburg, 325.

A library open to the public for free use is an institution of purely public charity within the meaning of Art. IV. § 1; and the Act of 14 May, 1874, providing

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CONSTITUTIONAL LAW—*Continued.*
for its exemption from taxation, is not unconstitutional. The existence of a class of stockholders and subscribers to the library who have the additional privilege of taking books from the building, does not deprive the institution of its purely charitable character so long as it is not administered for gain. Donohugh's Appeal, 196.

The Act of 2 July, 1839, relating to the commissions of county officers pending a contested election, is not repealed by the Constitution and the Act of 19 May, 1874. Barber's Case, 350.

See ELECTIONS. FOREIGN JUDGMENT. TAXES AND TAXATION.

CONTRACT. A promissory note given by third parties to a candidate for election to Congress, in consideration of his withdrawal, is void, even though such candidate may have expended for election purposes a sum of money equal to the amount of the note. Ham *v.* Smith, 390.

An affidavit of defence by a mortgagee to a *sci. fa.* on a mortgage that, within six months after the execution of the mortgage, a jury *de lunatico inquirendo* had found him to have been insane for six months prior to such finding, is sufficient to send the case to a jury. (C. P.) Philada. Trust Co. *v.* Kneedler, 492.

Though a stranger may maintain an action in his own name upon a contract made expressly for his benefit where his release would be a sufficient discharge to the promisor, an incoming partner is not liable to suit by the creditors of the old firm, even though he purchase the interest of the outgoing partner with an agreement to take his place in the payment of the firm debts. Kountz *v.* Holthouse, 463.

One not a party to a contract though beneficially interested in it cannot maintain an action upon it against the promisor, if, after a judgment in such an action, the promisor would remain liable to suit by the promisee, or his personal representatives. Guthrie *v.* Kerr, 458.

Where goods are ordered of a manufacturer, to be made by himself of a certain quality, and the goods delivered are made by another and of inferior quality and full of latent defects, judgment will not be entered in an action against the purchaser, for want of a sufficient affidavit of defence. (C. P.) Smith *v.* Citizens' Gas Co., 97.

Construction of. A contract for acceptance of real estate in payment of debt construed. What entry into possession is evidence of acceptance of property in payment. Loughery *v.* Dobson, 535.

A railroad company entering upon land under a special contract with the land-owner to re-locate its road upon certain contingencies, is liable in damages for the breach of such covenant. Mine Hill R. R. Co. *v.* Lippincott, 560.

A creditor, who agrees to take a house in payment of a debt, is entitled to recover the full amount of the debt if the debtor refuses to convey the same, and not simply damages for refusal to convey the house. Singerly *v.* Armstrong, 139.

A contract by a landlord to supply heat to an occupant of certain rooms in his premises during the season is entire, and judgment will not be given against the tenant for want of a sufficient affidavit of defence, when he shows that before the cold weather ceased the heating apparatus was destroyed by fire, and that no more heat was furnished. (C. P.) Guillou *v.* Toudy, 528.

Agreement of partners for payment by one to the other of a fixed sum for his interest in the business, and an assumption of the firm's debts, construed. Kahn *v.* Pickard, 537.

CONTRACT—*Continued.*
A contract expressed in writing to be "for value received," imports a present payment of the purchase money, and the burden of proof is upon him who asserts the contrary. Etting's Estate, 277. (O. C.) McFarland's Estate, 567.

An agreement and supplemental agreement for loan of stock, construed. Huntingdon, etc., R. R. Co. *v.* English, 354.

A contract providing for the future performance of an act without specifying any time, must be performed within a reasonable time. What in each case is a reasonable time is a question for the jury. Shepler *v.* Scott, 223.

See BROKER. DECEDENTS' ESTATES. EVIDENCE. INFANT. SPECIFIC PERFORMANCE.

CONTRIBUTORY NEGLIGENCE. See NEGLIGENCE. RAILROAD.

CONVERSION. See PARTITION. Eckert's Estate, 451.

CORPORATIONS. The majority of the directors de facto of a railroad company have the power to lease the works and franchises of the company, but in so doing they must comply with all the requisitions of the charter concerning notice to the officers and time of meeting. (C. P.) Kersey Oil Co. *v.* R. R. Co., 144.

The President and Treasurer of a railroad company have an implied authority to issue negotiable paper. (C. P.) Mechanics' Bank *v.* West Philadelphia P. R. W. Co., 290.

The trustees of a church have an implied authority to borrow money for repairs to the church building, and a promissory note given by them for such borrowed money in the name of the corporation is admissible in an action against the latter for the sum so borrowed. Church *v.* Caughey, 421.

A corporation will be enjoined at the suit of a stockholder from issuing bonds secured by a mortgage to its own stockholders when no consideration is given for such bonds. (U. S. C. C.) Kemble *v.* Wilmington R. R. Co., 172.

The seal of a corporation to a bond is prima facie evidence of the authority of the corporation to make it. Parkinson *v.* Parker City, 285.

The notes of a railroad company do not need the seal of the corporation in order to give them validity. (C. P.) Bank *v.* Railway Company, 290.

A corporation incorporated prior to the adoption of the Constitution of 1874 is not bound by the provision of Art. XVI. § 7, relating to the borrowing of money by corporations. Lewis *v.* Jeffries, 369.

The treasurer of a corporation has no authority to bind it by an agreement with one subscribing to stock giving such subscriber an indefinite credit for payment. (U. S. C. C.) McComb *v.* Credit Mobilier, 80.

A subscriber to corporation stock is not entitled to receive certificates for his stock until payment of the purchase-money. (U. S. C. C.) McComb *v.* Credit Mobilier, 80.

A corporation ought not transfer stock upon a blank power of attorney signed by the registered owner many years prior to its presentation without due inquiry as to whether the power has been revoked. Penna. R. R. Co.'s Appeal, 22.

Though certificates of stock with blank powers of attorney signed by the registered owner are not negotiable instruments, if the true owner entrusts the certificates with the power of attorney to one who makes a fraudulent sale or pledge of them, he is not entitled to relief against a bona fide purchaser. Penna. R. R. Co.'s Appeal, 22.

One who takes title to real estate to hold in trust for

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CORPORATIONS—*Continued.*
a society about to be incorporated will be compelled to convey it to the society when incorporated, although the society has contracted debts for which he as a member is personally responsible. Fourth Univ. Parish *v.* Wensley, 273.

A decree in equity upon a bill filed by members of a church claiming to be the corporation is conclusive in a subsequent action brought in the name of the corporation upon a question of account covered by the decree. Church *v.* Fox, 399.

Foreign corporation. A foreign insurance company may be sued in the United States Circuit Court by service upon the resident agent appointed under the Act of 4 April, 1873, § 13. (U. S. Sup. C.) Schollenberger *v.* Ins. Co., 405.

Quære.—Whether a foreign corporation can be made garnishee in a foreign attachment. (C. P.) Meylert *v.* White, 342.

COSTS. A plaintiff is not entitled to witness fees and mileage for his own attendance at Court as a witness, although suing as an assignee for the benefit of creditors. (C. P.) Rhoads *v.* Bank, 191.

A party is entitled to witness fees of witnesses actually in attendance, although there is no evidence of their having been subpœnaed. Dahman *v.* Quinn, 441.

No appeal lies from a taxation of costs in the Common Pleas to the Supreme Court. McCauley's Appeal, 316.

A defendant in equity is entitled to security for costs when the complainant is a non-resident, and though the proper practice is to apply for such security by motion, a rule taken under Rule of Court XIV. applying to common law actions will not be discharged. (C. P.) Smoot *v.* Harrah, 147.

See ORPHANS' COURT.

COUNCILS. Members of, in cities of first-class, election of, for unexpired term.

See MUNICIPAL CORPORATION.

COUNTY TREASURER. The decision of auditors appointed under the Act of 15 April, 1834, to settle the accounts of a county treasurer is final unless appealed from within the time provided for in that Act. Siggins *v.* Commonwealth, 336.

COURTS, jurisdiction of. The Circuit Court of the United States has jurisdiction of a suit by a citizen of Pennsylvania against a foreign insurance company upon whose resident agent appointed under the Act of 4 April, 1873, service of the original process was made by the marshal. (U. S. Sup. C.) Schollenberger *v.* Ins. Co., 405.

The jurisdiction of the Common Pleas in equity to declare void an assignment of an interest under a will obtained by fraud from a legatee by the executrix, is not affected by the fact that the legatee had previously petitioned the Orphans' Court for a citation to compel the executrix to file an account. The proceeding in equity is against the executrix individually; that in the Orphans' Court in her representative capacity. McMurray *v.* Davis, 305.

While the Common Pleas in equity has jurisdiction to establish the rights of members of unincorporated societies they will not exercise it in cases where the tribunals of the society furnish an adequate remedy, and where no right of property is involved. Bauer's Appeal, 485.

A Judge of the Court of Common Pleas has no power to order the admission of a will to probate. Guthrie *v.* Kerr, 458.

A Court of Common Pleas should not attempt to marshal or distribute the assets of a decedent's estate; such attempt through common law forms is always awkward, cumbrous, and unsafe. The Orphans' Court has

COURTS—*Continued.*
exclusive jurisdiction in such matters. Guthrie *v.* Kerr, 458.

The Oyer and Terminer of a county where one dies who has been murderously assaulted in an adjoining county has jurisdiction to try for murder those who committed the assault. Kehoe *v.* Commonwealth, 81.

The "Oyer and Terminer" is a sufficient description of the Court having jurisdiction of homicide cases. It may be held by an additional law judge in the 25th district elected under the provisions of the Act of 9 April, 1874. Turner *v.* Commonwealth, 497.

Under the road laws of the State relative to Philadelphia the Quarter Sessions has no jurisdiction over a petition of property owners to order the widening of a street on one side thereof. *In re* Chestnut Street, 237.

COVENANT. A railroad company entering upon land may covenant with the owner to re-locate its road on certain contingencies, and is liable in damages for the breach of such covenant. Mine Hill R. R. Co. *v.* Lippincott, 560.

Such a covenant runs with the land, and an action for its breach may be maintained by a lessee who is injured through its breach. Ib.

Covenant upon ground rent deed. See LANDLORD AND TENANT.

Covenants running with the land. See LANDLORD AND TENANT. Conrad *v.* Smith, 402.

CRIMES, CRIMINAL LAW, AND PROCEDURE. Homicide. When a case against one charged with a crime rests upon clear and positive evidence, it seems that evidence of an alibi should be of like character so as to produce a reasonable doubt, but when the evidence of the prosecution is wholly circumstantial evidence of an alibi though not clear should go to the jury to be considered with other matters of defence. Turner *v.* Commonwealth, 497.

What is sufficient evidence of an intention to murder when the deceased is brutally assaulted and dies two days afterwards. Kehoe *v.* Commonwealth, 81.

Insanity as a defence. For an elaborate discussion of insanity as a defence in homicide cases, see charge of LUDLOW, P. J. (Q. S.) Commonwealth *v.* Sayre, 424.

When one accused of murder pleads insanity, the burden of proof is on him to show by satisfactory and clearly preponderating testimony that he really was insane at the time of the homicide, but it is not necessary that the proof of the insanity should be so conclusive as to remove all doubt. Pannell *v.* Commonwealth, 481.

In order to relieve one killing another from the guilt of murder it is not necessary that he should be a frenzied maniac, it is enough that he is not of sound mind. Pannell *v.* Commonwealth, 481.

Evidence. Testimony that one accused of murder is a member of an extensive secret organization which had for its object the commission of crimes, chiefly beatings, arsons, robberies, etc., is admissible. Hester *v.* Commonwealth, 213.

A confessed accomplice in a murder is a competent witness to fasten participation in the crime upon a prisoner, even though such accomplice had been convicted previously of larceny, and the period of his sentence had not expired, if it appears that he has been pardoned by the Governor, and the Court will not permit inquiry to be made whether in obtaining the pardon the rules of the Board of Pardons have been complied with. Hester *v.* Commonwealth, 213.

Those jointly indicted for the same offence, but to whom separate trials have been granted, are not competent witnesses for each other. Kehoe *v.* Commonwealth, 81.

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CRIMES, CRIMINAL LAW, AND PROCEDURE—*Continued.*

A trial and conviction in the Quarter Sessions for an offence exclusively triable in the Oyer and Terminer is void, and does not disqualify him convicted from being a witness in another case. Hester *v.* Commonwealth, 213.

Burglary. One who by artifice or fraud induces the occupants of a dwelling to open the door at night, and after entering assaults the occupants and robs the premises, is guilty of burglary. An entry under such circumstances is a constructive breaking. Johnston *v.* Commonwealth, 49.

The opening of an inner door of a dwelling-house at night with intent to commit a felony in the house constitutes a sufficient actual breaking to sustain a conviction under an indictment for burglary; *aliter*, if the door is opened only for the purpose of escape. Rolland *v.* Commonwealth, 53.

The Act of 22 April, 1863, was not intended to affect the offence of burglary at common law, but to define a new offence, viz., breaking by day, or entering either by day or night without breaking, into a dwelling-house, and also to apply to a class of buildings not the subject of burglary at common law. Ib.

Forgery. An indictment for forgery in which the accused is charged with the fraudulent alteration of the stub of a check book left in his custody by the owner, without showing how such alteration caused damage to the owner, cannot be sustained. Commonwealth *v.* Mulholland, 208.

Continuing offence. There is no such thing in law as a continuing offence, and where an indictment charged a conspiracy to have been formed more than two years prior to the finding of the indictment, with an averment of continuance and renewal of the conspiracy up to a period within the two years, it is defective. Commonwealth *v.* Bartilson, 177.

Other matters. Where a prisoner is found guilty under two counts of an indictment, one charging a greater, the other a lesser crime, but for the same offence, it is error to sentence the prisoner under both counts, since the lesser offence is merged in the greater. But the error being purely technical, can be corrected in the Supreme Court, and a new trial will not be granted. Johnston *v.* Commonwealth, 49.

Pending a certiorari or writ of error, whether the accused shall be held to bail is within the sound discretion of the Court, and not reviewable in the Supreme Court; but where there is a question of serious doubt upon the law, and the District Attorney declares an intention of taking the case up, it is the better course to hold the defendant to bail pending such removal. Commonwealth *v.* Bartilson, 177.

A *nolle prosequi* upon an indictment for murder will not bar a subsequent indictment for the same offence. Hester *v.* Commonwealth, 213.

Quære. Whether a discharge under the tw erm rule is a bar to a subsequent indictment. Ib.

Where one is indicted for murder of an illegitimate child of his daughter, it is error to permit the daughter to testify that her father had committed a rape upon her, even though the prisoner to discredit the daughter's testimony had offered testimony to show that she had previously charged him with rape without murder. Snyder *v.* Commonwealth, 397.

Where the prisoner has offered evidence good character, it is error to permit evidence showing specific acts of cruelty to his family. Ib.

In a capital case, even though the general tenor of the charge is correct, if the Judge, upon any material question, give an instruction which is likely to be misunderstood to the disadvantage of the prisoner, a new

CRIMES, CRIMINAL LAW, AND PROCEDURE—*Continued.*

trial will be granted. Pannell *v.* Commonwealth, 481.

But in a trial for burglary a strong expression of opinion by the Court upon the facts which does not amount to a binding instruction, is not a ground for reversal. Johnston *v.* Commonwealth, 49.

Where a man assaulted feloniously in one county dies two days after in another, his assailant may be tried for murder in the county where the deceased died. Kehoe *v.* Commonwealth, 81.

CUSTOM. See INSURANCE. Girard Life Ins. Co. *v.* Mutual Life Ins. Co., 173. BANKS AND BANKING. Citizens' Bank *v.* Wiegand, 12. EVIDENCE. Gingrich *v.* Hamaker, 488.

DAMAGES, MEASURE OF. In an action against the sheriff for trespass, where the damages are excessive, a new trial will be granted. (C. P.) Suydam *v.* Elliott, 317.

In an action for tortiously flooding the plaintiff's mine, the defendant is liable for the loss of profits to the plaintiff, which are susceptible of computation and definite ascertainment. (U. S. C. C.) Prevost *v.* Gorrell, 149.

Where a railroad company enters upon coal land with a covenant to re-locate its road whenever the land-owner desired to mine the subjacent coal, the measure of damages in an action for breach of this covenant is the value of the coal necessarily left standing at the time of breach, and a verdict so rendered in solido may be apportioned by the jury between the land-owner and a lessee of the mining rights. Minehill R. R. Co. *v.* Lippincott, 560.

In an action by a tavern-keeper against the city of Philadelphia for failing to keep a bridge in repair, whereby travel was diverted from his house, the Court, upon demurrer to the declaration, refused to say that the damages were too remote. (C. P.) Brandt *v.* Philadelphia, 234.

The measure of damages for failure to deliver stock according to contract is the same as in the case of any marketable commodity, except when the stock is of such small quantity as not to have a market value, or a trust relation exists between the parties, in which case the damages may be computed according to the rule stated in Bank *v.* Reese (2 Casey, 143). Huntingdon and Broad Top R. R. Co. *v.* English, 354.

In an action against an insurance company for refusing to deliver a paid-up policy, the burden of proof is on the plaintiff to show that he has suffered actual damage, and in the absence of such proof he cannot recover more than nominal damages. (C. P.) Price *v.* Ins. Co., 250. See CONTRACT. ROADS, HIGHWAYS, AND BRIDGES.

DEBTOR AND CREDITOR. Assignment for the benefit of creditors. Real estate and personal property assigned for the benefit of creditors remain liable to taxation as if no assignment had been made, and the personal property, while it remains on the real estate, may be distrained and sold for taxes assessed against the real estate before as well as after the assignment. Wright *v.* Wigton, 28.

Preference by debtor. Apart from the Bankrupt Act, it is not fraudulent or illegal for an insolvent debtor to confess a judgment to his son for a debt really due. Brown's Appeal, 394.

A debtor's passive non-resistance to an action, though he may be insolvent in contemplation of the Bankrupt Act, is not per se a fraud under the Act. Louchheim *v.* Henzey, 552.

A sale under an execution is not invalidated by the

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DEBTOR AND CREDITOR—*Continued.*
mere fact that some of the goods sold were brought within reach of the execution a short time before the sale, which was closely followed by the filing of the petition in bankruptcy. Ib.

Trust. Money held by a commission merchant in a fiduciary capacity requires no earmark, and a fund will be followed in equity through any number of transmutations, and preserved for the true owner. A deposit by a factor in bank of funds in his own name does not change the property in the funds. (O. C.) Cox's Estate, 474.

DECEDENTS' ESTATES. The Orphans' Court has exclusive jurisdiction over all questions relating to the marshalling and distributing of the assets of a decedent's estate. Guthrie *v.* Kerr, 458.

The promise to an administrator to pay a claim against a decedent's estate is not admissible as evidence to prove the validity of the claim. (O. C.) McFarland's Estate, 567.

Contracts of decedents. Specific performance. A petition to the Orphans' Court to compel the specific performance of a contract of the decedent relative to real estate is in the nature of a bill in equity, and governed by the same equitable principles. Where the title to the estate to be conveyed is subject to certain unreasonable conditions, which were unknown to the parties at the time of entering into the agreement for purchase, specific performance will not be enforced. (O. C.) Anders's Estate, 78.

Claim for services against. Where a man of very dissipated habits gives to his boarding-house keeper, in consideration of special attention, an order upon the trustees of his estate for $2000, though such order does not make trust funds which were covered by a spendthrift-son trust liable for the debt, the order is admissible in the Orphans' Court against the estate of the spendthrift after his decease as evidence of a contract to pay so much money. Newton's Appeal, 521.

Lien of debts on land. The presentation and proof of a claim in a decedent's estate before an auditor does not constitute an "action" within the Act of February 24th, 1834, and accordingly does not extend the lien on the decedent's real estate. Craig's Appeal 243.

Personalty, when liable for mortgage. The purchase of real estate "under and subject to the payment of a mortgage," without other evidence of an assumption of payment, does not make the personal estate of the purchaser after his decease liable for the payment of the mortgage. (O. C.) Moore's Estate, 366.

Debts of decedents. A petition for the sale of real estate for the payment of the debts of a decedent is radically defective, unless it contain a schedule of all the real estate of which the decedent died seised. (O. C.) Eddy's Estate, 568.

A judgment creditor of an heir, whose judgment is obtained prior to the inheritance of the property, has no status in the Orphans' Court to ask that a sale of the real estate for the payment of debts of the decedent ancestor should be set aside. (O. C.) Gheen's Estate, 319.

Though an order of sale be made within the statutory period, and successive appeals taken by the devisee to the Supreme Court be dismissed, if the sale is made after five years from the decedent's death, it will be set aside on petition of the purchaser with the concurrence of the devisee. Craig's Appeal, 243.

A decedent's estate is severally responsible for the debts of an unincorporated association of which he was a member. (O. C.) Thomson's Estate, 14.

DECEDENTS' ESTATES—*Continued.*
When a creditor of a decedent's estate begins the proof of his claim before an auditor appointed to take proof of debts, but subsequently abandons his case before the auditor, and files a bill in equity to establish his claim in the United States Circuit Court, the Orphans' Court will not delay distribution of the decedent's estate until the end of the equity suit. (O. C.) Thomson's Estate, 14.

Executors and Administrators, rights, duties, and liabilities of. Letters testamentary granted to an executor, who subsequently became financially embarrassed and likely to become insolvent, will be vacated. (O. C.) Edwards's Estate, 431.

Those interested in a decedent's estate are entitled to have it administered by one whose interests are not adverse to theirs. The secretary of a corporation, who induces the widow of a decedent to renounce in his favor her right to administer upon the estate of her husband, will be removed if he refuses to prosecute against the company a claim as requested by the decedent's family. Kellberg's Estate, 504.

An executor who, in good faith and under legal advice, carries on the business of his testator, which is found in a very embarrassed and complicated condition, will not be held responsible for the failure to realize the inventoried price of the personalty. (O. C.) Bowker's Estate, 493.

The Orphans' Court in their discretion may permit executors to extend the time for the payment of bonds due the estate. (O. C.) Tasker's Estate, 477.

An administrator who has paid over money to a distributee, in accordance with a decree of the Orphans' Court, will be protected against loss by reason of a subsequent opening and change of the decree. Stewart's Appeal, 135. (O. C.) Charlton's Estate, 456.

A purchase at a public sale, after due advertisement of assets of a decedent's estate by the son of an executor, is neither fraudulent or illegal. (O. C.) Bowker's Estate, 493.

An executor who purchases assets of his testator's estate at his own sale is guilty of a legal fraud, and though the price paid be a fair one, he holds the property as trustee for those interested in the estate. (O. C.) Peters *v.* Kerper, 523.

Who entitled to citation for an account. When executors do not file an account within one year after the grant of letters testamentary, one who alleges himself to be a creditor of the estate is entitled to a decree for an account, and at this stage of the proceedings the court will not consider the validity of the claim. (O. C.) Wistar's Estate, 128. (O. C.) Toner's Estate, 386.

Widow's claim. Where the interests of creditors or residuary legatees may be affected, the delay of a widow to claim her $300 exemption until more than a year after the decease of her husband will bar her claim, but where no such interests intervene, such delay will not be a bar. (O. C.) Hurley's Estate, 101.

A widow will be permitted to take $300 of the proceeds of real estate of her deceased husband sold to pay his debts, where the personal estate is insufficient to pay such debts, though in amount more than $300. Her delay in presenting a petition for this allowance until after an application for the sale of the real estate will not bar her right in a case where no delay is thereby caused in the sale. (O. C.) Rank's Estate, 555.

The acceptance of a legacy under her husband's will does not prevent a widow from claiming $300 provided for her by the Act of 14th April, 1851. (O. C.) Hurley's Estate, 101.

Real estate appraised at a greater value than $600, though subject to an incumbrance which reduces it

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DECEDENTS' ESTATES—*Continued.*
below that amount, will not be set apart for a widow. (O. C.) Toner's Estate, 387.

Allowance to minors. An allowance for a minor child will not be granted out of a decedent's estate within one year from his decease, and where no administration account has been settled. (O. C.) Friedlinger's Estate, 405.

Power of mother to appoint guardian. Though a mother has no power by will to appoint a guardian of her minor child, where one is appointed guardian by will, the evident intention of the testator being to appoint a trustee, the appointment will be considered as that of a trustee, and the funds in his custody will not be transferred to a guardian chosen by the minor. (O. C.) Colehower's Estate, 343.

Ancillary administration. Though in the exercise of a wise discretion, the Orphans' Court may order the transfer of assets collected in this State to an ancillary administrator appointed in Maryland, such administrator cannot demand such transfer. (O. C.) Cox's Estate, 474.

The Courts of this State have no jurisdiction in an action by a non-resident against a foreign administrator having no assets in the State. Magraw *v.* Irvin, 557.

A pledge by an executor for his private debt, of securities of the estate standing in the name of his testator, passes no title to the pledgee. (C. P.) Wood *v.* Ellis, 427.

Collateral inheritance tax. The collateral inheritance tax is payable on a bond executed by a decedent, and made payable at his death. (O. C.) Thomson's Estate, 14.

A collateral inheritance tax is payable on an annuity. For the method of its computation, see Thomson's Estate, 14.

Distribution. It is the duty of executors to pay legacies out of the personalty if sufficient; if insufficient and a power of sale to pay legacies is given, they ought to sell the real estate. *Quære.*—Whether the Orphans' Court upon petition would compel executors to make such sale. (O. C.) Smyth's Estate, 103.

An executor who is also a legatee may, by assenting to his own legacy, vest the thing bequeathed in himself in the capacity of legatee. What is sufficient evidence of such election. (O. C.) Hanbest's Estate, 429.

An executor who is also residuary legatee may, subject to the rights of creditors and legatees, apply moneys coming to his testator's estate to his own use, and his individual receipt to his testator's debtors will be a valid discharge of such debts. (O. C.) Winpenny's Estate, 512.

Commissions. Although a certain percentage on the amount of an estate is often a convenient and fair method of computing the compensation of executors or trustees, the real inquiry in every case should be, what have the services rendered really been worth. Montgomery's Appeal, 345.

For settling an estate of $42,000, where there was no trouble or responsibility, $500 was deemed sufficient compensation for a trust company. Ib.

The fact that trustees under a will have already received commissions upon a fund, as executors of the testator, does not preclude them from charging a commission upon income collected by them as trustees. Sharkey's Appeal, 534.

Five per cent. upon the income of $30,000 Philadelphia City 6's is not excessive. Sharkey's Appeal, 534.

Where the labors and responsibilities of an administratrix are shown to be of an extraordinary character, a compensation beyond the ordinary rate will be given. This may be done by the award of a gross sum; in this

DECEDENTS' ESTATES—*Continued.*
case ten per cent. was allowed. (O. C.) Cox's Estate, 474.

The payment of income by a trustee to a *cestui que trust* for a term of years without deducting any commission does not estop the trustee from claiming a commission upon the settlement of his account, in the absence of an express agreement to waive commissions. Wister's Appeal, 373.

A tenant in common of real estate, in the absence of an express agreement, is not entitled to a commission for the sale of the joint estate. (O. C.) Thomson's Estate, 14.

An executor by agreement with those interested in an estate may become entitled to a stipulated salary for managing an embarrassed estate in addition to the usual commissions of an executor. (O. C.) Bowker's Estate, 493.

Attachment execution against executors as garnishees. See EXECUTION. Downing's Estate, 544.

DECEIT. An action of deceit will not lie against one who erroneously, but in good faith, represents another to be solvent. Duff *v.* Williams, 419.

DEED. A deed executed, but not delivered, is admissible in evidence in an action to enforce specific performance of a parol contract for the sale of land, as tending with other facts to prove the existence of the contract of sale. Hart *v.* Carroll, 376.

DEMURRER. See PLEADING.

DEPOSITIONS. See PRACTICE.

DESCENT. See INTESTATE.

DEVISE. See WILLS.

DIRECTORS. See CORPORATION.

DISCONTINUANCE. See PRACTICE.

DIVORCE. An issue in the discretion of the Court may be awarded in proceedings for a divorce even after a reference to and meetings before an examiner, but it will be made conditional upon the payment of examiner's costs. (C. P.) Fougeray *v.* Fougeray, 38.

DOMICILE. A man's domicile is the place in which he has fixed his habitation without any present intention of removing therefrom. Hindman's Appeal, 347.

DONATIO MORTIS CAUSA. See GIFT.

DOWER. See HUSBAND AND WIFE.

DYING DECLARATIONS. See EVIDENCE. Kehoe *v.* Com'th, 81.

EASEMENT. A right of way cannot be enlarged or altered to uses not contemplated by the parties at the time of its creation. Carty *v.* Shields, 241.

EJECTMENT. In ejectment the plaintiff must show title out of the Commonwealth unless he can prove thirty years' continuous possession. Sherwood *v.* Sumne, 357.

See EXECUTION, McLaughlin *v.* McLaughlin, 515; LIMITATIONS, STATUTE OF; FRAUDS, STATUTE OF, Hart *v.* Carroll, 376; LAND LAW; TAXES AND TAXATION.

ELECTION. See DECEDENTS' ESTATES. Hanbest's Estate, 429. See WILLS. Lydia Smith's Appeal, 56.

ELECTION LAW. Qualification of electors. Payment of a tax within thirty days of an election is inoperative to qualify a voter. (Q. S.) Connolly's Case, 8.

Inmates of the almshouse who do certain work about the place, and are accorded certain privileges in return for their work in addition to being supplied with food, lodging, and clothing, are not qualified voters. Murray's Case, 9.

Ballots. Ballots for a candidate for district surveyor printed on ward tickets are regular, and should be counted. (Q. S.) Johnson's Case, 249.

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ELECTION LAW—*Continued.*

Other matters. Art. VIII. § 7, of the Constitution requiring uniform election laws does not, without further legislation, repeal the Act of 6 April, 1868, establishing in Luzerne and Wyoming counties the single ticket system instead of the flag system ticket of voting which prevails elsewhere in the State. Wright *v.* Barber, 444.

Parol evidence is admissible to show that ballots cast for *Simon* Marburger and *Samuel* Marburger were intended for the same person, Simon M. being frequently known as Samuel M. Marburger's Case, 379.

Pending a contested election it is improper to issue a commission to the candidate returned as elected, and the incumbent in office at the time of the election contested holds over until the question of who was legally elected is determined. Barber's Case, 350.

Vacancies in the Philadelphia Councils should be filled at the next general election, when the one elected holds office for the unexpired term of his predecessor. Brooke *v.* Commonwealth, 416.

The respondent in a contested election case is entitled to receive from the petitioner a bill of particulars. Whitehouse *v.* Schalck, 122.

A promissory note given by third parties to a candidate for public office in consideration of his withdrawal from the election is void even though the amount of the note be not more than such candidate has actually paid out for election expenses. Ham *v.* Smith, 390.

EMINENT DOMAIN. See CONSTITUTIONAL LAW; ROADS, HIGHWAYS AND BRIDGES.

EQUITABLE ASSIGNMENT. An order drawn by a *cestui que trust* upon a fund held under a spendthrift-son trust, though given for a valuable consideration is inoperative as an equitable assignment. Newton's Appeal, 521.

EQUITY. Injunction. A complainant who shows no special injury and does not allege irreparable damage is not entitled to an injunction to restrain proceedings at law. Olmsted's Appeal, 258.

An execution at law will not be enjoined to await the determination in equity of an account claimed to be a set-off to the judgment upon which execution has issued, unless in a case where fraud is shown, or in a case where the execution plaintiff is insolvent. (C. P.) Laughlin *v.* Finley, 144.

Injunction to restrain execution at law, when erroneous. Rapp *v.* Hains, 489.

The Gas Trustees of Philadelphia have full power to make reasonable regulations concerning the form and attachments of meters. One who attached a patent "regulator" to a meter in violation of these rules, has no standing in a court of equity to obtain an injunction restraining the trustees from removing the attachment. (C. P.) Foster *v.* Philadelphia, 269.

The word "Lithogen" may be appropriated as a trade-mark, and after such appropriation, its unlawful use will be enjoined. (C. P.) Wehn *v.* Krause, 272.

One who takes title to real estate to hold for an unincorporated society until a charter has been obtained, will be compelled, at the suit of the corporation, to make transfer of the title, even though in his answer the defendant alleges an indebtedness to him from the corporation. (C. P.) Fourth Parish *v.* Wensley, 273.

Equity has jurisdiction of the settlement of accounts between the part owners of a ship. (C. P.) Endsor *v.* Simpson, 232.

Subrogation. When a decedent pledged stock in a life insurance company, upon which seventy-five per cent. of the par value had been paid in, as collateral for a loan, and after his death out of the proceeds of a policy on his life the insurance company retain the

EQUITY—*Continued.*

remaining twenty-five per cent., the pledgee is only entitled to 75 per cent. of the proceeds of the stock, the balance belongs to the decedent's estate. Myers *v.* Scully, 307.

Subrogation does not arise in favor of a stranger who voluntarily pays a debt, but only in favor of one who on some sort of compulsion discharges a demand against a common debtor. Webster's Appeal, 486.

Subrogation is a purely equitable right and will not be allowed where it will work injustice to the rights of others. Ib.

Receiver, when appointed. A receiver pendente lite will be appointed to take the custody of a fund admitted by the agent of an insurance company to be in his possession, but against which he claims to set off damages from the loss of prospective salary and commissions caused by his illegal dismissal from his agency, in a case where the plaintiff shows probable peril to the fund if left in the hands of the agent. (U. S. C. C.) Union Ins. Co. *v.* Kellogg, 477.

In such case no individual is necessary as receiver, the fund will be ordered into the registry of the court. Ib.

Ne exeat regno, writ of, when granted (U. S. C. C.) Ins. Co. *v.* Kellogg, 477.

Equity practice. It is improper practice for a court to dismiss a bill in equity before an answer or demurrer is filed upon a hearing upon the bill and affidavits on a motion to continue a preliminary injunction. Buck Mt. Coal Co.'s Appeal, 309.

In Philadelphia County a bill for the dissolution of a partnership does not need the certificate of counsel provided for in the Act of 13 October, 1840, § 19, that the case is of such a nature that there is no adequate remedy at law. (C. P.) Bachman *v.* Einhorn, 250.

A non-resident plaintiff in equity can be compelled to give adequate security for costs, but the proper mode of accomplishing this is by formal motion, and not by a rule of course under Rule of Court XIV., which applies solely to common law actions. (C. P.) Smoot *v.* Harrah, 147.

After an examiner has filed his report, his functions are at end and he has no power to take further testimony without a special order of the court. (C. P.) Kressler *v.* Williams, 97.

When a bill in equity shows a substantial ground of relief an amendment in form will be permitted even after the case is heard in the Supreme Court. Darlington's Appeal, 529.

ERRORS AND APPEALS. What the subject of. A writ of error will lie in all cases where a court of record has given a final judgment or made an order in the nature of a final judgment. The setting aside a sale of personal property is a final order or decree, and therefore reviewable in error. Mackaness *v.* Long, 374.

An appeal to the Supreme Court does not lie from a decree of the Quarter Sessions in the matter of opening or widening a street or road. Certiorari is the only method of bringing up the record. *In re* Chestnut Street, 239.

An appeal does not lie to the Supreme Court from an order of the Common Pleas taxing costs. McCauley's Appeal, 316.

When an auditor reports facts directly proved by the witnesses his report is entitled to great weight, but when he reports deductions from such facts, such deductions are subject to review by the Supreme Court, and will be corrected if error be discovered. Hindman's Appeal, 547.

An order setting aside a sheriff's sale of real estate before the acknowledgment of the deed is a matter

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ERRORS AND APPEALS—*Continued.*
within the discretion of the Court below, and when granted upon the application of one interested in the estate will not be reviewed. Connelly *v.* Philadelphia, 161.

The refusal of the Orphans' Court to set aside a sale of real estate because of inadequacy in the price obtained at the sale will not be reviewed. It is a matter within the discretion of the Court, and even though that discretion in the opinion of the Supreme Court has not been wisely exercised, it will not interfere unless the record shows palpable and gross abuse of the discretion. Bowers's Appeal, 257.

The refusal of the Court of Quarter Sessions to hold the accused to bail pending a writ of error by the Commonwealth will not be reviewed. But where there is a doubtful question of law in the case it is better that the accused should be held to bail. Commonwealth *v.* Bartilson, 177.

When the parties without remonstrance go to the jury on an issue of fact raised by the evidence, the Supreme Court will not reverse because the issue was not made in the pleadings. Mathias *v.* Sellers, 518.

What sufficient error. In a capital case even though the general tenor of the charge is correct if the Judge give an instruction on any material question which is likely to be misunderstood by the jury to the disadvantage of the prisoner, a new trial will be granted. Pannell *v.* Commonwealth, 481.

But in a trial for burglary it is not error for the Judge to give a strong expression of opinion upon the facts which in connection with the entire charge did not amount to a binding instruction but left the question to the jury. Johnston *v.* Commonwealth, 49.

In a capital case the prisoner in the discretion of the Court will be permitted to file additional assignments of error at bar. Kehoe *v.* Commonwealth, 81.

Where owing to irregularities or informalities in a record coming up from the Orphans' Court, it is impossible for the Supreme Court to make an intelligent disposition of the case, they will refer the whole case to an auditor, or at their discretion reverse the decree and remit the record for further proceedings. Stewart's Appeal, 135.

Bail in error. New rule of Supreme Court concerning, 81.

ESCHEAT. It is improper to restrain a deputy escheator from proceeding regularly in escheat when the party in possession of the estate can make full defence to the claim of the Commonwealth by traverse to the inquisition. Olmsted's Appeal, 258.

ESTOPPEL. By matters of record. See CORPORATION. Church *v.* Fox, 399.

Against taking advantage of unconstitutionality of Acts of Assembly. See CONSTITUTIONAL LAW. Bidwell *v.* Pittsburgh, 41.

Lapse of time will not prevent a minor, upon coming of age, from filing a bill of review to reopen his guardian's account. (O. C.) Bessinger's Estate, 320. (C. P.) Peters *v.* Kerper, 523.

Corporation, when estopped by acts of officers. (C. P.) Kersey Oil Co. *v.* R. R. Co., 144. Bank *v.* R. W. Co., 290.

See NEGLIGENCE. Penna. R. R. Co.'s Appeal, 22.

EVICTION. See LANDLORD AND TENANT.

EVIDENCE. Cross-examination, scope of. In a capital case great scope should be given to the cross-examination, and where a witness expresses a positive opinion upon any subject it is error to rule out questions tending to show that the witness had not sufficient knowledge of the subject to form an intelligent opinion. Pannell *v.* Commonwealth, 481.

EVIDENCE—*Continued.*

Parol evidence, when admissible. Where a will is proved to have been in existence at the death of a testator, and is afterwards lost or destroyed, its contents may be proved by parol and admitted to probate. Foster's Appeal, 413.

Parol evidence is admissible to show that an entry of satisfaction on a judgment in an alderman's docket was made by mistake. (C. P.) Kollock *v.* Palmer, 474.

Parol evidence is admissible to explain or vary the effect of a written instrument when upon the faith of the agreement resting in parol, the written agreement was executed. Barclay *v.* Wainwright, 163. (C. P.) Robinson *v.* Leahy, 318. (C. P.) Coe *v.* Schenkmeyer, 252.

Parol evidence is admissible to show that a draft was payable only on the happening of a certain contingency, when no time for payment is mentioned on its face. (C. P.) Leary *v.* Meredith, 37.

Parol evidence is admissible to show that the grantee of real estate "under and subject" to the payment of a certain mortgage took it as a dry trustee and that he entered into no agreement to pay the mortgage. Girard Ins. Co. *v.* Stewart, 87.

Parol evidence is admissible to show that the grantee of real estate "under and subject" to the payment of a certain mortgage took it with an express agreement from his vendor that he should not be personally liable for the payment of the mortgage. (C. P.) Girard Ins. Co. *v.* Addicks, 75.

Parol evidence offered to limit the operation of a written agreement to a particular time must be both clear and positive. Shepler *v.* Scott, 223. Chartiers R. W. Co. *v.* Hodgens, 313.

Custom. Evidence of a custom at a bank in discounting a joint and several note to treat the first maker as principal and the second as surety is inadmissible. Gingrich *v.* Hamaker, 488.

Evidence of a custom of trade, however extensive or well established it may be, is inadmissible if such custom is contrary to the policy of the law. (C. P.) Bank *v.* Wiegand, 12.

General Reputation. Evidence of general opinion of the mental condition of one accused of murder, in the neighborhood in which he was born, raised, and lived for many years, is inadmissible to prove insanity. Pannell *v.* Commonwealth, 481.

Evidence of the general good character of witnesses should not be submitted to the jury in the absence of evidence impeaching such character. Turner *v.* Commonwealth, 497.

Hearsay. Although a prisoner has introduced evidence of general good character it is error to admit evidence that his family had frequently been heard to complain of his cruelty toward them. Snyder *v.* Commonwealth, 397.

Evidence that a witness had previously related the same story to other parties *ante litem motam* is admissible after the witness's character for veracity has been impeached. Hester *v.* Commonwealth, 213.

Res gestæ. Statements made by a prisoner to outside parties relative to his return home and surrender into custody cannot be made evidence on the principle of res gestæ. Ib.

Declarations made by one brutally assaulted who died within two days from the effects of the assault are admissible as dying declarations against his assailants when tried for murder. Kehoe *v.* Commonwealth, 81.

Evidence of previous illicit intercourse between the prisoner and the deceased is admissible when it becomes a link in the chain of circumstances connecting the prisoner with the murder. Turner *v.* Commonwealth, 497.

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EVIDENCE—*Continued.*

Experts. In an issue *devisavit vel non* the testimony of medical experts who have had no personal acquaintance with the testator and unaccompanied by the facts upon which their testimony is based is of little value. (O. C.) Palmer's Estate, 542.

The testimony of medical experts upon questions of insanity is of great value in criminal cases, and when competent experts have testified intelligently, the Court should not tell the jury that they doubt whether much aid will be derived from the expert testimony. Pannell *v.* Commonwealth, 481.

Competency of Witnesses. Although a plaintiff is not a competent witness in an action against an executor, his affidavit is admissible on a motion to continue a special injunction. (C. P.) Buchanan *v.* Strepler, 289.

Where several persons are jointly indicted and separate trials are awarded, one who has not been tried is not a competent witness for one of the others on trial. Kehoe *v.* Commonwealth, 81.

A convicted felon who has received the pardon of the Governor is a competent witness, and the question of whether the rules of the Board of Pardons have been complied with will not be considered by the Courts. Hester *v.* Commonwealth, 213.

Before the testimony of an accomplice is accepted it should be corroborated by unimpeachable testimony in some material part, but it is not necessary that such corroboration should be by direct testimony. It may be by circumstances which satisfy the jury of the fact. Hester *v.* Commonwealth, 213.

Book Entries. See AFFIDAVIT OF DEFENCE LAW.

A book kept by a clerk under the supervision of his master is admissible to charge the master with rents which he was employed to collect. (O. C.) P. M. Hanbest's Estate, 429.

Other matters. A note given by trustees of a religious corporation for borrowed money is admissible in an action against the corporation even though no express power was given in the charter to issue negotiable paper. Church *v.* Caughey, 421.

Answers of a witness to questions put on cross-examination not connected with the cause or with the parties are not subject to contradiction. Hester *v.* Commonwealth, 213.

A receipt signed "A, by his agent B," is competent evidence of the fact that the agent received the money stated in it. Watson *v.* Grier, 248.

EXAMINER'S FEE. By whom payable. Dyre's Estate, 455.

EXECUTION. Writs of execution in the United States Circuit Court in a State divided into districts run directly from one district into another. (U. S. C. C.) Prevost *v.* Gorrell, 152.

Exemption. Watchmen, messengers, and employés in the sheriff's office are not such disinterested persons as are competent appraisers under the act of 9 April, 1849. (C. P.) Posey *v.* Loutey, 291.

Where an interest in a partnership has been levied on and the defendant claims it is exempt, which claim the sheriff refuses to allow, the Court will not make a peremptory order on the sheriff to allow the claim. (C. P.) Thornton *v.* Hotel Co., 428.

A piano rented is exempt from levy or distress for rent, and a notice given by the owner one day after a distress is in time. (C. P.) Wireman *v.* Ditson, 428.

Effect of staying fi. fa. Where a levy under a fi. fa. has been made on real estate and the writ is then stayed by the plaintiff's attorney, a certified copy of the fi. fa. may afterwards be given to the sheriff upon which an inquisition can be had, and a vend. ex. issued. After an acknowledgment of the sheriff's deed

EXECUTION—*Continued.*

under this execution the regularity of the process for the sale will not be inquired into. McLaughlin *v.* McLaughlin, 515.

When a fi. fa. is stayed by order of Court pending a rule to open a judgment before actual levy, the lien of the execution is lost as against subsequent executions even though the rule to open the judgment be subsequently discharged. Sturges' Appeal, 445.

Inquisition. Where a levy is made upon a life interest in real estate, it is the duty of the jury of inquisition to find the yearly value of the estate. (C. P.) Donahue *v.* Helme, 539.

Although it is not necessary that the face of a sheriff's return to a fi. fa. upon real estate should show that notice of the inquisition was given to the defendant, when the fact of notice is questioned the sheriff should be ready with proof of notice and in the absence of proof that such notice was given a rule to set aside an inquisition will be made absolute. (C. P.) Huddy *v.* Jones, 491.

Interpleader. A married woman, although she has taken the benefit of the Act of 1872 securing her separate earnings, is not competent to give her own bond in a sheriff's interpleader. (C. P.) Ward *v.* Whitney, 492.

The plaintiff in a feigned issue framed under the sheriff's interpleader act assumes the onus of proving his title to the property levied on, and if he fails a non-suit may properly be entered, but where any fair question of fact upon the evidence arises it should be submitted to the jury. Dale *v.* Pierce, 206.

Bail in error upon a writ of error to a judgment upon a sheriff's interpleader issue are only liable for the costs of the feigned issue. Guyer *v.* Spotts, 226.

Attachment-execution. Advances due to the defendant under a contract for a building operation are the subject of attachment-execution, although the buildings have not been completed. (C. P.) Kelly *v.* Snyder, 39.

When the creditors of one entitled to share in the distribution of a decedent's estate attach it in the hands of the executors as garnishees, the Court in distributing will award such distributive share to the attaching creditors and enforce the award by an order to pay. (O. C.) Downing's Estate, 544.

After such award a claim by the defendant for $300 exemption is too late. (O. C.) Downing's Estate, 544.

A seat in the Philadelphia Stock Exchange is not the subject of attachment-execution. (C. P.) Pancoast *v.* Houston, 36.

There is no priority between writs of attachment-execution placed in the sheriff's hands and served on the same day. Baldwin's Appeal, 457.

A defendant is entitled to $300 exemption out of funds attached in the hands of garnishees. (C. P.) Thomas *v.* Born, 362.

A defendant cannot come in and contradict the answers of the garnishees. (C. P.) Cole *v.* Bowden, 296.

A judgment in an attachment-execution in favor of the garnishee is not a bar to a future action upon the same subject matter brought by the defendant in the first action as plaintiff against the garnishee as defendant. Ruff *v.* Ruff, 181.

Sheriff's sale. A Court has no power upon the application of the sheriff after the return day of the writ to set aside a sale of personal property regularly and fairly made where the sheriff has given possession of the property sold to the purchaser, the plaintiff in the execution, and settled with him without receiving cash by crediting the purchase-money upon the writ, though it subsequently appears that there were liens upon the property sold prior to that of the execution

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EXECUTION—*Continued.*
plaintiff. An order setting aside a sale under these circumstances will be reversed by the Supreme Court. Mackaness *v.* Long, 374.

Distribution of proceeds of personalty. The sheriff cannot pay into court the proceeds of a sale of personalty without the permission of Court, which will only be granted when some doubtful question arises concerning the distribution. Where there is no such question, it is the duty of the sheriff to distribute without delay. (C. P.) Marble Co. *v.* Burke, 124.

Where there are conflicting claims for wages and rent on the proceeds of sale of personalty, the sheriff will be permitted to pay the fund into court. (C. P.) Kockenderfer *v.* Fiegel, 404.

Landlord's priority. Where a levy is made on personal property under a number of executions, and the proceeds of the sale are not sufficient to satisfy all, the landlord's claim on the proceeds for rent due is to be reckoned up to the date of the levy made on that execution which was the last to participate in the fund. Leaming's Appeal, 221.

A landlord is entitled to distrain on all property found on the demised premises. Whether it be the goods of the husband or wife is immaterial. Trimble's Appeal, 396.

Sale of real estate, when set aside. Although the Court is of opinion that a mortgage has not been divested by a sheriff's sale, if there is sufficient doubt upon the question to throw a cloud upon the future lien of the mortgage the sale will be set aside, the mortgagee being put upon such equitable terms as the Court in its discretion may direct. (C. P.) Merriman *v.* Richardson, 9.

A sale of real estate may be set aside before the acknowledgment of the sheriff's deed, or during the term of court in which the sale took place, where there is reason to believe that the rights of a lien creditor have been compromised through fraud or mistake. Connelly *v.* Philadelphia, 161.

A lumping sale will not be set aside unless the Court is shown that a better price could be obtained for the properties if sold separately. (C. P.) Hughes *v.* Calvert, 98.

Distribution of proceeds. See EQUITY. Webster's Appeal, 486. BUILDING ASSOCIATIONS. Weiss's Appeal, 423.

Rights of purchasers as landlords. A purchaser at sheriff's sale may maintain use and occupation against the occupant of premises purchased at sheriff's sale, even though the purchaser immediately after the sale gives such occupant notice to quit at the expiration of three months. (C. P.) Building Association *v.* Frisdjen, 318.

EXECUTORS AND ADMINISTRATORS. See DECEDENTS' ESTATES.

EXECUTORY CONTRACT. An action can be maintained upon a contract for services by a servant illegally discharged before the time of service expires, and upon a copy of such a contract being filed judgment will be given for want of an affidavit of defence. (C. P.) Strauch *v.* Land Co., 472.

EXEMPTION. See EXECUTION.
Widows, claim of. See DECEDENTS' ESTATES.

EXPERT TESTIMONY. See EVIDENCE.

FACTORS. Money of a consignor in the possession of a factor who dies insolvent, if traced into the latter's bank account, does not lose its trust quality by the deposit being made in the factor's own name. (O. C.) Cox's Estate, 474.

FALSE REPRESENTATIONS. See DECEIT.

FARM LANDS, Taxation of. See CONSTITUTIONAL LAW. Kelly *v.* Pittsburg, 324.

FEES. See ATTORNEY AND CLIENT. Freeman *v.* Shreve, 246.

Prothonotary's. See CONSTITUTIONAL LAW. Perot's Appeal, 203.

Examiner's, by whom payable. Dyre's Estate, 455.

FEIGNED ISSUE. Under sheriff's interpleader. See EXECUTION.

FEME SOLE TRADER. See HUSBAND AND WIFE.

FINES AND PENALTIES. Action for excluding negro from car. See COMMON CARRIER. Central R. R. Co. *v.* Green, 300.

FOREIGN ADMINISTRATOR. See DECEDENT'S ESTATES. (O. C.) Cox's Estate, 474.

Action against, where cognizable. See DECEDENTS' ESTATES. Magraw *v.* Irwin, 557.

FOREIGN ATTACHMENT. A receiver of a foreign corporation appointed in another State may become plaintiff in a foreign attachment, and thereby acquire a valid lien unless his claim come in conflict with the rights of our own citizens. Bagley *v.* R. R. Co., 263.

Quære.—Whether a foreign corporation can be made garnishee in a foreign attachment. (C. P.) Meylert *v.* White, 342.

FOREIGN INSURANCE COMPANY. Service of process on. See INSURANCE. Schollenberger *v.* Ins. Co., 405.

Effect of local custom on. See INSURANCE. Girard Ins. Co. *v.* Mutual Ins. Co., 173.

FOREIGN JUDGMENT. In an action on a judgment obtained in a court of competent jurisdiction in a sister State, the same faith and credit must be given to it as by law or usage it has in the Courts of the State in which it was entered. (C. P.) Johnson *v.* Dobbins, 537.

Action on. See AFFIDAVIT OF DEFENCE LAW. Hartman *v.* Manufacturing Co., 502.

FORFEITURE. See INSURANCE. Girard Ins. Co. *v.* Mutual Ins. Co., 173.

FRAUD. Constructive. See TRUSTS AND TRUSTEES. Darlington's Appeal, 529.

Even though there be no actual fraud the purchase by a trustee of assets of a trust estate is a legal fraud, and he will be held accountable for all profits derived from the transaction. (C. P.) Peters *v.* Kerper, 523.

An assignment obtained without full disclosure and explanation, by a mother from a daughter, of all interest in her father's estate, will be avoided in equity. McMurray *v.* Davis, 305.

See DECEIT.

FRAUDS AND PERJURIES, Statute of. Where one having a bona fide claim to land, whether valid or not, is induced to rely on the verbal promise of another that he will purchase an outstanding title at sheriff's sale for the benefit of the former, the latter if he refuse to convey such sheriff's title will be regarded in equity as a trustee ex maleficio. Wolford *v.* Herrington, 260.

In order to take a parol contract for the sale of lands out of the operation of the statute of frauds, its terms must be shown by full, complete, satisfactory, and indubitable proof. In addition to which exclusive and continuous possession must have been taken under the contract, and the position of the vendee must be such by reason of his performance of the contract, that he could not be compensated in damages if the same were rescinded. Hart *v.* Carroll, 376.

Parol promise to pay the debt of another. Where one makes a parol promise to pay the debt of another out of funds transferred to the promisor for the purpose, such promise is not within the statute of frauds. Justice *v.* Tallman, 90.

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GAS WORKS. The trustees of the Philadelphia Gas Works have power to make all reasonable regulations concerning the use of gas and form of meters in the houses of citizens. (C. P.) Foster *v.* Philadelphia, 269.

GIFT. Where one upon the point of death hands to his wife a pocket book containing $2800, saying "here, Mom., take this," it does not operate as a gift inter vivos, or a donatio mortis causa of the money. (O. C.) Bowker's Estate, 493.

A paper not executed so as to be a valid will of a married woman cannot be made operative as evidence of a gift, nor will an endorsement upon it by her husband promising to carry out the instructions of the paper render him personally liable. Long's Appeal, 309.

GOOD-FRIDAY. When the twenty days allowed by law for an appeal from a magistrate expire on Good-Friday an appeal taken the day following is in time. Linville *v.* Dalsam, 528.

GOVERNOR. When privileged from subpœna and process. See CONSTITUTIONAL LAW. Hartranft's Appeal, 105.

GRAND JURY. Power of. See CONSTITUTIONAL LAW. Hartranft's Appeal, 105.

GROUND RENT. See LANDLORD AND TENANT.

GUARDIAN AND WARD. The right of a minor over the age of fourteen years to choose a guardian is absolute, and is not lost by a mere statement made upon reaching that age of satisfaction with a previously appointed guardian. (O. C.) Lewry's Estate, 475.

Although a mother cannot by will appoint a guardian for her minor children, where property is by her will left to one styled guardian but whose duties are in reality those of trustee, the Court will not require him to surrender possession of the trust estate in his hands to a guardian chosen by a minor. (O. C.) Colehower's Estate, 343. See ESTOPPEL.

HEIRLOOMS. Family pictures. Moseley's Estate, 102.

HIGHWAY. Liability of owners of property adjacent to, for nuisance on. See NEGLIGENCE. Harrison *v.* Collins, 464.

See ROADS, HIGHWAYS, AND BRIDGES.

HOLIDAY, Public. See GOOD-FRIDAY.

HUSBAND AND WIFE. A relation between a man and woman shown to have been illicit at the commencement is presumed to continue so until proof of change, and such relation raises no presumption of marriage. Hunt's Appeal, 333.

Cohabitation and reputation are not marriage, but merely circumstances from which a marriage may be presumed; this presumption may be rebutted by proof that no marriage in fact ever took place between the parties. Hunt's Appeal, 333.

The issue of a marriage void by the laws of the State in which it takes place being illegitimate are illegitimate in Pennsylvania. Smith *v.* Thornton, 372.

Rights and liabilities of husband. A husband is not liable on a note given by his wife for the purpose of carrying on trade, even though the goods were purchased with his approbation; it must be shown that the note was issued by his authority. (C. P.) Morgan *v.* Ludecker, 491.

A promise made by the debtor of a deceased wife to her husband before he had taken out letters of administration is sufficient to toll the running of the statute of limitations. Keely *v.* Wright, 241.

In all contracts made between husband and wife, the burden of proof is upon the husband to show the utmost good faith on his part, and to establish the perfect fairness, adequacy, and equity of the contract. If this is not proved, any contract between husband and wife will be avoided. Darlington's Appeal, 529.

HUSBAND AND WIFE—*Continued.*

Conclusiveness of magistrate's certificate. Where the rights of innocent purchasers have not intervened, a certificate by a magistrate of a married woman's acknowledgment of a conveyance of her separate estate is not conclusive when her heirs attack the conveyance upon the ground of fraud and undue influence exercised over her by her husband. Darlington's Appeal, 529.

Dower. The Orphans' Court have jurisdiction in partition upon the petition of a widow to order a sale of her husband's real estate, though there be but one heir. Steel's Appeal, 503.

Rights of wife. A husband can sue in the right of his wife in covenant upon an agreement under seal, executed by his wife and the defendant, although he was not a party to the instrument, but signed as a witness. (C. P.) Linden *v.* Kelly, 527.

Disabilities and liabilities of wife. Mechanics' lien against estate of married woman, when valid. (C. P.) Atkinson *v.* Schuyler, 448.

The chattels of a wife on premises demised to her husband are subject to distress by the landlord. Trimble's Appeal, 396.

A married woman who has taken the benefit of the Act of 3 April, 1872, does not thereby become a feme sole trader, nor is her capacity to make a binding contract thereby increased. (C. P.) Ward *v.* Whitney, 492.

The right of a married woman to make a will of her separate estate rests upon statute, and its provisions must be strictly complied with. Long's Appeal, 309.

How far bound by submission to arbitration. See ARBITRATION. Darlington's Appeal, 529.

See DIVORCE.

Illegitimates. The Act of 27 April, 1855, merely enables illegitimate children to inherit from their mother, or the mother from the children. It does not legitimate bastards. Hence, one illegitimate cannot inherit from an illegitimate brother or sister. Woltemate's Appeal, 380.

IMPROVEMENT LEASE. What constitutes. See MECHANICS' LIENS. Barclay *v.* Wainwright, 162.

INFANTS. Although a mortgage given by an infant is voidable, the privilege is a personal one, and where the infant waives his right to avoid the instrument, the terre tenant cannot take advantage of his infancy. (C. P.) Love *v.* Dobson, 359.

See GUARDIAN AND WARD, PARENT AND CHILD.

INJUNCTION. See EQUITY.

To restrain corporation from mortgaging its franchises. See CORPORATION. Kemble *v.* P. R. Co., 172.

To restrain collection of tax. See TAXATION. Bank *v.* Reese, 344. Allen *v.* Luzerne, 229

INNKEEPER. See BAILMENT.

INSANITY. See CRIMES, CONTRACT, INSURANCE.

INSOLVENTS. A bond given by an insolvent debtor is forfeited unless he be discharged at the next term of court, or show a regular continuance of his case. (C. P.) Kindt *v.* McDonald, 38.

INSURANCE, Fire. Original process in a suit by a citizen of Pennsylvania against a foreign insurance company may issue out of the United States Circuit Court, and be served upon a resident agent appointed under the Act of 4 April, 1873. (U. S. Sup. C.) Schollenberger *v.* Ins. Co., 405.

A policy taken out in good faith upon property to which the insured believes he has a good title is not vitiated by want of insurable interest, by proof that

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INSURANCE—*Continued.*
the title of the insured was bad. Ins. Co. *v.* Robinson, 389.

A clause in a policy that the amount of loss shall on request be ascertained by arbitrators, and that no suit shall be brought until after award made, is not a bar to a suit on the policy for the loss, even though an arbitration is pending. (U. S. Sup. C.) Schollenberger *v.* Ins. Co., 360.

A condition written on the back of a policy of insurance, though unsigned, is binding upon the insured, if reference be made thereto in the body of the policy. Kensington Bank *v.* Yerkes, 159.

A policy with a condition that should, at any time, an incumbrance fall or be executed upon the property insured, sufficient to reduce the real interest of the insured to a sum below the amount insured, is vitiated by the confession of a judgment greater in amount than the value of the property, though no execution ever issued upon such judgment. Ib.

Life. A policy of life insurance, providing that it should become void if the insured should die by suicide, is not avoided by the self-destruction of the insured when insane, though intending to take his own life, and conscious that death would result from his act. Ins. Co. *v.* Groom, 433.

When a general dividend upon policies has been declared by a life insurance company sufficient in amount to cover an accruing premium, the company cannot enforce a forfeiture of the policy for a non-payment of the premium in cash, even though the exact amount of such dividend to be apportioned on each policy has not been ascertained at the time of default. Girard Ins. Co. *v.* Mutual Ins. Co., 173.

An insurance company, whose custom it was to send a notice to the insured of premiums as they accrued, and to receive premiums within thirty days after falling due, if the insured continued in good health, cannot, by omitting to send notice, whereby the insured failed to tender his premium until the day following its maturity, declare the policy forfeited. Ib.

Where a policy has been improperly declared forfeited, it is not incumbent upon the insured to make tender of the subsequent accruing premiums. Ib.

A foreign insurance company doing business here by a resident agent is bound by the customs of the place, as much as if their principal office was located here. Ib.

A mutual company, issuing a policy upon the receipt of a promissory note from the assured for the amount of the first premium, is not liable upon the policy in the event of the non-payment of the note at maturity. Kerns *v.* Ins. Co., 134.

A recital of the payment of premium in the policy is of no effect when the fact is shown to be otherwise. Ib.

In an action against an insurance company for refusal to deliver a paid-up policy, the plaintiff is only entitled to recover such damages as he has actually suffered. Price *v.* Ins. Co., 250.

INTEREST. See LEGACIES, USURY.

INTERPLEADER. See EXECUTION.

INTESTATE LAW. An estate of inheritance in real estate cannot pass to one who is not of the blood of the first purchaser. A devisee under a will who also would be entitled to the land under the intestate law is not a *propositus* from whom a new line of descent begins. (O. C.) Eckert's Estate, 451.

A sale in partition does not work a conversion of the proceeds of the real estate into personalty, but upon a second descent it is to be distributed as personalty. Ib.

An adopted child is not entitled to inherit from the adopted parent land which has been devised to such

INTESTATE LAW—*Continued.*
parent by an ancestor, whose heir the parent would have been under the intestate laws. The rule that only he who is of the blood of the first purchaser can inherit, enforced and applied. (C. P.) Johnson *v.* Whiteall, 31.

See ILLEGITIMATES. Woltemate's Appeal, 380.

ISSUE. Devisavit vel non, when awarded. See WILL, EXECUTION.

JOINT AND SEVERAL CONTRACT. Where a bond is joint and several the obligee can sue either obligor without joining the other, and hence an indebtedness arising out of such a bond may be set off by the obligee in an action against him by one obligor upon an independent transaction. Domestic Sewing Machine Co. *v.* Saylor, 287.

JOINT DEBTORS. Where one of two joint debtors is released in Indiana for a debt contracted in Pennsylvania, the other cannot set up such release as a discharge of the debt in an action brought in Pennsylvania, although in Indiana a release of one joint debtor operates as a discharge of the other. Greenwalt *v.* Kaster, 140.

JOINT OWNERS OF VESSELS. Relationship between. See SHIPS AND SHIPPING.

JOINT TENANTS. The Act of 31 March, 1812, abolishing survivorship in joint tenancy applies to legacies as well as devises. Yard's Appeal, 175.

JUDGMENT. Scire facias upon, when in time to preserve lien of. Reynolds's Appeal, 184.

A judgment against an heir obtained before the death of the ancestor is not a lien upon the heir's interest in the land. (O. C.) Gheen's Estate, 319.

Where a State is divided into districts of the United States Courts, a judgment obtained in one district is a lien upon the lands of the defendant throughout the State (U. S. C. C.). Prevost *v.* Gorrell, 151.

A judgment will be opened when it is shown to include usurious interest. (C. P.) Foulds *v.* Haubert, 291.

Where a judgment is opened it is vacated except for purposes of lien. Ham *v.* Smith, 390.

See Execution.

JUDICIAL SALE. The setting aside of a judicial sale of real estate is a matter within the discretion of the Court below, and will not be reviewed by the Supreme Court unless the record show a palpable and gross exercise of the discretion. Bowers's Appeal, 257. Connelly *v.* Philadelphia, 161.

But a Court has not power to set aside a sale of personalty after delivery of the articles sold to the purchaser, and a settlement by him with the sheriff. Mackaness *v.* Long, 374.

See EXECUTION. PARTITION.

JURISDICTION. An action against a foreign canal company for injuries to the plaintiff's barge through the neglect of the defendant to keep the banks of their canal in repair is local, and must be brought in the State where the canal is located. Moyer *v.* Canal Co., 233.

The jurisdiction of the common law courts cannot be ousted by an agreement in a policy of insurance to refer the amount of damage to arbitrators. (U. S. C. C.) Schollenberger *v.* Ins. Co., 360.

The Courts of this State have no jurisdiction in an action by a non-resident against a foreign administrator having no assets in the State. Magraw *v.* Irwin, 557.

See COURTS.

JUSTICE OF THE PEACE. Appeal from, when in time. See GOOD-FRIDAY. Linville *v.* Dalsam, 528.

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LACHES in prosecution of suit. See ABANDONMENT. Malone *v.* Haman, 447.

LAND OWNER. Liability of, for injury to trespasser. See NEGLIGENCE. Gramlich *v.* Wurst, 65.

Liability for nuisance on adjacent highway. See NEGLIGENCE. Harrison *v.* Collins, 464.

LANDLORD AND TENANT. Ground-rent. In an action of covenant sur ground-rent deed the statement filed should contain a reference to the record of the deed. (C. P.) Rudderon *v.* Hodges, 567.

Form of sheriff's return to. See PRACTICE. Ib.

A ground landlord has a lien for arrears of ground-rent upon damages awarded for the opening of a street through the land out of which the rent issues. (C. P.) Powel *v.* Whitaker, 168.

A purchaser at a tax sale of premises subject to a ground-rent is personally liable for ground-rent accruing during his ownership of the premises. (C. P.) Conrad *v.* Smith, 402.

Mining lease. Right of lessee of mine to sue for damages resulting from breach of covenants running with the land by the covenantor of his lessor. See MINING. R. R. *v.* Lippincott, 560.

Distress. A landlord may distrain upon all chattels found upon the demised premises, irrespective of whether they be the property of the tenant or his wife. Trimble's Appeal, 396.

Preference in the distribution of proceeds of sheriff's sale. See EXECUTION. Leaming's Appeal, 221.

Use and occupation. A tenant holding over by sufferance after the termination of his lease is liable to the landlord for rent accruing during the time intervening between the termination of the lease and the election of the landlord to treat him as a trespasser by bringing an action of ejectment. Bush *v.* Oil Co., 143.

The purchaser of real estate at sheriff's sale may maintain an action for use and occupation against the occupant of the premises for rent accruing after a notice to quit. (C. P.) Building Association *v.* Frisdjen, 318.

When lessee of premises remains liable for rent which accrues after an assignment of the lease to another. Hall *v.* Bardsley, 553.

Eviction. Where a tenant's goods remain upon the premises, and the tenant retains the key, he remains liable for the rent even though the landlord advertise the property as for rent. Such advertisement is not an eviction. Townsend *v.* Hendrickson, 492.

Admissibility of parol evidence to contradict terms of lease. See EVIDENCE. Robinson *v.* Leahy, 318.

See REPLEVIN. Cather *v.* Bray, 142.

LAPSED DEVISES AND LEGACIES. See WILL.

LEASE. Power of directors of corporations to lease corporate property. See CORPORATIONS. LANDLORD AND TENANT.

LEGACY. When a charge on land. Legacies may be made a charge on land without direct expressions; it is sufficient if the intention of the testator to create such charge appear by natural and obvious implication from the provisions of the will. Gilbert's Appeal, 303.

Interest on a legacy payable at the expiration of a life estate begins to run from the expiration of the life estate. (O. C.) Boyle's Estate, 363.

Joint legacy. A bequest of a gross sum to two, not of kin to the testator, for services rendered and kindness shown to the testator during his life, though no words of severance are used, is a legacy to them as tenants in common, and if one die in the lifetime of the testator his moiety will lapse. Yard's Appeal, 175. See WILLS.

LEGISLATURE. Proceedings in, constitutionality of, how far looked into by the courts. See CONSTITUTIONAL LAW. Kilgore *v.* Magee, 61.

LIBRARY. Taxation of. See TAXES AND TAXATION. Donohugh's Appeal, 196.

LICENSE. See BROKER. EASEMENT.

LIEN. See BAILMENT, DECEDENTS' ESTATES, EXECUTION, JUDGMENT, MECHANICS' LIEN.

LIFE ESTATE. See WILLS.

LIMITATIONS, STATUTE OF. Payment of taxes by an occupant of real estate, and the assessment of the property in his name, does not prove the possession to have been adverse. App *v.* Cadwalader, 137.

Evidence of adverse possession, prior to an acknowledgment by a defendant of his tenancy to the plaintiff within twenty-one years of the bringing of an ejectment, is inadmissible to show continuous adverse possession unless accompanied by proof of fraud or imposition, which induced the acknowledgment of tenancy. Ib.

No title for recovery can be obtained under the statute of limitations where thirty years' adverse possession is not shown, and the Commonwealth has not parted with her title. Sherwood *v.* Sumne, 357.

Where owners of adjoining tracts of land are in actual possession each of his own tract, using his woodland as farmers usually do, neither acquires title under the statute of limitations to his neighbor's land beyond that which he actually enters upon, clears, and cultivates, or incloses by fences, and holds by an exclusive and adverse possession. Collins *v.* Benedict, 549.

Mutual accounts. The exception to the statute of limitation in favor of mutual accounts has no application when the debit side of the account consists of charges and the credit side of cash payments on account, and where consequently the right of demand is not mutual. Adams *v.* Carroll, 2.

The statute of limitations does not begin to run until the cause of action has accrued. It does not run against an action for money deposited until there has been a demand and refusal. Mary Finkbone's Appeal, 283.

A receipt for $30 deposited, written on a receipt for $475 deposited more than six years before, is a re-acknowledgment of the receipt of the whole amount. Ib.

An acknowledgment by a deceased wife's debtor to her husband, before the grant to him of letters of administration is sufficient to toll the statute. Keely *v.* Wright, 241.

When charges in a book account are more than six years old, the entry of a credit within six years is insufficient to toll the statute unless it be proved *aliunde* that the payment was made before the statute barred the claim. Hull *v.* Mooney, 511.

The statute of limitations of 22 April, 1856, relating to trusts does not begin to run against infants until they attain their majority. (C. P.) Peters *v.* Kerper, 523. See USURY. CRIMES.

LIMITED COMPANY. See PARTNERSHIP.

LIS PENDENS. To sustain a plea of *lis pendens* the suit must be pending at the time of filing the plea. (C. P.) Dickson *v.* Wolf, 37.

LOCAL ACTIONS. What are. See JURISDICTION. Moyer *v.* Canal Co., 233.

MANAGER. Powers of. See PRINCIPAL AND AGENT.

MANDAMUS. When a Circuit Court improperly refuses to entertain jurisdiction of a case and quashes the writ, a mandamus from the Supreme Court of the United States directing the Judge to proceed with the

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MANDAMUS—*Continued.*
case is the proper remedy. (U. S. Sup. C.) Schollenberger *v.* Ins. Co., 405.

A mandamus directed to the city treasurer, is the proper mode of collecting an award of a road jury against the city of Philadelphia. Reimer *v.* City, 449.

MARRIAGE. See HUSBAND AND WIFE. DIVORCE.

MASTER AND SERVANT. A railroad company is responsible to a servant for any injury caused by the negligence of a fellow-servant, who had been employed by the general superintendent with a knowledge of his incapacity. Huntingdon R. R. Co. *v.* Decker, 265.

A master is not liable to his servant for injuries caused by the use of defective appliances furnished by the master, if such defects are so obvious that no prudent man would use them, and the servant gives no notice of their defect to the master. Oak Co. *v.* Reed, 3.

But where such appliances are, in fact, dangerous, though not obviously defective, a servant exercising due care may recover from the master damages for injuries resulting from such defects. Ib.

A master is not responsible for an injury to a servant caused by the negligence of a fellow-servant, if the general scope of their employment is the same, even though they are not engaged in the same particular work. Lehigh Valley Coal Co. *v.* Jones, 436.

A municipal corporation is not responsible for the negligence of a contractor exercising an independent employment, unless there be some stipulation in the contract which reduces the contractor to a mere agent of the corporation. Erie *v.* Caulkins, 129.

A provision that the chief engineer should have power to direct changes in the time and manner of conducting the work, does not amount to such a reservation of power by the corporation as will render it liable for injuries arising from the contractor's negligence. Ib.

The owner of a building who employs a master rigger to move heavy machinery into it, is not responsible for an injury to one passing on the sidewalk caused by the negligence of the rigger's employés. Harrison *v.* Collins, 464.

Since the Act of 4 April, 1868, no one except a passenger who is injured while upon the track of a railroad has a greater right of action against the company than he would have if an employé. (C. P.) Gerard *v.* Penna. R. R. Co., 251.

MECHANIC'S LIEN. Although generally the estate of a lessor is not bound by a mechanic's lien for work done at the instance of a lessee, yet, if it appears that the possession of the lessee is under an improvement lease, the land will be bound. Barclay *v.* Wainwright, 162.

In order to constitute a lease an improvement lease, it is not necessary that it should contain an express covenant on the part of the lessee to build, it is enough if it be shown that such was the manifest intention of the parties. Ib.

A mechanic's lien cannot be filed for materials furnished not upon the credit of the land, but solely upon certain collateral securities transferred to the materi..l-man. Ib.

Where more than two years elapses between the time of furnishing the bulk of a bill and a new item of small amount furnished within six months, it is evidently an attempt to evade the mechanic's lien law, and the dead claim will not be revived thereby. Kohler *v.* Mountney, 260.

A mechanic's claim will not be invalidated because of an obviously inaccurate description of the locality

MECHANIC'S LIEN—*Continued.*
of the premises charged, if the error be not such as to directly mislead from the true location, and if there be enough in the general description contained in the claim to identify the property and prevent mistake. Williams's Appeal, 24.

To bring a lumping charge for materials in a lien filed by a sub-contractor within the provision of the Act of 22 March, 1849, the dates when that particular work so charged was begun and finished must be distinctly stated. It is not enough to state when the whole work was begun and finished. Shields *v.* Garrett, 120. (C. P.) Van Roden *v.* Campbell, 126. *Contra*, (C. P.) Howell *v.* Campbell, 361.

Judgment may be entered upon one return of *nihil habet* to a sci. fa. sur mechanic's claim. (C. P.) Shoemaker *v.* Duganne, 403.

Requisites of mechanic's claim against estate of married women. (C. P.) Atkinson *v.* Schuyler, 448.

MILITIA. It is the duty of counties and cities to provide armories for the militia resident within their respective limits, for the rent of which they are entitled to be indemnified out of the brigade fund, and they may be sued for the same in use and occupation. Pittsburgh *v.* Biggert, 281.

MINING. When a railroad company having a right of way over mining land covenants with the land-owner to remove upon notice, or otherwise permit the mining of the subjacent coal, a lessee to whom has been demised all of the coal within the land is entitled to sue in the name of the landlord for breach of the covenant. R. R. *v.* Lippincott, 560.

A mine owner has no right to permit the drainage of his colliery to run into an adjacent mine which is upon a lower level. (U. S. C. C.) Prevost *v.* Gorrell, 149.

See NEGLIGENCE. Lehigh Valley Coal Co. *v.* Jones, 436.

MINOR. See DECEDENTS' ESTATES. GUARDIAN AND WARD. INFANT. PARENT AND CHILD.

MIXTURE OF GOODS. The commingling of the plaintiff's goods with those of the defendant by the wrongful act of a third party is not necessarily a bar to an action of replevin; but, if the character of the article has essentially been changed by the mixture a different question is raised. Wilkinson *v.* Stewart, 70.

MORTGAGE. The power of a State bank, incorporated prior to the adoption of the Constitution of 1874, whose charter authorized it to borrow money upon mortgage of its real estate, is not affected by the provisions of the Constitution. Lewis *v.* Jeffries, 369.

Mortgage made by infant. See INFANT. Love *v.* Dobson, 359.

Judgment for want of a sufficient affidavit of defence will not be given upon a sci. fa. sur mortgage when the mortgagor, in his affidavit of defence, avers that he was insane at the time of executing the mortgage. Phila. Trust Co. *v.* Kneedler, 492.

The lien of a mortgage is not divested by a sale under a subsequent incumbrance because of the existence of a municipal claim for benefits assessed for opening a street, the claim for which was not filed by the city solicitor until after the recording of the mortgage. (C. P.) Merriman *v.* Richardson, 9.

When an action has been brought on a mortgage and a sufficient affidavit of defence has been filed thereto, the plaintiff cannot, without discontinuing, issue execution upon a judgment entered on the accompanying bond and warrant. (C. P.) Hicks *v.* Funston, 428.

One who holds a mortgage as collateral may proceed upon it and buy in the mortgaged premises, without

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MORTGAGE—*Continued.*
prejudice to his right to proceed upon the principal debt for the deficiency. Smith *v.* Bunting, 186.

When there is a return of *mortuus est* as to a mortgagor, judgment will not be entered until the personal representatives have been brought in. (C. P.) Blanchard *v.* Koller, 362.

A mortgage without a bond is not an instrument within the affidavit of defence law. (C. P.) Fidelity Co. *v.* Miller, 191.

Five per cent. is not an unreasonable collection fee for an attorney, except where the principal of the mortgage is very large. When it is excessive, the Court in its discretion will reduce it, but the question is not one requiring the intervention of a jury. (C. P.) Moller *v.* Ohse, 510. (See Maitland *v.* Daly, 6 W. N. C. 31.)

The personal estate of a decedent is not liable for a mortgage under and subject to which he has purchased real estate, in the absence of evidence of a personal assumption of the mortgage debt. (O. C.) Moore's Estate, 366.

A purchaser of land under and subject to a mortgage may show by parol an agreement with the vendor that there was no personal assumption of the mortgage by him. (C. P.) Girard Ins. Co. *v.* Addicks, 75.

One who takes title as a dry trustee to real estate under and subject to a mortgage, is not personally responsible for the same. Girard Ins. Co. *v.* Stewart, 87.

A deed containing a recital of a purchase under and subject to the payment of a mortgage is not an instrument within the affidavit of defence law in an action against the purchaser for a deficiency after a foreclosure of the mortgage. Morris *v.* Guier, 132.

MUNICIPAL CLAIMS. A claim filed against the "heirs of A., B., owners or reputed owners," sufficiently designates the parties. Wistar *v.* Philadelphia, 279.

A sheriff's return to a sci. fa. upon a municipal claim must strictly conform to the requirements of the acts of assembly, and if it fails to set out that the posting was on a conspicuous part of the premises or that the advertisement was duly inserted two weeks prior to the return day it is insufficient. Ib.

The six months allowed for filing a municipal claim begins to run from the completion of the work and not from its approval by councils. Kaiser *v.* Weisse, 45.

A municipal claim under the Act of 1 April, 1870, may be filed for benefits resulting from the opening of a street in Allegheny City more than six months after the completion of the work, but it is not a first lien unless filed within the six months. Lofink *v.* Allegheny, 46.

All the formalities of advertisement required by ordinances and acts of assembly as precedent to the awarding of a paving contract must be strictly complied with to entitle the contractor to file a municipal claim. Philadelphia *v.* Sanger, 335.

Benefits assessed upon surrounding properties for opening a street in Philadelphia do not become a lien until a claim is filed by the city solicitor. (C. P.) Merriman *v.* Richardson, 9.

Constitutionality of acts authorizing municipal claims in the city of Pittsburgh. Bidwell *v.* Pittsburgh, 41. Kaiser *v.* Weisse, 45. Ballentine's Appeal, 321.

MUNICIPAL CORPORATIONS. The city of Philadelphia is responsible to a tavern-keeper for damages to his business resulting from the lack of travel past his house consequent upon the closing of Penrose Ferry Bridge which the city is bound to keep in repair. (C. P.) Brandt *v.* Philadelphia, 234.

The city of Erie is not responsible for the negligent acts of a board of water commissioners created by the Act of 4 April, 1867, who in their actions are independent of the city authorities. Ashby *v.* Erie, 1.

Liability of, for negligence of contractor. See MASTER AND SERVANT. Erie *v.* Caulkins, 129.

Liability of, for rent of armory. See MILITIA. Pittsburgh *v.* Biggert, 281.

Improvements, cost of, when assessable. See CONSTITUTIONAL LAW. Bidwell *v* Pittsburgh, 41. Kaiser *v.* Weisse, 45. Ballentine's Appeal, 321.

Elections, terms of, councilmen. See ELECTIONS. Brooke *v.* Commonwealth, 416.

Mandamus against, on award of road jury. See MANDAMUS. Reimer *v.* Philadelphia, 449.

NATIONAL BANKS. See BANKS. USURY.

NE EXEAT REGNO, writ of, when awarded. See EQUITY. (U. S. C. C.) Ins. Co. *v.* Kellogg, 477.

NEGLIGENCE. The widow of one injured through the negligence of a railroad company may maintain an action under the Act of 26 April, 1855, without a joinder of the children of the deceased as parties plaintiff. Huntingdon R. R. Co. *v.* Decker, 265.

The employment by the superintendent of a railroad company of an engineer of known intemperate habits, through whose reckless running of a train while drunk a fellow-servant is killed, renders the company employer liable in damages to the family of the deceased. Ib.

A common carrier cannot by contract relieve himself from liability for actual negligence. P. & B. R. R. Co. *v.* McShane, 228.

Negligence is the absence of care according to the circumstances. Common carriers are not bound to take precautions against extraordinary circumstances which there is no reason to anticipate. Penna. R. R. Co. *v.* Fries, 545.

In an action against a railroad company by one not a passenger for alleged negligence, the plaintiff must overcome by proof the presumption that the defendant has exercised due care, and in the absence of evidence tending to such proof it is error to submit the question to the jury. P. & R. R. R. Co. *v.* Heil, 91.

When the plaintiff's evidence in an action for negligence fails to show the omission of any duty incumbent upon the defendant a non-suit will be entered. Clark *v.* P. & R. R. R. Co., 119. (C. P.) Dougherty *v.* R. R., 14. McGettigan *v.* R. R., 235.

But under the facts in evidence in this case, the question should have been left to the jury. (C. P.) Mulhair *v.* R. R., 190.

Action against a railroad company for negligently killing one lawfully on its track. See MASTER AND SERVANT. Gerard *v.* R. R., 251.

A passenger railway company is responsible for injuries to a female passenger who through a sudden jolt of the car was thrown down and injured, although straps were suspended from the roof of the car which the plaintiff found it inconvenient to grasp on account of a resulting disarrangement of dress. West Philadelphia P. R. W. Co. *v.* Whipple, 68.

In an action against a mining company for failing to keep their mine properly ventilated, testimony is admissible to show that the deceased at the time of his death was in a position which he had been warned and himself had warned others to avoid as dangerous. Lehigh Valley Coal Co. *v.* Jones, 436.

See MASTER AND SERVANT. Ashby *v.* Erie, 1. Oak Ridge Coal Co. *v.* Reed, 3. Erie *v.* Caulkins, 129. Coal Co. *v.* Jones, 437. Harrison *v.* Collins, 464.

See MUNICIPAL CORPORATIONS.

Liability of Safe Deposit Company for loss of articles

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NEGLIGENCE—*Continued*
deposited in their vault. See BAILMENT. Safe Deposit Co. *v.* Pollock, 183.

Ths owner of an open lot in the city of Philadelphia is not responsible to a trespasser for injuries received by falling into an excavation made in the lot at some distance from the public highway although no guard or fence is placed around the excavation. Gramlich *v.* Wurst, 65.

The owner of a building is not responsible to one who falls into a coal hole upon the pavement from which the cover has been unlawfully removed by a third party unless such owner had notice of the uncovering of the hole or such a length of time had elapsed as to charge him with notice. Harrison *v.* Collins, 464.

Although a corporation is not justified in transferring stock upon a blank power of attorney thirteen years old, yet when the true owner has entrusted such blank power with the certificates to one who fraudulently has them transferred, such owner is estopped by reason of his own negligence from holding the company responsible. Penna. R. R. Co.'s Appeal, 22.

The president of a bank who permits a customer to take away bills of lading held as collateral, for the alleged purpose of examining them, is *per se* guilty of negligence and answerable to the bank for any resulting loss. (C. P.) Bank *v.* Wiegand, 12.

See COMMON CARRIER. MASTER AND SERVANT. MUNICIPAL CORPORATION.

NEGOTIABLE INSTRUMENT. A certificate of stock with a blank power of attorney to transfer signed by the registered owner is not a negotiable instrument. Penna. R. R. Co.'s Appeal, 22.

Warrants upon a township treasurer issued to a contractor or bearer by commissioners appointed to view and open a State road are not negotiable instruments entitling the holder to bring suit on them in his own name. Township of East Union *v.* Ryan, 440.

See BILLS AND NOTES.

NEW TRIAL. See PRACTICE.

NON-SUIT. When security for costs is not entered in due time as required by order of Court a nonsuit will be entered. (C. P.) Fouse *v.* Garrick, 168.

See NEGLIGENCE. PRACTICE.

NOTICE. General rumor of a fact is not sufficient to put a party on inquiry. There must be some act or declaration from an authentic source which a person would be careless if he did not regard. (C. P.) Peters *v.* Kerper, 523.

NUISANCE. Owner of property adjacent to highway when liable for nuisance on highway. See NEGLIGENCE. Harrison *v.* Collins, 464. Granlich *v.* Wurst, 65.

ORDINANCES. Of city of Philadelphia, 31 December, 1862, 99; 23 December, 1874, 99.

ORPHANS' COURT. The Orphans' Court has jurisdiction to decree partition of real estate upon the petition of the widow although the decedent leave but one heir. Steel's appeal, 503.

Jurisdiction. Over heir-looms. Moseley's Estate, 102.

When concurrent with Common Pleas. McMurry *v.* Davis, 305.

One who in a petition supported by affidavit sets out that he is a creditor of a decedent's estate is entitled to a decree that the executors file an account if more than a year has elapsed since the grant of letters testamentary. (O. C.) Wistar's Estate, 128.

Under what circumstances an attachment will be granted. (O. C.) Winpenny's Estate, 512.

Examiner's fee, order for payment of, when granted. (O. C.) Dyre's Estate, 455.

ORPHANS' COURT—*Continued.*

Power of Court to direct sale of real estate for the payment of legacies; when a power of sale is given to executor's discussed. (O. C.) Smyth's Estate, 103.

The refusal of the Orphans' Court to set aside a sale of real estate ordered for the payment of debts will not be reviewed by the Supreme Court unless the Court have manifestly abused the discretion vested in them. Bower's Estate, 257.

A decree of partial distribution of an estate is conclusive only as to the fund thereby distributed. Kline's Appeal, 468.

An administrator who has paid over money to a distributee in accordance with a decree of the Orphans' Court will be protected against loss by reason of a subsequent opening and change of the decree. Stewart's Appeal, 135.

The Orphans' Court, like every court of record, has, irrespective of statute, a power of amendment which may be exercised after the expiration of the term. (O. C.) Beck's Estate, 274.

An order to pay will be granted upon the petition of an attaching creditor of a distributee of a decedent's estate. (O. C.) Downing's Estate, 544.

Bill of review. When errors are alleged in an account which has been confirmed by the Court a bill of review is the proper practice. The right of a minor to a bill of review is not affected by the lapse of time. (O. C.) Bessinger's Estate, 320.

The fact that a decree of the Orphans' Court has been affirmed by the Supreme Court does not prevent the Orphans' Court from entertaining a bill of review. (O. C.) Loxley's Estate, 384.

One interested in an estate is entitled to a bill of review as a matter of right for error of law apparent on the face of the record, otherwise it is a matter of grace and will not be granted to review matters fully considered before the entry of the first decree. (O. C.) James M. Smith's Estate, 495.

When the accumulations of a trust have been improperly awarded to the trustee to hold for the purposes of the trust, a bill of review, not a petition for a supplemental account, is the proper method of rectifying the error. (O. C.) Howell's Estate, 430.

PARENT AND CHILD. An agreement by a father to pay his minor son a specific sum for work to be done during his minority, is a sufficient consideration to support a note given sixteen years afterward by the father when insolvent to the son which is contested by the father's creditors as fraudulent. Brown's Appeal, 394. See INFANT, GUARDIAN, AND WARD.

PARTITION. Effect of sale in partition on nature of estate. See INTESTATE LAW. Eckert's Estate, 451.

Right of widow to. See Orphans' Court. Steel's Appeal, 503.

PARTNERSHIP. Joint owners of a vessel do not become partners by virtue of that relation. Adams *v.* Carroll, 2.

The estate of a decedent who was a member of an unincorporated construction company is severally liable for all the debts of the company. (O. C.) Thomson's Estate, 14.

An incoming partner purchasing the interest of one retiring with an agreement to pay the debts of the old firm does not thereby become liable to suit by a creditor of the old firm. Kountz *v.* Holthouse, 463.

In order to establish the liability of a dormant partner upon a note given in the name of his alleged partner it must affirmatively appear that the note was given for partnership purposes. Gingrich *v.* Hamaker, 488.

A judgment against one member of a partnership who was not served will be opened upon an affidavit

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PARTNERSHIP—*Continued.*
of merits although an attorney has entered a general appearance for the firm at the request of the partner served. (C. P.) Percival *v.* Fuller, 273.

"Limited" company. An action against a company organized under the Limited Company's Act of 2 June, 1874, should be brought against the company by its association name and not against the individual members. (C. P.) Ladner *v.* Gibbon, 127.

Under the Act of 2 June, 1874, the capital of a limited company must be paid in cash, and a company organized prior to the amendment of 1 May, 1876, cannot invoke its protection unless it has complied with its requirements. (C. P.) Bement *v.* Machine Co., 58.

Relations inter se. Contribution between solvent partners towards a debt due to the firm by an insolvent partner, how computed. (C. P.) Wood *v.* Cunningham, 189.

Injunction to restrain execution on judgment because of an unsettled partnership account, alleged to be a set-off, when granted. Rapp *v.* Hains, 489.

Agreement for dissolution of partnership and settlement of business construed. Kahn *v.* Pickard, 537.

An affidavit of defence denying a partnership does not obviate the necessity of an affidavit in support of a plea denying partnership. (C. P.) Raine *v.* Gordon, 292.

The Court will not instruct the sheriff to appraise an interest in a partnership taken in execution. (C. P.) Thornton *v.* Hotel Co., 428.

Effect of release of one partner. See JOINT DEBTORS. Greenwald *v.* Kaster, 140.

Bill to dissolve partnership, signature of counsel to, when required. See EQUITY PRACTICE. (C. P.) Bachman *v.* Einhorn, 250.

PATENTS. The assignee of a deceased patentee may make direct application for a reissue of a patent without action on the part of the executor or administrator. Kellberg's Appeal, 504.

A holder for value without notice, of a promissory note, is not affected by the Act of 12 April, 1872, relating to notes given for patent rights. Haskell *v.* Jones, 165.

PAUPER. Right of to vote. See ELECTION LAW.

PENALTY. The penalty for excluding negroes from a railroad car can be recovered but once though several negroes are excluded at the same time. Central R. R. Co. *v.* Green, 300.

PLEADING. A plea of no partnership must be supported by affidavit, even though the partnership be denied in the affidavit of defence. (C. P.) Raine *v.* Gordon, 292.

Where the plea *non est factum* is required by rule of court as well as by general practice the plea *nil debet* is demurrable. Parkinson *v.* Parker City, 285.

Under a plea of property in replevin the defendant is entitled to show that he has a special interest in or lien upon the goods replevied, without previous notice to the plaintiff of the nature of such interest or lien. Mathias *v.* Sellers, 518.

Where parties without remonstrance go to the jury upon an issue of fact raised by the evidence the Supreme Court will not reverse because such issue was not made in the pleadings. Ib.

The filing of a plea in part demurrable is not a ground for continuance, upon the application of the defendant, until the disposal of the demurrer. (C. P.) McMurdy *v.* Insurance Co., 284.

Pleas, when insufficient because argumentative. (C. P.) Conrad *v.* Smith, 402.

POWER OF APPOINTMENT. See WILL.

POWER OF ATTORNEY, in blank with certificate of stock, effect of. See CORPORATION. Penna. R. R. Co.'s Appeal, 277.

PRACTICE. Assignment of cases to the several courts of Common Pleas. When the original writ, issued prior to the reorganization of the courts, was of June Term, though returned "nihil habet," and the alias writ returned served was of December Term, the case follows the term of the original writ, and belongs to the Common Pleas No. 3. (C. P.) Bank *v.* Parrish, 57.

Bail in error. New rule of Supreme Court concerning, 81.

Parties to actions. An association organized under the limited liability Act of 1874 should be sued by its association name and not by the individual names of its members. (C. P.) Ladner *v.* Gibbon, 127.

Effect of delay. Mere delay in the prosecution of a suit is no evidence of an intention to abandon it. Malone *v.* Haman, 447.

Process. Although a capias served on one who is decoyed within the jurisdiction will be set aside, it is too late to apply for such an order after the discharge of the defendant on common bail. (C. P.) King *v.* Embrey, 97.

A judgment obtained against a partner without service of process upon him will be set aside upon an affidavit showing a meritorious defence. (C. P.) Percival *v.* Fuller, 273.

When there is a return of *mortuus est* as to the mortgagor, upon a sci. fa. sur mortgage, judgment will not be entered until his personal representatives have been brought in. (C. P.) Blanchard *v.* Koller, 362.

Particularity in return to sci fa. sur municipal claim, what requisite. See MUNICIPAL CLAIMS. Wistar *v.* City, 279.

Form of return to summons in covenant sur ground rent deed. (C. P.) Rudderon *v.* Hodges, 567.

The plaintiff is entitled to judgment upon one return of *nihil habet* to a sci. fa. sur mechanic's lien. (C. P.) Shoemaker *v.* Duganne, 403.

To entitle the plaintiff to judgment on two returns of *nihil habet* in covenant sur ground rent, he must file a statement with a reference to the record of the deed. (C. P.) Rudderon *v.* Hodges, 567.

A foreign insurance company may be served on process issuing out of the United States Courts by service on the resident agent. Schollenberger *v.* Ins. Co., 405.

Amendment. When a motion to open a judgment has been refused, the Court will not amend the record so as to make it appear that judgment had been entered for want of a sufficient affidavit of defence, so as to enable the defendant to take a writ of error. (C. P.) Atkinson *v.* Schuyler, 448.

Discontinuance. A case cannot be discontinued without leave of Court, which will not be granted on an order of the plaintiff, unless it appear that his attorney's charges have been settled. (C. P.) Davis *v.* Sharpe, 404.

Demurrer. A demurrer will not be stricken off unless plainly inappropriate. The proper practice is to put it on the argument list, when, if it appear frivolous and for delay, judgment will be given for the plaintiff. (C. P.) Frankish *v.* Marsh, 57.

Rule to produce books and papers. What not a sufficient answer to rule. (C. P.) Ins. Co. *v.* Michener, 36.

Affidavit of defence. The filing of a narr. without a rule to plead does not bar the plaintiff from taking judgment for want of an affidavit of defence. (C. P.) Brobston *v.* Campbell, 273.

Judgment will not be entered for an amount admitted to be due in an affidavit of defence, but not covered by the copy filed. (C. P.) Rand *v.* Lore, 236.

See AFFIDAVIT OF DEFENCE LAW.

Bill of particulars. Rule for, when granted. Ban-

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PRACTICE—*Continued.*
croft *v.* Freeman, 98; O'Connell *v.* Simmons, 149; Marcus *v.* Boling, 542.

A bill of particulars is demandable in a contested election case. Whitehouse *v.* Schalek, 122.

Disappearance of record. Where an affidavit of defence is removed from the records, judgment will be entered as for want of an affidavit. (C. P.) Woodside *v.* Stevenson, 235; Thompson *v.* Galloway, 383.

Depositions. It is within the discretion of the Court whether they will order depositions to be filed or not. (C. P.) Johnson *v.* R. R., 360.

Depositions will not be ordered in a distant part of the State under a rule to open a judgment, unless the defendant tender or give security for the payment of a reasonable counsel fee. (C. P.) Strauch *v.* Land Co., [No. 2] 473.

See new rule of C. P. as to depositions in advance of trial, 14.

Commission to take testimony. Impertinent interrogatories will be stricken out on motion before the issuing of the commission, but their irrelevancy must be clearly shown. (C. P.) McMurdy *v.* Ins. Co., 211.

Security for costs. If a non-resident plaintiff fail to comply with an order for the entering of security for costs, a non-suit will be entered. (C. P.) Fouse *v.* Carrick, 168.

Who can be made garnishee. See FOREIGN ATTACHMENT.

In an attachment execution the defendant will not be permitted to contradict the answers of the garnishee. (C. P.) Cole *v.* Bowden, 296. See EXECUTION.

Trial and its incidents. The filing of an additional plea at bar, to which the plaintiff demurs, is not a ground for continuance on the application of the defendant. (C. P.) McMurdy *v.* Ins. Co., 384.

The discovery after verdict of the personation of a juror by one whose name was not on the panel is ground for a new trial. (C. P.) Field *v.* Johnson, 404.

The manner and time of the examination of witnesses is within the discretion of the Court, and it is not error to stop a cross-examination of sixty-five minutes on trivial matters. (C. P.) Ins. Co. *v.* Robinson, 389.

New trial. When granted for surprise in the character of testimony advanced. (C. P.) Kollock *v.* Palmer, 474.

When granted for after-discovered evidence. (C. P.) Raine *v.* Gordon, 292.

Where, in an action upon the case for damages, the plaintiff, if entitled to any verdict, should have substantial damages, the Court will grant a new trial if the jury find for the plaintiff with one cent damages. Levan *v.* R. R., 293.

Where the plaintiff has a prima facie case it is error to enter a non-suit. Parkinson *v.* Parker City, 285.

Province of court and jury. See NEGLIGENCE. CRIMES.

Assessment of damages in action for breach of unexpired contract. (C. P.) Strauch *v.* Land Co., 472.

Costs. See COSTS.

Rule to open judgment. What sufficient ground for. (C. P.) Percival *v.* Fuller, 273; Strauch *v.* Land Co. 472.

Other matters. Effect of judgment prematurely entered after the making absolute a rule for a new trial, conditioned upon the remission of a portion of the verdict. (C. P.) Keating *v.* R. R., 232.

Effect of different verdicts in actions of replevin between the same parties based upon a distress for rent of succeeding months. Cather *v.* Bray, 142.

PRACTICE—*Continued.*
Where after a sheriff's sale of real estate the writ of execution is improperly withdrawn from the office, the Court will order the prothonotary to execute a duplicate writ. Building Asso. *v.* Dunagon, 148.

See EXECUTION.

Where an action has been brought on a mortgage and an affidavit of defence thereto sustained by the Court, the plaintiff cannot, without discontinuing, issue execution upon a judgment entered on the bond and warrant accompanying the mortgage. Hicks *v.* Funston, 428.

See DIVORCE. EQUITY PRACTICE. ERRORS AND APPEALS. ORPHANS' COURT. CRIMES. AMENDMENT.

PRECATORY WORDS. Effect of. See TRUST. Fidelity Company's Appeal, 13. WILL. (O. C.) Dougherty's Estate, 556.

PRINCIPAL AND AGENT. The manager and general superintendent of a "limited" company can bind it by endorsing negotiable paper. (C. P.) Schofield *v.* Asbestos Co., limited, 209.

Powers of cashier. See BANKS AND BANKING. Dorsey *v.* Abrahams, 73.

Liability of principal for trespass of agent. Bean *v.* Howe, 5.

Liability of principal for unauthorized representations of agent. R. R. Co. *v.* Hodgens, 313.

See MASTER AND SERVANT. NEGLIGENCE.

PRINCIPAL AND SURETY. A reduction of rent does not discharge a surety upon a lease. (C. P.) Dickson *v.* Wolf, 37.

A custom of banks to treat the first of two joint-makers of a note as principal and the second as surety is not admissible to show that such was the relation of the parties. Gingrich *v.* Hamaker, 488.

PRIVILEGED COMMUNICATION. See CONSTITUTIONAL LAW. Hartranft's Appeal, 105.

PROTEST. Costs of, when recoverable. See BILLS AND NOTES. (C. P.) Gibb *v.* Geiss, 148.

Where notice of to be sent. Kerr *v.* Roberts, 25.

PROTHONOTARY. Right of to fees. See CONSTITUTIONAL LAW. Perot's Appeal, 203.

PUBLIC HOLIDAY. See GOOD-FRIDAY.

RAILROAD COMPANY. Action by, to recover subscription to stock. R. R. Co. *v.* Hodgens, 313.

Action against, for injury to passenger. See COMMON CARRIER.

Action against, for excluding negro from car. See COMMON CARRIER.

Action against, for ejecting passenger. See COMMON CARRIER.

Action against, for loss of baggage. See COMMON CARRIER.

Action against, for injury to one on track. See NEGLIGENCE.

Action against, for injury to servant. See MASTER AND SERVANT.

Liability of, for location of road. See DAMAGES.

Action against railroad for refusal to re-locate road according to covenant. See MINING. R. R. *v.* Lippincott, 560.

Duty of, to reconstruct highway. See ROADS.

Right of to erect watch-house on street. Wilson *v.* R. R., 185.

See CORPORATION.

RATIFICATION. See INFANT. Love *v.* Dobson, 359.

RECEIVER. A receiver of an insolvent corporation appointed in a foreign State will be permitted to sue in our Courts when the rights of our citizens are not prejudiced. Bagley *v.* R. R., 263.

When receiver appointed. See EQUITY.

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RELIGIOUS SOCIETY. Powers of trustees of. See CORPORATION.

REMAINDER. See WILL.

REPLEVIN. The fact that a verdict for the defendant in a replevin for goods distrained contains no finding of the value of the goods or the amount of rent in arrear does not prevent the entry of judgment thereon. Cather *v.* Bray, 142.

See MIXTURE OF GOODS. Wilkinson *v.* Stewart, 70.

Pleading in. See PLEADING. Mathias *v.* Sellers, 518.

RES ADJUDICATA. What is. See ESTOPPEL. Church *v.* Fox, 399.

What is not. Cather *v.* Bray, 142. Ruff *v.* Ruff, 181.

When judgment is not a bar to another suit. See LIS PENDENS. Lipppincott *v.* Milling, 38.

RES GESTÆ. See EVIDENCE. Kehoe *v.* Commonwealth, 81.

RETROACTIVE LEGISLATION. See CONSTITUTIONAL LAW.

ROADS, HIGHWAYS, AND BRIDGES. It is the duty of the city of Philadelphia to keep the Penrose Ferry Bridge in repair, and they are liable to suit by a tavern-keeper whose business was injured through the diversion of traffic consequent upon the closing of the bridge. (C. P.) Brandt *v.* Philadelphia, 204.

The Court of Quarter Sessions has no jurisdiction over the widening of Chestnut Street in Philadelphia. *In re* Chestnut Street, 237.

An injunction upon application of neighboring property owners will be granted against the erection of a new building which does not conform to the line of Chestnut Street as fixed by the Act of 28 April, 1870. Times Co. *v.* Ladomus, 33.

An order by the Court of Quarter Sessions upon a road jury for a merely formal amendment of their report does not require notice to the parties interested to give it validity. Sharp's Appeal, 239.

An appeal does not lie by a decree of the Quarter Sessions in a road case. *In re* Chestnut Street, 239.

Method of recovering the award of a road jury. See MANDAMUS. Reimer *v.* City, 449.

Warrants issued for expenses of opening, nature of. See NEGOTIABLE INSTRUMENT. Township *v.* Ryan, 440.

Liability of county treasurer for road taxes. See COUNTY OFFICERS. Siggins *v.* Commonwealth, 336.

In a proceeding to vacate or change a road there is no authority to assess damages when no change has actually been made. Road in Reserve Township, 476.

Duty of railroad company to replace a public bridge destroyed by opening their road. Bean *v.* Howe, 5.

Road damages. Lien of ground landlord upon, for arrears of ground-rent. Powel *v.* Whitaker, 168.

Paving contracts, advertisements for, when requisite. (C. P.) Vodges *v.* Ferree, 99. City *v.* Sanger, 335.

Cost of improving streets when assessable on neighboring property.

See CONSTITUTIONAL LAW. DAMAGES. MUNICIPAL CLAIMS. MUNICIPAL CORPORATIONS.

RULES OF COURT. Amendment to C. P. Rule XV. § 48, as to depositions in advance of trial, 4.

S. C. Rule V. concerning bail in error, 8.

SAFE DEPOSIT COMPANY. Liability of. See BAILMENT. Safe Deposit Co. *v.* Pollock, 193.

SCHOOL LAW. Rights of conflicting boards of school directors in Philadelphia. Blake *v.* Commonwealth, 48.

SET-OFF. An unliquidated account not between partners may be set off under the Act of 1705, although arising out of a separate and distinct cause of action. Machine Co. *v.* Saylor, 286.

SET-OFF—*Continued.*

But the set-off must arise *ex contractu* and be capable of liquidation by a jury. (O. C.) Thomson's Estate, 14.

The existence of an equitable set-off is not ground for granting an injunction to restrain an action at law. Rapp *v.* Hains, 489; Laughlin *v.* Finley, 144.

Quære.—Whether in an action by an insurance company against their former agent for unaccounted-for premiums, the defendant is entitled to set off damages suffered by him through his illegal dismissal from the office of agent. (U. S. C. C.) Ins. Co. *v.* Kellogg, 477.

SHERIFF. Liability of, for mistake in distribution of proceeds of sale. Mackaness *v.* Long, 374.

Return to sci. fa. sur municipal claim, form of. See MUNICIPAL CLAIM. Wistar *v.* Philadelphia, 279.

Action against, for illegal execution of writ. See TRESPASS.

See EXECUTION.

SHIPS AND SHIPPING. Equity has jurisdiction over the settlement of the accounts of part owners of a ship. (C. P.) Endsor *v.* Simpson, 233.

A managing owner of a vessel may be sued in assumpsit by his joint owners for their proportionate parts of the ascertained earnings. Steelman *v.* Doughty, 166.

Joint owners of a vessel do not stand to each other or to the world in the relation of partners, and where one sells his interest in a vessel by bill of sale duly registered under the Acts of Congress, he is no longer personally responsible for supplies furnished to the vessel even though the supply-man has no knowledge of the sale. Adams v. Carroll, 2.

Only those specifically mentioned in the Acts of Assembly are entitled to libel a vessel under the Act of 1836, and that only for articles covered by their business designation. Merchant *v.* The Odorilla, 288.

The giving of a bond for the release and discharge of a vessel attached under the Act of 1836 works a complete discharge of the vessel from the lien acquired by the libellant and the shares of co-owners cannot be sold upon execution issued upon the judgment. Shakespeare *v.* Cain, 392.

SPECIAL LEGISLATION. See CONSTITUTIONAL LAW. Kilgore *v.* Magee, 61.

SPECIFIC PERFORMANCE. A covenant by a railroad company to permit the removal of a subjacent support cannot be enforced by a bill for specific performance. R. R. *v.* Lippincott, 560.

Contracts of decedents. See DECEDENTS' ESTATES. Anders's Estate, 78.

See VENDOR AND VENDEE. Hart *v.* Carroll, 376.

STATUTES. To repeal a statute by implication there must be a repugnancy between the provisions of the new law and the old so positive as to be irreconcilable. Barber's Case, 350.

Where a later statute is absolutely repugnant to a former one only in part, it repeals the former one only so far as the repugnancy extends, and leaves all the remainder in force. Barber's Case, 350. Navel *v.* Elliot, 35.

STOCK. A sealed power of attorney to transfer stock, which is expressly irrevocable and for value received, is prima facie a sale of stock for a present consideration, and removes from the holder the burden of showing that he paid for the stock at the time of transfer. Etting's Estate, 277. (O. C.) McFarland's Estate, 567.

Action for failure to deliver. See DAMAGES, MEASURE OF. Huntingdon, etc., R. R. Co. *v.* English, 354.

A certificate of stock with a blank power of attorney is not a negotiable instrument. Penna. R. R. Co.'s Appeal, 15. Wood *v.* Ellis, 427.

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STOCK EXCHANGE. A seat in the Stock Exchange is not subject to attachment by the creditors of the owner. (C. P.) Pancoast *v.* Houston, 36.

SUBPŒNA. Requisites of. Hartranft's Appeal, 105.

SUBROGATION, when allowed. See EQUITY. Webster's Appeal, 486.

SUICIDE. See INSURANCE.

SURETY. Right of, to bill of review in Orphans' Court. James M. Smith's Estate, 495.

See PRINCIPAL AND SURETY.

TAXES AND TAXATION. Property assigned for the benefit of creditors is subject to distress for taxes accruing both before and after the assignment. Wright *v.* Wigton, 28.

A free public library is such an institution of purely public charity as may be exempted from taxation. Donohugh's Appeal, 196.

Method of enforcing collection of tax in Montgomery County. Wright *v.* Wigton, 28.

See BANKS AND BANKING. CONSTITUTIONAL LAW.

TENANT BY SUFFERANCE. Liability of, for rent. See LANDLORD AND TENANT.

TENDER. Where a policy of life insurance has illegally been declared forfeited by the company it is not incumbent upon the insured to tender subsequently accruing premiums. Girard Ins. Co. *v.* Mutual Ins. Co., 173.

A bailor is not entitled to maintain replevin for goods deposited by him with a tradesman until payment or tender of all charges for which the tradesman has a lien. Mathias *v.* Sellers, 518.

In trover after demand and refusal to deliver, the plaintiff is not bound to accept tender of the property deteriorated since conversion. Whitaker *v.* Houghton, 94.

TRADE-MARK. What infringement of, enjoined. Wehn *v.* Krause, 272.

TRADESMAN'S LIEN. See BAILMENT.

TRESPASS. When it lies against railroad company for trespass of its employés. Bean *v.* Howe, 5.

Action against sheriff, damages when excessive. Suydam *v.* Elliott, 317.

See MINING.

TRESPASSER. Duty of land-owner to. See NEGLIGENCE. Gramlich *v.* Wurst, 65.

TROVER. Measure of damages in. Where goods have been unconditionally received by the plaintiff after trover brought, the measure of damages is their difference in value at the time of conversion and that of delivery. Whitaker *v.* Houghton, 94. See TENDER.

TRUSTS AND TRUSTEES. Precatory words in a will, though in themselves inoperative, may be of value in the construction of a deed avowedly in pursuance thereof, to show the intention of the parties. Fidelity Co.'s Appeal, 513.

When active. When a trustee is empowered to collect and pay over income, sell the estate and reinvest the proceeds, the cestui que trust to receive the income during life, and upon her death the estate to go to her appointees, and in default thereof to her legal representatives, the trust is active. Ib

A paper of a testamentary character, but inoperative as a will, cannot be treated as a declaration of trust. Long's Appeal, 309.

A trust to continue for a life or lives in being and twenty-one years thereafter, is not too remote. Stœver's Appeal, 467.

When a power of appointment gives the donee power to dispose of an estate "in such way and manner," etc., the donee may create a trust for a designated class. (O. C.) Boyle's Estate, 363.

TRUSTS AND TRUSTEES—*Continued.*

An interest in property covered by a spendthrift-son trust cannot be attached for the debt of the spendthrift. Bentley *v.* Kaufman, 88.

Trust money, how followed. See FACTORS. (O. C.) Cox's Estate, 474.

A trustee holding real estate will not be surcharged for failure to secure a greater rental for the estate, unless it appears that he has been guilty of wilful default or gross negligence. (O. C.) Beck's Estate, 274.

Commissions. A trustee will not be allowed commissions on the corpus of productive real estate. Ib.

See DECEDENTS' ESTATES.

Other matters. Trustee for unincorporated society. Church *v.* Wensley, 273.

When a trustee seeks to derive any benefit from a contract made with his cestui que trust, the burden of proof is upon him to show the utmost good faith, and the fairness, adequacy, and equity of the contract. Darlington's Appeal, 529.

Trust ex maleficio. See FRAUDS, STATUTE OF. Wolford *v.* Herrington, 204.

A trustee purchasing at his own sale will be held accountable for profits made by a resale of the property. (C. P.) Peters *v.* Kerper, 523.

But the son of a trustee may purchase at such a sale without liability to account for profits. (O. C.) Bowker's Estate, 493.

Constructive trust. Purchase by the holder of collateral securities at his own sale, effect of. Smith *v.* Bunting, 186.

ULTRA VIRES. See CORPORATION.

"UNDER AND SUBJECT TO" a mortgage, effect of clause in deed. See MORTGAGE.

UNINCORPORATED SOCIETY. Jurisdiction of courts over internal disputes of. Bauer's Appeal, 485.

USE AND OCCUPATION. Liability of municipality in action for rent of armory. See MILITIA. Pittsburgh *v.* Biggert, 281.

When maintainable generally. See LANDLORD AND TENANT. Bush *v.* Oil Co., 143. Building Ass. *v.* Friedjen, 318.

USURY. An action against a national bank to recover usurious interest must be brought within six months. (C. P.) Meloney *v.* Bank, 363.

Where usurious interest has been charged upon a series of discounts by a national bank, the defendant is entitled to credit upon the principal of his debt for all the interest paid in the whole series. Cake *v.* Bank, 244.

A judgment debtor who has paid usurious interest on a judgment, and who has confessed a judgment of revival is not precluded by the confession from asking that the latter be opened on the ground of usury. Walter *v.* Breisch, 358.

Construction of agreements alleged to be usurious. Foulds *v.* Haubert, 291. Thompson *v.* Galloway, 383.

The fact that a bond calls for eight per cent. interest does not invalidate the obligation; it is only void as to the excess over the legal rate of interest. Parkinson *v.* Parker City, 285.

VENDOR AND VENDEE. Parol contract for sale of land, when enforceable. See FRAUDS, STATUTE OF. Hart *v.* Carroll, 377.

Liability of vendee of land under and subject to mortgage. See MORTGAGE.

VESSEL. See SHIPS AND SHIPPING.

WAIVER, of tradesman's lien. See BAILMENT. INSURANCE.

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WARRANTS. See NEGOTIABLE INSTRUMENTS. Township *v.* Ryan, 440.

WATER COMMISSIONERS. Responsibility of municipality for acts of. See MUNICIPAL CORPORATIONS. Ashby *v.* Erie, 1.

WILL. Testamentary capacity. What not sufficient evidence of lack of, to send a case to a jury. (O. C.) Palmer's Estate, 542.

Value of medical expert testimony in contest. Ib.

Parol, republication of. What not sufficient evidence of. (C. P.) Rankin *v.* Rankin, 127.

Married woman's will. How to be executed. See HUSBAND AND WIFE. Long's Appeal, 309.

Charitable or superstitious use. A bequest of money to a church to be expended in masses to be said for the repose of the testator or his brother is not for a charitable or religious use, and the will need not be made thirty days before the testator's death. (O. C.) Power's Estate, 59. Dougherty's Estate, 556.

An absolute devise to one with a request that the same be appropriated to the saying of masses need not be by will executed thirty days before the testator's death. (O. C.) Dougherty's Estate, 556.

Other matters. The Court of Common Pleas has no jurisdiction to order the probate of a will. Guthrie *v.* Kerr, 458.

Where a will which has always been in the custody of the testator cannot be found after his death, the presumption is that he destroyed it animo revocandi, but this presumption may be rebutted by competent evidence. Foster's Appeal, 413.

Where a will is proved to have been in existence at the death of a testator, and is afterwards lost or destroyed, its contents may be proved by parol and admitted to probate. Ib.

Where there is any real conflict of testimony as to the mental capacity of the testator, the Orphans' Court must award an issue to determine the question. (O. C.) Colgate's Estate, 170.

An application for an issue must be by formal petition, setting forth the grounds of the appeal and the form of the issue. (O. C.) Colgate's Estate, 170.

After a hearing by the Orphans' Court, upon testimony taken by an examiner, it is too late to ask the Court to award an issue to determine the validity of a will. Foster's Appeal, 413.

Where by will duly executed a testator leaves a legacy of $1000 to a charity, and by a codicil revokes this bequest and leaves $500 to the same charity, if the codicil is not made thirty days before the testator's death, the charity will receive nothing. (O. C.) Poulson's Estate, 554.

Right of mother to appoint testamentary trustee of her children. See GUARDIAN AND WARD. (O. C.) Colehower's Estate, 343.

A legatee cannot maintain an action in his own name against a debtor of his testator. Guthrie *v.* Kerr, 458.

WILL—*Continued.*

Where there is a trust for accumulation, the cestui que trust upon coming of age is entitled to the accumulations. Howell's Estate, 430.

A legacy lapsing in the lifetime of the testator passes to the next of kin, and not to the residuary legatee. (O. C.) Loxley's Estate, 384.

A devise lapsing in the lifetime of the testator passes to the next of kin, and not to the residuary devisee. Yard *v.* Murray, 21.

The Act of 31 March, 1812, abolishing survivorship in joint tenancy, applies to legacies as well as devises. Yard's Apeal, 175.

A bequest of a gross sum to two persons, not of the kin of the testator, in consideration of services rendered by them to her, though no words of severance are used, is a legacy to them as tenants in common, and if one legatee die in the lifetime of the testatrix, his moiety will not go to the survivor, but will lapse. Yard's Appeal, 175.

A trust to continue for a life or lives in being and twenty-one years thereafter is not too remote. Stœver's Appeal, 467.

Construction of will, legacy charged on land. Stœver's Appeal, 467.

An involved will and residuary clause construed. Kline's Appeal, 468.

Construction of power of appointment. See POWER OF APPOINTMENT. (O. C.) Boyle's Estate, 363.

Property of a testator subject to a power of appointment by will does not pass under a general bequest in a will made before the creation of the power. (O. C.) Murray's Estate, 296.

A legacy may be made a charge on land without direct expressions; it is sufficient if such appear to be the intention of the testator by a fair interpretation of the will. Gilbert's Appeal, 303.

A bequest of an annuity or an absolute legacy at the election of the legatee expressed by the will to be in lieu of all claims against the estate, precludes the legatee, after making the election, from prosecuting any further claim against the estate. Lydia Smith's Appeal, 56.

Construction of will, as to the estate taken, whether a fee or life estate. (C. P.) Donahue *v.* Helme, 539. Bentley *v.* Kaufman, 88. See TRUSTS.

Remainder. A bequest of a fund to trustees to pay the income to G. for life, and after his decease to pay the income to W. until he arrived at the age of twenty-five years, and on arriving at that age to pay him the principal of the fund; but if W. should die before arriving at the age of twenty-five years without issue surviving, then the fund was to go to P. W. died at the age of thirty-seven, in the lifetime of G.; held that the remainder of W. was vested, and on the death of G. the fund was payable to the executors of W. McCall's Appeal, 546.

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